CHIEF JUSTICE WILLIAM HOWARD TAFT AND THE CONCEPT OF FEDERALISM*

Robert C. Post **

Always given to a stately form of self-deprecation, William Howard Taft would no doubt have been amused by the subject of this paper. For of all the Supreme Court Justices of his time, Taft was undoubtedly the most averse, for reasons of both affinity and conviction, to what modern Americans would recognize as the ideal of federalism.

To appreciate exactly why this is so, however, will require us to disentangle at least four separate aspects of that ideal: federalism as a commitment to limited national legislative power; federalism as a commitment to the diversity of local cultures; federalism as a commitment to decentralized management; and federalism as a commitment to the diffusion of power. Although these four aspects of federalism are ordinarily fused together into a single generalized preference for state decisionmaking, they in fact rest on distinct rationales and lead to quite diverse jurisprudential outcomes. These differences can be made clear by an examination of Taft's unique judicial perspective, an examination that has some relevance to our own contemporary struggles with the constitutional implications of federalism.

I

Taft presided over a Court that, as Felix Frankfurter noted in 1930, the year of Taft's death,

> invalidated more legislation than in fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected in decisions nullifying minimum wage laws for women in industry, a standard-weight bread law to protect buyers from short weights and honest bakers from unfair competition, a law fixing resale price of theatre tickets by ticket scalpers in New York, laws controlling exploitation of the unemployed by employment

---

* This paper was originally delivered in April of 1990 at the Fourth Berkeley Seminar on Federalism. It will also be published in the proceedings of that Seminar.

** Professor of Law, University of California at Berkeley.

agencies and many tax laws.[1]

The controversial and reactionary quality of the Taft Court has indelibly stamped on the popular as well as the academic mind an image of Taft as "a rock-ribbed conservative" in "matters judicial and constitutional."[2] Taft's close association with conservative Justices like Sutherland, Butler, Van Devanter, and McReynolds—Justices who were later to attempt to undermine the New Deal—has been fixed by passages in his letters, written only months before his resignation and death, hoping for the "continued life of enough of the present membership . . . to prevent disastrous reversals of our present attitudes."[3] "With Van and Mac and Sutherland and you and Sanford," Taft wrote to Butler on September 14, 1929, "there will be five to steady the boat, and . . . there would be a good deal of difficulty in working through reversals of present positions, even if I either had to retire or were gathered to my fathers, so that we must not give up at once."[4]

Given sentiments like these, the identification of Taft with Van Devanter, Sutherland, Butler and McReynolds is readily understandable. But the limitations of this identification are readily apparent once Taft's constitutional perspective is scrutinized from the vantage of federalism.

Consider, for example, a decision like *Lambert v. Yellowley*,[5] which concerned the constitutionality of provisions of the National Prohibition Act of 1919 forbidding physicians from prescribing "more than a pint of spirituous liquor . . . for use by the same person within any period of ten days," and forbidding any such prescription from being "filled more than once."[6] Dr. Samuel W. Lambert, "a distinguished" doctor, had sought and received an injunction against the application of the statute, claiming that it violated "his constitutional rights as a physician" to "advise the use of such medicines and medical treatment as in his opinion are best calculated to effect [the] cure and establish [the] health" of his patients.[7] In essence Lambert claimed that although the eighteenth amendment gave to Congress the power to prohibit the "manufac-

1. Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 Current History 235, 239 (1930).

2. Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 Sup. Ct. Rev. 159, 161.

3. William Howard Taft to Pierce Butler, Sept. 14, 1929, quoted in Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 294 (Simon & Schuster, 1965).

4. Id. at 296-97.

5. 272 U.S. 581 (1926).

6. Id. at 587.

7. Id. at 588. The Circuit Court of Appeals for the Second Circuit had dismissed the injunction.

ture, sale, or transportation" of spirituous liquor "for beverage purposes,"[8] it did not give to Congress the power to regulate the medical use of liquor, and all such "control [of] the medical practice in the states is beyond the power of the Federal Government."[9]

The Court, in an opinion authored by Justice Brandeis and heavily edited by Taft, rejected Lambert's claim in a manner that strongly upheld the prerogatives of congressional power.[10]

> High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses.[11]

Brandeis's opinion was joined by Taft, Holmes, Van Devanter and Sanford.

Justice Sutherland, hammering away at traditional federalist themes of limited national power, authored a strong dissent, which was joined by Justices McReynolds, Butler and Stone:

> The general design of the Federal Constitution is to give to the federal government control over national and international matters, leaving to the several states the control of local affairs. Prior to the adoption of the 18th Amendment, accordingly, the direct control of the manufacture, sale and use of intoxicating liquors *for all purposes* was exclusively under the police powers of the states; and there it still remains, save in so far as it has been taken away by the words of the Amendment. These words are perfectly plain and cannot be extended beyond their import without violating the fundamental rule that the government of the United States is one of delegated powers only and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." . . . Plainly, Congress in submitting the Amendment, and the several states in ratifying it, meant to leave the question of the prohibition of intoxicating liquors for other than beverage purposes to the determination of the states,

8. Section 2 of the eighteenth amendment gave to Congress the power to enforce the provisions of Section 1, which prohibited the "manufacture, sale, or transportation of intoxicating liquors within . . . the United States . . . for beverage purposes." U.S. Const., Amend. XVIII, sec. 1.

9. *Lambert*, 272 U.S. at 596.

10. The Brandeis papers suggest that Taft offered Brandeis extensive comments about the opinion, and may have actually drafted large portions of it.

11. *Lambert*, 272 U.S. at 597.

where it had always been.[12]

Relying heavily on *Hammer v. Dagenhart*,[13] Sutherland argued that Brandeis's reasoning could easily transform "a carefully and definitely limited power" into "a general and unlimited power," and thus radically undermine the important "constitutional limitations" expressed by the tenth amendment.[14] "The effect of upholding the legislation is to deprive the states of the exclusive power, which the Eighteenth Amendment has not destroyed, of controlling medical practice and transfer it in part to Congress."[15]

Lambert, then, occasioned a classic confrontation between those who believed that national legislative power ought to be narrowly circumscribed in deference to the maintenance of decentralized state authority, and those who believed that national legislative power ought to be generously endowed with ample means for the attainment of its ends. It is entirely characteristic that Taft would be on one side of that debate, while the Justices with whom he is normally associated—Sutherland, Butler, McReynolds—should be on the other.[16] On the question of national power, historically a central aspect of the debate over federalism, Taft parted company with his conservative colleagues.

In this Taft viewed himself as fulfilling the constitutional program of his idol John Marshall, "the greatest Judge that America or the World has produced."[17] As Taft repeatedly told the story, Marshall had definitively set the course of the Court toward a "liberal construction of the Constitution in conferring powers upon the National Government," against "the school of Jefferson" that would have "emphasize[d] unduly the sovereignty of the States."[18] Like Marshall, Taft interpreted the Constitution so as to give the national government generous powers to accomplish the tasks entrusted to it. We know, for example, that Taft thought national prohibition foolish and unwise.[19] He favored a "local option ar-

12. Id.
13. 247 U.S. 251 (1918).
14. *Lambert*, 272 U.S. at 604.
15. Id.
16. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).
17. William Howard Taft, *Popular Government: Its Essence, Its Permanence and Its Perils* 131 (Yale U. Press, 1913) ("*Popular Government*").
18. Id. at 131-37. William Howard Taft, *Address Before the National Civic Federation at the Belasco Theatre, Washington D.C., January 17, 1910*, in 1 *Presidential Addresses and State Papers* 549 (Doubleday, 1910) ("*Presidential Addresses*"); William Howard Taft, *Criticisms of the Federal Judiciary*, 29 Am. L. Rev. 641, 645-46 (1895).
19. "Taft Denounces Dry Amendment," New Haven Journal-Courier, (Saturday, Sept. 7, 1918), reprinted in *The 1918 Year Book of the United States Brewers' Association* 21, 21-27 (New York, 1919); Henry F. Pringle, 1 *The Life and Times of William Howard Taft* 375 (Farrar & Rinehart, 1939). Compare id., vol. 2, at 981-83.

rangement," because he believed that

> Experience has shown that a law of this kind, sumptuary in its character, can only be properly enforced in districts in which a majority of the people favor the law, and, therefore, favor its enforcement; but in a district where the majority of the people are opposed to the law, and do not sympathize with its provisions, a sumptuary law is almost certain to become a dead letter. Now every one must recognize the demoralizing effect of the enactment of laws and their attempted enforcement and their failure because of the lack of public opinion to support the officers of the law in attempting such enforcement.[20]

But once the eighteenth amendment authorized federal prohibition of liquor, Taft refused to circumscribe national power by any lingering reservations concerning local control.

It has been remarked, in fact, that Taft's liberal interpretations of federal power, particularly with respect to congressional authority under the commerce clause, mark "his most successful and influential work as Chief Justice."[21] Taft moved decisively in this direction during his first Term. In *Railroad Commission of Wisconsin v. Chicago, Burlington, & Quincy RR. Co.*[22] he wrote an opinion upholding provisions of the Transportation Act of 1920 authorizing the ICC "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States."[23] Although the Act gave the ICC effective jurisdiction over intrastate railway rates, Taft did not blink:

> Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.[24]

Two months later Taft issued another ringing endorsement of federal power in *Stafford v. Wallace*,[25] a decision from which Justice McReynolds dissented. In *Stafford* the Court upheld the Pack-

20. Taft, *Popular Government* at 46-47 (cited in note 17). See William Howard Taft, *Four Aspects of Civil Duty* 46-47 (Yale U. Press, 1906).

21. Stanley I. Kutler, *Chief Justice Taft, National Regulation, and the Commerce Power*, 51 J. Am. Hist. 651 (1965).

22. 257 U.S. 563 (1922).

23. Id. at 585.

24. Id. at 588.

25. 258 U.S. 495 (1922).

ers and Stockyards Act of 1921, which sought to impose upon stockyards a scheme of federal regulation. Taft wrote that

> [w]hatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.[26]

In defining congressional power under the interstate commerce clause, Taft drew heavily, as he readily admitted, upon *Swift & Co. v. United States*,[27] a 1905 Holmes opinion allowing a bill in equity to proceed under the Sherman Act against the same packing firms as those regulated by the Packers and Stockyards Act of 1921. But Taft also traveled significantly beyond *Swift*. The Sherman Anti-Trust Act had delegated to courts the task of delimiting the boundaries of federal power; the Packers and Stockyards Act represented a congressional judgment about the reach of Congress's own authority. Taft, in a move that was to become the foundation of modern doctrine, held that the Court was to defer to such congressional judgments unless their basis was "nonexistent."

In 1923 Taft authored another major opinion sustaining congressional power under the commerce clause. Over the dissenting votes of McReynolds and Sutherland, Taft in *Board of Trade of the City of Chicago v. Olsen*[28] upheld the Grain Futures Act of 1922, writing that the commerce clause was to be interpreted according "to the real and practical essence of modern business growth."[29] The nub of the opinion lay in Taft's explicit deference to the judgment of Congress that transactions involving grain futures were "susceptible to speculation, manipulation, and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce."[30]

Olsen is particularly significant because less than a year before, in *Hill v. Wallace*,[31] Taft had written for the Court to strike down the Future Trading Act of 1921, on the ground that it had attempted to use the taxing power to regulate transactions involving

26. Id. at 521.
27. 196 U.S. 375 (1905).
28. 262 U.S. 1 (1923).
29. Id. at 35.
30. Id. at 37.
31. 259 U.S. 44 (1922).

grain futures. In *Hill* Taft had noted that such transactions could not "come within the regulatory power of Congress . . . unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."[32] Taft noted with a broad wink that in enacting the Futures Trading Act Congress "did not have the exercise of its power under the commerce clause in mind,"[33] and so Congress had left no record to which the Court could properly defer.[34] Congress immediately took the hint, and the Grain Futures Act, "substantially identical" to the invalidated Futures Trading Act except for its purported reliance on the interstate commerce power,[35] was introduced within two weeks of the *Hill* decision[36] and enacted four months later.

Cases like *Lambert*, *Stafford* and *Olsen* make clear that Taft was substantially less dedicated to a regime of limited national power than were more conservative figures such as McReynolds, Sutherland, and Butler, Justices with whom Taft is normally identified. But Taft was, in this respect, not as committed to federal power as Justices Holmes and Brandeis, Justices who are ordinarily associated with the ideals of federalism. This is made evident by Taft's attitude toward *Hammer v. Dagenhart*[37] in which the Court struck down a 1916 federal statute attempting to bar certain products of child labor from interstate commerce. Over the dissenting votes of Holmes, Brandeis, McKenna and Clarke, the Court, speaking through Justice Day, had viewed the Act as an attempt "to regulate the hours of labor in children in factories and mines within the State, a purely state authority,"[38] and had rested its decision on the principle that the "grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."[39]

Although *Dagenhart* appeared to rest on federalist principles quite contrary to those enunciated by Taft in cases like *Stafford* and

32. Id. at 69.

33. Id. at 68.

34. On the self-conscious quality of Taft's hints, see Kutler, 51 J. Am. Hist. at 661 (cited in note 21).

35. Note, *Two Attempts to Regulate the Grain Trade: Findings of Fact by Congress*, 37 Harv. L. Rev. 136, 138 (1923).

36. 62 Cong. Rec. 7987 (June 1, 1922) (Rep. Tincher introducing H.R. 11843, a bill "for the prevention and removal of obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges").

37. 247 U.S. 251 (1918).

38. Id. at 276.

39. Id. at 273-74.

Olsen, Taft nevertheless applauded the decision.[40] Indeed he had in 1913 taken a position substantially identical to *Dagenhart*:

> Bills have been urged upon Congress to forbid interstate commerce in goods made by child labor. . . . The proposed law is to be enforced to discourage the making of articles by child labor in the State from which the articles were shipped. In other words, it seeks indirectly and by duress, to compel the States to pass a certain kind of legislation that is completely within their discretion to enact or not. Child labor in the State of the shipment has no legitimate or germane relation to the interstate commerce of which the goods thus made are to form a part, to its character or to its effect. Such an attempt of Congress to use its power of regulating such commerce to suppress the use of child labor in the State of shipment would be a clear usurpation of that State's rights.[41]

As Chief Justice, Taft specifically reaffirmed *Dagenhart* in 1922[42] and again in 1925.[43]

There is an obvious tension between the expansive construction of federal power to which Taft was usually attracted, and the more restrictive impulses aroused in him by federal attempts to regulate child labor, or, more likely, manufacturing generally. When Taft himself sought to reconcile this tension, he argued that

> a federal law forbidding the transportation of articles manufactured by child labor in one state to another was invalid, because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the state of origin, by an embargo on its external trade. Articles made by child labor and transported into other states were harmless, and could be properly transported without injuring any person who either bought or used them. In [other cases], the use of interstate commerce had contributed to the accomplishment of harmful results to people of other States, and . . . congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it.[44]

The reasoning in this passage is impossible to square with Taft's own commitment to federal power, as his opinion in *Brooks v. United States*[45] makes clear. In *Brooks* Taft authored a unanimous opinion sustaining the National Motor Vehicle Theft Act, which

---

40. Kutler, 51 J. Am. Hist. at 655 (cited in note 21).
41. Taft, *Popular Government* at 142-43 (cited in note 17).
42. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39 (1922).
43. *Brooks v. United States*, 267 U.S. 432 (1925).
44. Id. at 438. See Taft, *Popular Government* at 142-43 (cited in note 17).
45. 267 U.S. 432 (1925).

prohibited the transportation of stolen cars in interstate commerce.[46] Cars that happen to be stolen are themselves "harmless"; they can be "transported without injuring any person who either bought or used them"; and they do not effect any "harmful result to people" of the State into which they are driven. Congress banned stolen cars from interstate commerce, as Taft fully recognized, to deter the theft of automobiles, an undesirable form of behavior that was conceptually distinct from interstate commerce.[47] In an exactly similar manner, Congress had banned the products of child labor from interstate commerce to deter child labor, an undesirable form of behavior that was conceptually distinct from interstate commerce.

Taft was unable to offer any logically cogent explanation of the distinction between congressional regulation of interstate commerce in the products of child labor and congressional regulation of interstate commerce in stolen automobiles. It is clear, however, that maintaining some form of this distinction was for him quite important. This can be seen in Taft's unusually impassioned rhetoric in *Bailey v. Drexel Furniture Co.*, a case striking down the congressional Child Labor Tax, which attempted to use the taxing power to achieve the same results as the statute invalidated in *Dagenhart*:

> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress but left or committed by the supreme law of the land to the control of the states. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.[48]

---

46. The Act offered a strikingly broad definition of interstate commerce, as including " 'transportation from one State, Territory, or the District of Columbia, to another state, territory, or the District of Columbia . . . .' " Id. at 436.

47. Id. at 438-39.

48. 259 U.S. 20, 37 (1922). Taft wrote:

> The analogy of the Dagenhart Case is clear. . . . [H]ere the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.

Id. at 39.

If one approaches *Drexel Furniture Co.* solely from the perspective of Taft's view of congressional power—as illustrated by cases like *Lambert* or *Brooks*—the vehemence of this passage is deeply mysterious. But, strangely enough, its intensity does become explicable if interpreted in light of Taft's relationship to the ideal of federalism as cultural pluralism, an ideal most associated with the eloquent figure of Justice Brandeis.

II

It is undeniable that Brandeis stands as a major progenitor of modern principles of federalism. This is not because Brandeis believed in constitutional limitations on federal congressional power, for he, like Taft, had ample respect for the full prerogatives of that power.[49] It is due rather to the fact that Brandeis believed that federalism required a respect for the diversity of local cultures. As Brandeis remarked in his important address on "True Americanism," the unique contribution of America has been its declaration "for equality of nationalities as well as for equality of individuals":[50]

> The movements of the last century have proved that whole peoples have individuality no less marked than that of the single person; that the individuality of a people is irrepressible, and that the misnamed internationalism which seeks the obliteration of nationalities or peoples is unattainable. The new nationalism adopted by America proclaims that each race or people, like each individual, has the right and duty to develop, and that only through such differentiated development will high civilization be attained.[51]

The federalism dearest to Brandeis was thus dedicated to preserving, to the extent consistent with a powerful national government, "the heterogeneity inherent in local and regional differentiation."[52] In his words, "America has believed that in differentiation, not in uniformity, lies the path of progress."[53]

It is fair to say that Taft was in profound disagreement with every aspect of this ideal of federalism. For Taft the fundamental end of government was not the development of groups or cultures,

---

49. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lambert v. Yellowley*, 272 U.S. 581 (1926); *Board of Trade v. Olsen*, 262 U.S. 1 (1923).

50. Louis D. Brandeis, *True Americanism* (July 4, 1915), in *Brandeis on Zionism: A Collection of Addresses and Statements by Louis D. Brandeis* 8 (Zionist Organization of America, 1942) ("*Brandeis on Zionism*").

51. Id. at 10-11.

52. Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Calif. L. Rev. 297, 302 (1988).

53. Brandeis, *Brandeis on Zionism* at 10 (cited in note 50).

but "the promotion of the happiness of the individual and his progress."[54]

> We believe that government is, of course, for the benefit of society as a whole, but that society is composed of individuals and that the benefit of society as a whole is only consistent with the full opportunity of its members to pursue happiness and their individual liberty. This, in the broadest and proper sense, includes freedom from personal restraint, right of free labor, right of property, right of religious worship, right of contract.[55]

Because Taft understood the public good to consist of the sum of the happiness of individuals, he deeply opposed any conception of politics that legitimated the interests of particular groups.[56]"Division into groups means . . . . the willingness of each to sacrifice the general interest of the country to the achievement of a particular object."[57] For Taft, intermediate social structures like culture or class created a "group system" that defeated "responsibility as to general policies and the common good."[58] He therefore believed that the great strength of the American party structure was that the "two large parties" were "each made up of all classes and conditions. Their cleavage is vertical and not horizontal."[59] As a result "[t]hey can not be selfish in seeking the welfare of one group, because their constituent elements, if they would hold them together, forbid. Party success thus bids them to take an obviously patriotic course, having the interests of all in view."[60] For the same reason he also distrusted and resented those immigrants who retained "their old country relations and customs and language," hoping "that the present serious movement for the Americanization of these elements of our population will lessen the danger of their presence in our community."[61]

Taft's version of individualism, from the very beginning of his career, was founded on a naturalized, presocial image of the person.

---

54. Taft, *Popular Government* at 9-10 (cited in note 17). William Howard Taft, *Liberty Under Law: An Interpretation of the Principles of Our Constitutional Government* 51 (Yale U. Press, 1922) ("*Liberty Under Law*").

55. William Howard Taft, *The Anti-Trust Act and the Supreme Court* 37 (Harper & Brothers, 1914) ("*The Anti-Trust Act*").

56. For a discussion of the interrelationship between individualism and what I have elsewhere termed assimilationism and pluralism, see Post, 76 Calif. L. Rev. at 302-05, 319-24 (cited in note 52).

57. Taft, *Liberty Under Law* at 33 (cited in note 54).

58. Id. at 34-35.

59. William Howard Taft, *Representative Government in the United States* 25 (N.Y.U. Press, 1921) ("*Representative Government*").

60. Id.

61. Id. at 45-46.

He understood human nature to be driven primarily by selfish motivations.[62] The trick was to channel these motivations into socially useful channels. This was the object and achievement of property rights[63] which were therefore to be understood as "the keystone of our society."[64]

> The certainty that a man could enjoy as his own that which he produced, furnished the strongest motive beyond what was merely necessary to obtain the bare necessities of life. The knowledge that what he saved would enable him to increase and share the result of another's labor was the chief inducement to economy and self control . . . . In other words, the institution of private property is what has led to the accumulation of capital in the world. Capital represents and measures the difference between the present condition of society and that which prevailed when men lived by what their hands would produce without implements, or other means of increasing the result of their labor, that is, between the utter barbarism of prehistoric ages and modern civilization.[65]

Because human nature was universal, so too were property rights. To weaken them was to endanger "our whole social fabric"[66] by undermining "the motive of enlightened selfishness that to-day is at the basis of all human labor and effort, enterprise and new activity."[67] Infringing property rights would violate the "limitations" of government "power, which are fixed . . . by the inexorable law of economics."[68] These laws were uniform; they did not vary from state to state or from region to region. "The lesson must be learned, expensive as it is proving to be, that there is only a lim-

---

62. Taft, *Popular Government* at 91, 231, (cited in note 17).

63. The very advantage to be derived from the security of private property in our civilization is that it turns the natural selfishness and desire for gain into the strongest motive for doing that without which the upward development of mankind would cease and retrogression would begin.

William Howard Taft, *The Right of Private Property*, 3 Mich. L. J. 215, 224 (1894).

64. Taft, 29 Am. L. Rev. at 654 (cited in note 18).

65. Taft, 3 Mich. L. J. at 220-21 (cited in note 63). See Taft, *Four Aspects of Civic Duty* at 14-20 (cited in note 20).

66. Id. at 231.

67. Taft, *Popular Government* at 91 (cited in note 17). At times Taft generalized the point to a defense of inequality as such:

> Inequality is essential to progress. If you make a dead level there will be no interest in life or motive for effort, and you will destroy the very spring of progress and the fountain of Christian civilization.

William Howard Taft, *Ethics in Service* 87-88 (Kennikat Press, 1969).

68. Taft, 3 Mich. L. J. at 229 (cited in note 63). See Taft, *Popular Government* at 230 (cited in note 17). Taft often acknowledged his intellectual debt to "the influence of the *laissez faire* school of political and economic thought which was largely in control when I was in college. Professor Sumner was a strong member of this school." Taft, *Ethics in Service* at 91 (cited in note 67). See Taft, *Four Aspects of Civic Duty* at 8-15 (cited in note 20).

ited zone within which legislation and governments can accomplish good. We cannot regulate beyond that zone with success or benefit. . . . If we do not conform to human nature in legislation we shall fail."[69]

The zone of possible legislation was defined and enforced by a national regime of constitutional rights in property:

> Our Constitution has been called too individualistic. It rests on personal liberty and the right of property. In the last analysis, personal liberty includes the right of property as it includes the right of contract and the right of labor. Our primary conception of a free man is one who can enjoy what he earns, who can spend it for his comfort or pleasure if he would, who can save it and keep it for his future use and benefit if he has the foresight and self-restraint to do so. This is the right of property. Upon this right rests the motive of the individual which makes the world materially to progress. Destroy it and material progress ceases. Until human nature becomes far more exalted in moral character and self-sacrifice than it is today, the motive of gain is the only one which will be constant to induce industry, saving, invention and organization, which will effect an increase in production greater than the increase in population.[70]

Hence even though citizens of the different states, responsive to their differing cultures, desired to enact legislation to achieve a "wider equality of comfort and living" and "economic as distinguished from . . . political reform," in fact "[n]either Congress nor a state legislature has it within its power to work such economic changes, even though they were possible."[71] For Taft this lack of power was true in the double and complementary sense of economic necessity and constitutional prohibition.

The great task of the judiciary was the enforcement of constitutional protection for individual rights, upon which the maintenance of modern civilization depended.[72] The "very purpose" of the Constitution was to offer protection for "the fundamental rights of the individual."[73] Taft thus viewed the power of judicial review as "the secret of the strength of our nation"; to weaken that power would

---

69. Taft, *Liberty Under Law* at 42 (cited in note 54).

70. Id. at 25-26.

71. Taft, *Representative Government* at 11 (cited in note 59). Taft took a very strong incorporationist position. He understood the fourteenth amendment to vest "in the National Government the power and duty to protect, against the aggression of a State, every person within the jurisdiction of the United States in most of the personal rights, violation of which by Congress is forbidden in the first eight amendments to the Constitution." Taft, *Popular Government* at 128 (cited in note 17).

72. Taft, *Popular Government* at 180-81 (cited in note 17).

73. *Truax v. Corrigan*, 257 U.S. 312, 338 (1921).

necessarily lead "to socialism."[74] For this reason the "greatest advantage of our plan of government over every other is the character of the judicial power vested in the Supreme Court."[75] "[T]here has been nothing in our form of government so admirable and useful in its workings as the Supreme Court of the United States and the authority which it has exercised, . . . in the security it has given to life, liberty, and property."[76]

In this way, Taft's image of a universal, pre-social human nature led inexorably toward a vision of national rights. This vision was fundamentally incompatible with any notion of federalism founded upon a respect for regional or cultural heterogeneity. In fact for Taft the chief advantage of federal law was precisely its uniformity, its ability to facilitate civilized growth evenly throughout the nation:

> Another test of the trained self-restraint of the American people is the constitutional and statutory provisions enabling non-residents to avoid the assumed local prejudice of state courts against them by trying their controversies with home people in Federal Courts. . . . It is not too much to say, however, that few factors in the rapid growth of the newer parts of the country have been more effective than the knowledge by those whose confidence and capital were needed to build up that new country that the Constitution and the laws of the nation furnished a national court wholly impartial between citizens of all the states in which the contracts and property rights, though they were non-residents, could be adjudged and protected. Such courts have in an indirect but most strikingly effective way united the sections of the country in a common effort to develop our great resources.[77]

Taft worked diligently, along many different fronts, to promote that uniformity. He vigorously defended diversity jurisdiction, arguing that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."[78]

---

74. Taft, *Popular Government* at 180-82 (cited in note 17). Taft, *Ethics in Service* at 96 (cited in note 67).

75. Taft, *Popular Government* at 184 (cited in note 17).

76. Taft, *The Anti-Trust Act* at 41 (cited in note 55).

77. William Howard Taft, *At the Cradle of Its Greatness*, 8 A.B.A. J. 333, 335 (1922). Taft had made this same point as early as 1895. Taft, 29 Am. L. Rev. at 658-59 (cited in note 18). See Tony A. Freyer, *The Federal Courts, Localism, and the National Economy, 1865-1900*, 53 Business History Rev. 343, 344-46 (1979).

78. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922). For a description of Chief Justice Taft's lobby-

He defended the right of foreign corporations to be free from state regulations impeding access to federal courts.[79] He upheld the doctrine of *Swift v. Tyson*,[80] which authorized the application of a uniform federal "common law" in diversity cases.[81] He supported a strong preemption doctrine.[82] He was concerned to protect interstate commerce from the intrusions of state regulation.[83] And, most importantly, he stood staunchly by the substantive protection for property that he viewed as required by the Due Process Clause of the fourteenth amendment. With the exception of his notable dissent in *Adkins v. Children's Hospital of the District of Columbia*,[84] Taft solidly supported the tendency of his Court to resist regulation of property rights. In the great proportion of controversial cases decided during his tenure, his vote was to protect property against state regulation.[85]

Needless to say, federalism as an ideal of cultural pluralism had no place whatever in this program; Taft sought instead to establish an implacable and naturally grounded universality.

III

This uniform regime of constitutional rights, in turn, requires us to reevaluate Taft's support of *Dagenhart*. It makes clear the inadequacy of conceptualizing that support as a simple limitation on federal power, since in Taft's mind the fourteenth amendment's federalized protection of property rights would continue to govern, whether or not Congress was empowered to act. Decentralization was therefore sharply circumscribed by a ring of national rights.[86]

---

ing efforts against Senator Norris's campaign to strip federal courts of their diversity jurisdiction, see Mason, *William Howard Taft: Chief Justice* at 127-28 (cited in note 3).

79. See *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922).

80. 41 U.S. 1 (1842).

81. See *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928); Tony Freyer, *Harmony & Dissonance: The* Swift *&* Erie *Cases in American Federalism* 104-09, 159 (N.Y.U. Press, 1981).

82. *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U.S. 87 (1926); *First National Bank v. Missouri*, 263 U.S. 640 (1924) (Taft, C.J., dissenting).

83. *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921); *Dahnke-Walker Mill. Co. v. Bondurant*, 257 U.S. 282 (1921); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925); *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927); *Public Utilities Comm. of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

84. 261 U.S. 525, 562-67 (1923) (Taft, C.J., dissenting).

85. See, e.g., *Truax v. Corrigan*, 257 U.S. 312 (1921); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530 (1922) (Taft, C.J., dissenting); *Chicago, Rock Island & Pacific Railway Co. v. Perry*, 259 U.S. 548 (1922) (Taft, C.J., dissenting); *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); *Ribnik v. McBride*, 277 U.S. 350 (1928).

86. Thus Thomas Reed Powell was moved to this summary of the work of the Taft Court: "For one interested in local self government the work of the Supreme Court of the

But this does not explain why Taft in *Dagenhart* sought affirmatively to limit federal power. Why, we may ask, was decentralization, however limited, to be constitutionally mandated at all? Why did Taft not join Brandeis and Holmes and abandon all pretense of a rigorous distinction between "local self-government, on the one hand, and the national power, on the other"?[87] Why did Taft, in *Drexel Furniture Co.*, so passionately locate this distinction within the very "ark of our covenant"?[88]

When Taft was evicted from the Presidency in 1912, he chose to return to Yale as a Law Professor. He put together a series of lectures on the conditions of contemporary government, which were later collected and published as his book on *Popular Government: Its Essence, Its Permanence and Its Perils*. The closest Taft ever came to systematically addressing the question of federalism was in Chapter VI of that book.

In Chapter VI Taft remarked upon the vast increase of federal power. "This great expansion of Federal activities has been almost within the present generation and within the recollection, and by the agency, of living men."[89] This expansion "has not come from a new construction of the Constitution, but it has come from the fact that the Federal power has been enlarged by the expansion of the always conceded subjects of national activities."[90] A "tendency toward greater paternalism" has caused "Congress to vest, by statute, in the general Government, powers that under the Constitution were impliedly within congressional creation, but which had been allowed to lie dormant in view of the supposed lack of public necessity for their exercise."[91] This growth of federal power, however, "has not changed the form of our government, nor has it lessened our obligation to respect the sovereign rights of the State[s]."[92] To the contrary, Taft wished to stress "the importance of maintaining the constitutional autonomy of our States."[93]

Taft offered two reasons for this position. The first concerned the need for decentralized management.

> Our Federal system is the only form of popular government that

---

United States in applying the Fourteenth Amendment to state legislation must raise the question whether judicial centralization is not pushed to an extreme under our federal system." Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-30*, 17 Va. L. Rev. 529, 531 (1931).

87. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).
88. Id.
89. Taft, *Popular Government* at 144 (cited in note 17).
90. Id. at 138.
91. Id. at 140.
92. Id. at 144.
93. Id. at 144-45.

> would be possible in a country like ours, with an enormous territory and 100,000,000 population. There is a great homogeneity among the people, greater indeed than many of us suppose, but, on the other hand, not only the mere geographical differences, but the differing interests of the people in different localities, require that a certain part of their government should be clearly within their own local control and not subject to the interference of people living at a great distance from them.[94]

The varying circumstances and interests of the different regions of the nation, Taft argued, precluded effective governance from Washington D.C., the point from which, as he ironically put it, "everything radiates to the ends of the country."[95] Only a decentralized government could be responsive to local needs and conditions.[96] But this responsiveness was to be safely confined, because the uniform floor of the fourteenth amendment would ensure that local governance could never trench on aspects of the national culture that Taft deemed essential.

The concept of federalism as decentralized management is primarily a practical one. It turns on pragmatic questions of administrability. It holds that a certain degree of localism is necessary and useful for the successful prosecution of government business. The image is of a purely tactical division of power. As issues become "so national in their character and effect that people remote from them geographically are . . . affected,"[97] so too will the allocation of power ascend from local to federal levels.

This practical, common-sense perspective represents an important strand in Taft's jurisprudential thinking. His discussion of the constitutional limits of national power not infrequently veers toward issues of managerial strategy and tactics.[98] In fact Taft's interpretation of the fourteenth amendment was also, by his own lights, heavily influenced by such considerations. He was fully aware that because of the increased "mutual dependence" characteristic of advanced industrial society, property rights ought to interpreted in a manner "appreciative of the change of conditions and the necessity for a liberal construction of the restrictions of the Con-

94. Id. at 145.

95. Taft, *Presidential Addresses* at 549 (cited in note 18).

96. Thus Taft wrote to his brother Horace on November 10, 1924, that he was "glad" that Massachusetts had defeated the child labor amendment, "because I don't think the Constitution ought to be amended to take away the powers of the States. I think child labor is a matter for local administration, and that the requirements differ in different States." Letter from William Howard Taft to Horace Taft (Nov. 10, 1924) (Taft Papers, Library of Congress, Reel 268).

97. Taft, *Popular Government* at 148-49 (cited in note 17).

98. Id. at 145-51; Taft, *Presidential Addresses* at 549-54 (cited in note 18).

stitution."[99] He even wrote in 1914 that *Lochner v. New York* was no longer good law.[100] This is the strain in Taft's jurisprudence that led him, for example, to dissent in *Adkins* and to uphold statutory regulation of hail insurance in light of the peculiar local characteristics of the business.[101] It is important to stress, however, that Taft's instinct to respond pragmatically to practical problems was always checked by his concern not to permit government to trench on those rights necessitated by the universal requirements of human nature.[102]

If pressed, Taft's explanation of federalism as embodying the strategic value of decentralized management would require a fluid division of federal and state power, of the kind exemplified by Cardozo's dissent in *Carter v. Carter Coal Co.*,[103] or by Chief Justice Hughes's opinion in *NLRB v. Jones & Laughlin Steel Corp.*[104] Congressional power over intrastate activities would be authorized "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions. . . . The question is necessarily one of degree."[105] We can only speculate as to whether

---

99. Taft, *The Anti-Trust Act* at 44-47 (cited in note 55). See William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 Ky. L. J. 3, 8-11 (Nov. 1916).

100. Taft, *The Anti-Trust Act* at 45 (cited in note 55). In his dissent in *Adkins* Taft had justified his disregard of *Lochner* on the ground that it had been overruled "sub silentio" by *Bunting v. Oregon*, 243 U.S. 426 (1917). *Adkins v. Children's Hospital*, 261 U.S. 525, 563-64 (1923) (Taft, C.J., dissenting). In point of fact, however, Taft had publicly disavowed *Lochner* at least three years before *Bunting*.

101. *National Union Fire Insurance Co. v. Wanberg*, 260 U.S. 71 (1922). See also *Merchants Mutual Automobile Liability Ins. Co. v. Smart*, 267 U.S. 126 (1925).

102. Note, for example, the movement of the rhetoric in this passage from Taft, *Liberty Under Law* at 39-43 (cited in note 54):

> Social groups in a great community become more interdependent. . . . Our constitutional system has been easily elastic in these regards, and courts have not failed to apply it to conform to the needs of the community. These changing conditions have led some reformers to condemn what they call the excessive individualism of the Constitution. I confess I do not follow them. The rights of personal liberty and of property as protected by the courts are not obstructive to any reasonable qualification of these rights in the interest of the community. Indeed, we may well question whether the paternalistic enthusiasm of such reformers has not gone too far. The strength of the American in the past has been in his independence and self-reliance.
>
> * * *
>
> We must stop attempting to reform people by wholesale. It is the individual upon whom our whole future progress depends. In giving and securing scope for his ambition, energy, and free action our constitutional system has its chief merit, whatever would-be reformers say.

103. 298 U.S. 238, 326-30 (1936) (Cardozo, J., dissenting) ("The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' ").

104. 301 U.S. 1 (1937).

105. Id. at 37. In reaching this conclusion, Hughes quoted and relied heavily upon language from Taft's opinions in *Olsen* and *Stafford v. Wallace*:

> Whatever amounts to more or less constant practice, and threatens to obstruct or

Taft would have remained true to this perspective if faced with the disaster of the Great Depression, which revealed to all but the most doctrinaire the very real interdependence of all economic activities in the nation.

What is clear, however, is that this essentially administrative account of federalism cannot begin to account for the passionate rhetoric of *Drexel Furniture*. To locate the source of that powerful commitment to "the ark of our covenant,"[106] we must turn to the second justification for federalism offered by Taft in *Popular Government*.

IV

After discussing for several pages the practical arrangements necessary for the States to retain "their dignity and power"[107] Taft suddenly switched gears and escalated the intensity of his rhetoric. It was "essential," he argued, "that the power and functions of the State governments be maintained in all the fulness that they were intended to have by the framers of the Constitution," because:

> A school has arisen called the New Nationalist School that proposes to put into operation a great many new remedies through the National Government, basing the national authority on the failure or unfitness of the States to discharge their proper and exclusive duties under the Constitution. This school is one which is closely associated with that which is trying to enforce new doctrines as to the direct rule of the people and an unsettling of the security of individual rights. Its members are generally impatient with the suggestion that certain reforms can only be effected through the State governments. They are in favor of national "hair trigger" legislation, and anything that has to depend upon the action of the forty-eight different States can never be of that kind.
>
> To one opposed to the adoption of such remedies as I have

---

unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.

106. Taft's use of the phrase "ark of the covenant" is particularly telling in light of its long history as an object of ridicule by those opposed to activist forms of conservative judicial review. Thomas Jefferson, for example, had in 1816 ridiculed those who "look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched." Letter to Samuel Kercheval, July 12, 1816, in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* 674 (Modern Library, 1944). As recently as 1913 Yale professor and progressive candidate for Congress Yandell Henderson had spoken with disdain of conservatives who believed that "The Constitution was the Ark of the Covenant especially entrusted to the judiciary for protection." Yandell Henderson, *The Progressive Movement and Constitutional Reform*, Yale Rev. 79 (Oct. 1913).

107. Taft, *Popular Government* at 151 (cited in note 17).

> been commenting on, the existence of the State governments is one of the chief grounds for hope that the tendency to error in the weakening of constitutional guaranties that is now going on in some States may be halted by the conservatism of other States, and that the errors from actual experience in departing from representative government in the more radical States will ultimately bring back the whole nation to sounder views.[108]

The passage is remarkable, for it at last joins the dry topic of federalism to the nerve center of Taft's jurisprudence. Theodore Roosevelt's famous 1910 address at Osawatomie, Kansas, entitled "The New Nationalism," had forcefully and directly challenged Taft's vision of judicially protected property rights. "[E]very man holds his property," Roosevelt had argued, "subject to the general right of the community to regulate its use to whatever degree the public welfare many require it."[109] Roosevelt urged reform at a national level, seeking to inspire "a spirit of broad and far-reaching nationalism" that would engender a "judiciary that . . . shall be interested primarily in human welfare rather than in property."[110] For Taft this was no less than a threat to the "whole fate of constitutional government."[111] If the "New Nationalism" could capture the federal government, it would be able to undo at one "hair-trigger" stroke the system of self-restraint that guaranteed the continued existence of property rights. By religiously enforcing the division of power between state and federal governments, however, the social impulses represented by the New Nationalism would be forced to exhaust themselves in the conduct of an arduous state-by-state campaign.

Principles of federalism, in other words, were important because they diffused power between the States and the national government. This diffusion functioned "to defend us all against the danger of sudden gusts of popular passion and to secure for us the delay and deliberation in political changes essential to secure considered action by the people."[112] Because the people were driven by a primitive "demand for equality of condition,"[113] they were all too likely to forget that it "is the individual upon whom our whole future progress depends. In giving and securing scope for his ambi-

---

108. Id. at 151-53.

109. Theodore Roosevelt, *The New Nationalism*, in *Social Justice and Popular Rule*, 19 *The Works of Theodore Roosevelt* 24 (Charles Scribner's Sons, 1925).

110. Id. at 26-27.

111. Taft to J.G. Schurman, Feb. 29, 1912, quoted in Pringle, 2 *The Life and Times of William Howard Taft* at 757 (cited in note 19). For accounts of Taft's horror at the New Nationalism, see id. at 572-74, 757-58, 781, 822, 832-33, 840-41.

112. Taft, *Liberty Under Law* at 19-20 (cited in note 54).

113. Taft, *Representative Government* at 10-11 (cited in note 59).

tion, energy, and free action our constitutional system has its chief merit, whatever would-be reformers say."[114] Thus any "reasonable suspension of popular action until calm public consideration of reliable evidence can be secured is in the interest of a wise decision. That at least was what our forefathers thought in making our Federal Government and the result has vindicated them."[115]

Taft was fond of using the example of Kansas populism to make his point:

> The experience of Kansas and some of the other States, where populism ran riot for a time, is instructive. Then everyone was against the creditor and in favor of the debtor and wished to put obstacles in the path of the former in seeking to recover his money when due. To gratify the popular demand, the legislature passed stay laws which introduce many delays in the legal procedure of the State for the collection of mortgages. The people of Kansas learned a lesson from the result of such legislation that has not yet been forgotten. Capital fled the State of Kansas as men flee from a contagious disease and business became as dead in Kansas as if it had no population at all. The blight that followed taught the statesmen of that State the utilitarian doctrine that honesty is the best policy, and that laws that drove creditors from a State and frightened away all capital, helped neither those who owed money nor those who did not owe money in the State. These so-called remedial laws were very soon repealed and since then other States have not made exactly the same mistake, though there are similar lessons in store for many of them.
>
> There is a great advantage in having different State governments try different experiments in the enactment of laws and in governmental policies, so that a State less prone to accept novel and untried remedies may await their development by States more enterprising and more courageous. The end is that the diversity of opinion in State governments enforces a wise deliberation and creates a *locus poenitentiae* which may constitute the salvation of the Republic.[116]

Reserving significant areas of regulation to the "exclusive" jurisdiction of the States was thus a method to force the nation to observe the results of constitutionally mandated state "experiments." In this manner the desire of "the 'hair trigger' reformer . . . to reform the entire country at onc [sic]"[117] would be frustrated, and "a wise deliberation" would be enforced by creating time for the entire

114. Taft, *Liberty Under Law* at 43 (cited in note 54).

115. Id. at 21-22.

116. Taft, *Popular Government* at 154-55 (cited in note 17). See Taft, *Ethics in Service* at 89-90 (cited in note 67).

117. Taft, *Popular Government* at 151 (cited in note 17).

country to witness what for Taft would be the inevitably negative effects of the contemporary "disease of excessive legislation."[118] Federalism therefore served as part of that larger system of self-restraint which was the glory of the Constitution.

This account of federalism, however, is structural rather than substantive. It focuses on the systemic need to defuse power, and so offers no particular guidance as to *which* areas of legislation ought to be reserved to the exclusive jurisdiction of the States. For Taft this guidance came primarily from his vision of human nature and the concomitant need to preserve rights in property. Such rights were most especially in need of protection from the gusts of popular passion.

This perception underlay Taft's distinction between congressional competence to regulate interstate commerce in stolen cars, and congressional incompetence to regulate interstate commerce in the products of child labor. The latter trenched on property rights; the former did not. Even if States were ultimately empowered under the fourteenth amendment to regulate the conditions of child labor, it was nevertheless an area in which caution and deliberation ought to be required, and hence in which the structural principle of federalism ought to be brought into play.

Of course in engaging that principle Taft was careful to distinguish between ordinary property and property that fell into the narrow category of having been "affected with a public interest."[119] With respect to ordinary property, "freedom" was "the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."[120] The rule was quite otherwise, however, for property affected with a public interest, which was broadly subject to reasonable regulation, even to the extent of "fixing wages and terms of employment."[121] It is no accident, therefore, that the very cases in which Taft strongly endorsed the national commerce power all involved forms of property that were affected with the public interest.[122] Such property did not require special protection. But *Dagenhart* and *Drexel Furniture Co.* involved the regulation of ordinary property, and in such

118. Taft, *Liberty Under Law* at 41 (cited in note 54).

119. *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 535 (1923).

120. Id. at 534.

121. Id. at 535.

122. On railroads, see id., *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456, 481 (1924); *Western & Atlantic Railroad v. Georgia Publ. Ser. Comm.*, 267 U.S. 493, 496-97 (1925). On stockyards, see *Stafford v. Wallace*, 258 U.S. 495, 516 (1922). On grain markets, see *Board of Trade v. Olsen*, 262 U.S. 1, 40-41 (1923).

circumstances Taft was determined to invoke the structural limitations of federalism.

The irony, of course, is that Taft thus understood federalism as ultimately grounded in a quest for ways of ensuring the maintenance of a national regime of individual rights, one which would provide a *uniform* floor beneath which states could not sink in their regulation of property. In the end this is what distinguished Taft's perspective on federalism from that of Brandeis, who, like Taft, also invoked the metaphor of "experimentation":

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[123]

For Taft experimentation would forestall change, create the time for deliberation, and ultimately reveal the folly of crossing the universal and inexorable laws of human nature. For Brandeis, on the other hand, experimentation would open the possibility of genuinely new social arrangements. For Taft experimentation would be sharply circumscribed by a national regime of property and individual rights; the "Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual."[124] For Brandeis, on the other hand, experimentation would mean liberation from preconceived "prejudices" and timid conceptions of human nature and property.

For Taft, in short, federalism was simply a device to further strengthen individualistic rights that themselves sharply limited the autonomy of state governments. This is a vision of federalism that Taft paradoxically shares with another great proponent of individualist rights, Justice William J. Brennan, who also viewed federalism as "a double source of protection for the rights of our citizens."[125]

---

123. *New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

124. *Truax v. Corrigan*, 257 U.S. 312, 338 (1921).

125. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977). Brennan argues that "state experimentation" which "endangers the continued existence of our national rights and liberties" is "antithetical to the requirements of the Fourteenth Amendment." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61

The difference between the two, a difference scored by the gulf of the Great Depression, lies in the conception of the person. But that is another story. If we focus instead narrowly on the structure of federalism, Taft stands as an eerie precursor of the last great representative of the individualistic nationalism of the Warren Court.

N.Y.U. L. Rev. 535, 550 (1986). For a full discussion, see Robert C. Post, *Justice Brennan and Federalism*, 7 Const. Comm. 227 (1990). Brennan, of course, did not understand principles of federalism to require the limitation of national power, except to the extent that the "adequate state ground" doctrine may be understood to reflect a qualification of federal judicial power.