
FEDERALISM IN THE SECOND REPUBLIC'S THIRD CENTURY

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I. INTRODUCTION

I admit with lingering doubt the proposition that the era of self-affirmation has improved at least our perception of the human condition. In such a climate praise, including that generated from within, is thick on the ground. If I have an enduring objection it inheres in the difficulty of issuing praise when it is genuinely due. This is one of those occasions, a moment to pause and give thanks for Charles M. Haar, an extraordinary educator and colleague. One could go on seeking to identify this vibrant man but I cannot improve upon the self-characterization with which he began an extraordinary commencement address. In June of 1994, as he stood before the faculty and graduating class of the Hebrew College as they conferred the degree of Doctor of Human Letters, Charles declared: "My own life has been the law." The address evokes in this reader the same reaction that I have to Beethoven's Seventh Symphony with its themes, challenges, and affirmation of hope.

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The comparativism which he identifies is the fundamental similarity uniting the underlying mind set and methods of the common law and Jewish law.

Let me amplify how your general education at Hebrew College, and the implication of this sensitivity to legal thinking, are valuable: You have mastered two cultures, and thus become comparativists. Comparison, it can be argued, is the best way toward a deep understanding of a subject. Fresh insights come from new perspectives; stimulation comes from the surprise of assumptions and conclusions arrived at in a manner inconsistent with the axioms taken for granted.¹

Though aimed at the young, his words have inspired one well into middle age. They united with his admonition delivered a quarter of a century ago over lunch at a coffee house just off of Harvard Square: "From time to time try to match wits with big, meaningful problems." Since this directive contained no subject matter limitations, I hope that he will not take it amiss that I have strayed well beyond the responsibilities and assignments of the intervening years to match a tiny wit against the overarching issue of federalism and the role it ought to play in what I will be terming the Second Republic's third century.²

The topic, federalism in the twenty-first century, embodies the happy assumption that what I will be terming the "Second Republic" survives until the end of this decade. This is a modest aspiration for a set of ambitions, if not dreams, and institutions that are already 207. From my perspective I am eager to share in the survival assumption for it means that we shall encounter a recurrent set of challenges and opportunities in a fundamentally unaltered constitutional framework.³ And it is in this context that I advance three propositions: (1) that the absence of amendment has not in the past, and need not in the future, stand as a barrier to startling redistribution of governmental powers; (2) that many of the circumstances which can be identified as historical precursors of such power shifts stalk current institutional arrangements at both the state and national levels and underpin the vague feeling that government just does not seem to work; and (3) that there is a new

1. Charles M. Harr, Address at the Hebrew University Commencement (June 1994).

2. The First Republic, under the Articles of Confederation, lasted only eleven years.

3. In making this statement I am aware of the current debate swirling around the questions whether a balanced budget amendment and, if so, what is the appropriate content for a proposition to be submitted to the several states.

dimension to the debate which must be acknowledged if we are to profit from the experience we have already launched.

If I may trade on the element of modest suspense, I will refrain from identifying it for a little while. Sufficient for the moment is the proposition that it arises from an unlikely comparativist source and, if embraced, may provide a fresh perspective in our quest for the evolution or creation of political institutions deployed at the level closest to our problems and populace.

II. OUR REMARKABLY ADAPTABLE CONSTITUTIONAL SETTLEMENT

My first proposition, that the constitutional framework of the Second Republic has proven remarkably adaptable to the redistribution of power, can best be defended by stepping back 209 years.⁴

On September 28, 1787, the Congress of the Confederation voted to submit the draft of the new constitution to the several states for ratification.⁵ Delaware became the first state to assent to the new constitution and did so by unanimous vote at a convention called for that purpose.⁶ The date was December 7, 1787. The relative speed and unanimous support were inaccurate predictors of the reception of the document at the level of the several states.

Five days after Delaware had acted in the affirmative the matter was brought to a vote in Pennsylvania.⁷ Opposition forces focused upon the

4. A similar conclusion was advanced by Justice Sandra Day O'Connor speaking for the majority in *New York v. United States*:

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

505 U.S. 144, 157 (1992).

5. DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 176 (1990).

6. Gaspare J. Saladino, *Delaware: Independence and the Concept of a Commercial Republic*, in *RATIFYING THE CONSTITUTION* 29, 29 (Michael A. Gillespie & Michael Lienesch eds., 1989).

7. George J. Graham, Jr., *Pennsylvania: Representation and the Meaning of Republicanism*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 52, 52.

power of the central government and complained that the text of the fundamental document was grossly deficient in defining the power of that authority in relationship to that of the states.⁸ Notwithstanding, ratification was secured by a vote of forty-six to twenty-three.⁹ Following overwhelming victories in New Jersey,¹⁰ Georgia,¹¹ and Connecticut,¹² the issue of the extent of the power of the central government produced a razor thin assent in Massachusetts. The motion to ratify passed by a majority of nineteen before a convention of 355.¹³ This slim majority was secured only after an amendment was attached which recommended that the constitution be augmented with an explicit bill of rights to protect the states from federal encroachment on individual liberties.¹⁴ The year 1788 saw divided conventions produce majorities for ratification in Maryland,¹⁵ South Carolina,¹⁶ and New Hampshire.¹⁷ In New Hampshire the convention passed a separate motion calling for the addition of a bill of rights.¹⁸

Under the terms of the draft which the Congress of the Confederation had submitted, ratification by nine states was sufficient to establish a conforming federal government among the assenting states.¹⁹ The assent of New Hampshire produced the decisive ninth vote. Yet no attempt was made to organize the national government. The deterrent

8. *Id.* at 63-66.

9. *Id.* at 52, 66.

10. Sara M. Shumer, *New Jersey: Property and the Price of Republican Politics*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 71, 71.

11. Edward J. Cashin, *Georgia: Searching for Security*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 93, 93.

12. Donald S. Lutz, *Connecticut: Achieving Consent and Assuring Control*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 117, 117.

13. Michael A. Gillespie, *Massachusetts: Creating Consensus*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 138, 158. The Constitution was ratified by a vote of 187 to 168. *Id.*

14. *Id.* at 151-58.

15. Peter S. Onuf, *Maryland: The Small Republic in the New Nation*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 171, 171.

16. Robert M. Weir, *South Carolina: Slavery and the Structure of the Union*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 201, 201.

17. Jean Yarbrough, *New Hampshire: Puritanism and the Moral Foundations of America*, in RATIFYING THE CONSTITUTION, *supra* note 6, at 235, 235.

18. *Id.* at 250-55.

19. *Id.* at 235.

was realization that the two most powerful states—Virginia and New York—had yet to agree.²⁰ On June 10, 1788, Madison and Governor Randolph overcame the forces of opposition, led by Patrick Henry and George Mason, and obtained a ten vote majority in a convention of 168.²¹ The pro-ratification forces in Virginia had been greatly assisted by the arguments of a little known delegate, John Marshall.²² But the closest call was to come in New York where the motion before the convention would have conditioned ratification on the prior adoption of a bill of rights.²³ Again, the central focus of the debate was the issue of state versus national authority.²⁴ When that motion failed by a single vote, a motion to ratify unconditionally passed with thirty voting in the affirmative and twenty-seven casting a “no” ballot.²⁵

On September 29, 1788, Congress passed a resolution placing the new constitutional framework into operation. This was done notwithstanding the fact that ratification conventions had yet to act in North Carolina and Rhode Island. They were to add their assent in 1789 and 1790 respectively after George Washington had taken the oath of office as President and the first bicameral national legislature had begun to function. It is an interesting question to ponder the status of North Carolina and Rhode Island in the period which elapsed between the

20. Michael A. Gillespie & Michael Lienesch, *Introduction*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 1, 13.

21. Lance Banning, *Virginia: Sectionalism and the General Good*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 261, 286.

22. FARBER & SHERRY, *supra* note 5, at 179. Thirty-one years later John Marshall was to recall those debates in the course of propounding a justification for the startling proposition that only the United States Supreme Court could divine the appropriate boundary between state and federal authority:

This government [of the Union] is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

23. Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 300, 325-28.

24. *See generally id.* at 304-34.

25. *See FARBER & SHERRY, supra* note 5, at 134-42, 241-42.

demise of the First Republic and the establishment of the Second.²⁶ That to which they had assented was gone and that to which they had not agreed everywhere supplanted the confederation. Easing their angst, and perhaps enticing their belated ratification, was knowledge that the debate on the need for, and content of, a written assertion of the rights not ceded to the national government, by 1789, fully engaged.

Every American who has completed a primary education has been exposed to the basic history of the Bill of Rights. As I have noted, the creation of such an enumeration had been called for by ratification conventions in Massachusetts and New Hampshire. The popularity of such an effort was also indicated by the votes taken in the New York convention where ratification came within a single vote of being conditioned upon such a step. Yet when the attempt was made it was resisted. Surviving records of the first Congress seated under the new Constitution reveal that James Madison was confronted with what he characterized as “. . . one of the most plausible arguments I have ever heard against the admission of a bill of rights. . . .” [in Madison’s words]:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.²⁷

Madison’s solution was embodied in the last clause of the fourth resolution which he placed before his House colleagues: “The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.” The reader will recognize

26. Gillespie & Lienesch, *supra* note 20, at 15-17. The situations of the two states were quite different. North Carolina was represented in the Constitutional Convention while Rhode Island was the only state which refused to send a delegation. The first effort to ratify the Constitution in North Carolina failed in 1788. Michael Lienesch, *North Carolina: Preserving Rights*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 343, 343. Ratification was achieved on the second try on November 21, 1789. *Id.* at 363-64. Rhode Island refused to even consider ratification and it was not until May 29, 1790, that she assented to it under the explicit threat of the new Congress that she was to be regarded as a foreign nation and her trade goods subjected to import duties. *Id.* at 385. John P. Kaminski, *Rhode Island: Protecting State Interests*, in *RATIFYING THE CONSTITUTION*, *supra* note 6, at 368, 368.

27. 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

the language of the Ninth Amendment.

Until quite recently the decisions of the United States Supreme Court have been remarkably devoid of references to the Ninth Amendment and the concept of rights reserved directly to the people. The earliest citation can be credited to Justice Samuel Chase in *Calder v. Bull*.²⁸ The year was 1798. *Calder* is deserving of the closest reading by students of republican thought and constitutional history. Decided five years before the advent of Marshall's appointment, it is remarkable for the tenor of the open debate on the restraints which are imposed upon government by the terms of the post-revolutionary settlement. In accordance with English legal practice, the opinions of the various members of the Court were announced seriatim. The judgment of the case was ascertained by simply counting the various votes for a specific result. Chase voted to sustain the authority of the legislature of Connecticut to change the process whereby probate rights were adjudicated in the courts of that state and to subject a previously decided will contest to revisitation under the altered regime. He used the occasion to speculate at length upon the limited authority of the legislative power at both the state and federal levels which he deemed to be circumscribed by the terms of written constitutions *and* the norm of the "social compact."²⁹

Fully anticipating the 1803 judgment in *Marbury v. Madison*,³⁰ Chase announced that the hour had not yet come to decide "whether this Court has jurisdiction to decide that any law made by Congress, contrary

28. 3 U.S. (3 Dall.) 387-88 (1798). Chase is remembered today as the only member of the Supreme Court to ever be impeached by the House of Representatives. He was born in Maryland in 1741 and educated privately. At the age of twenty he was called to the Maryland bar. He was a member of the Maryland Assembly and in that capacity led resistance to the Stamp Act. He was a member of the Continental Congress from 1774 to 1778 when such service was an act of treason against the British Crown. Chase represented Maryland in the Congress of the Confederation for a two year period from 1784 to 1786. In 1796 he was nominated by President Washington to be an Associate Justice of the United States Supreme Court. The event which triggered his impeachment was criticism of the Jefferson Administration in the course of a charge delivered to a federal grand jury. Chase was acquitted by the Senate and he continued to serve on the Court until his death in June, 1811. SUPREME COURT HISTORICAL SOCIETY, *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993*, 41-45 (Clare Cushman ed., 1993) [hereinafter *SUPREME COURT JUSTICES*].

29. *Calder*, 3 U.S. (3 Dall.) at 387-89.

30. 5 U.S. (1 Cranch) 137 (1803).

to the Constitution of the United States, is void."³¹ On the question of whether the federal judiciary possessed a right to construe the constitutions of the several states and to use that predicate to annul state legislation, Chase was firmly resolved. "I am fully satisfied that this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such State, is void. . . . I should think that the courts of Connecticut are the proper tribunals to decide whether the laws, contrary to the constitution thereof, are void."³²

Notwithstanding this early focus, it is not until 1965 and the Court's consideration of the constitutionality of a challenged anticontraceptive statute that we find extensive citation to the Ninth Amendment in two of

31. *Calder*, 3 U.S. (3 Dall.) at 392 (emphasis omitted).

32. *Id.* at 392-93 (emphasis omitted).

Justice James Iredell concurred in the view that the prohibition in Article I, § 10, against state passage of bills of attainder and *ex post facto* laws, was not offended by the revision and retroactive application of non-criminal legislation. On the nature of the restraints which acted upon governmental power in general, and legislative authority in particular, he differed from Chase:

If then a government, composed of Legislative and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power, could never interpose to pronounce it void. It is true that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .

In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates these constitutional provisions it is unquestionably void, though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have suffered upon the subject; and all that the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. . . .

Id. at 398-99.

the opinions rendered in *Griswold v. Connecticut*.³³ Writing for the majority, Justice William O. Douglas pointed to the text of the Ninth Amendment even as he appeared to rest his conclusion, that the statute was fatally offensive to a protected right of marital privacy, on “emanations” from the Third, Fourth, and Fifth Amendments.³⁴

Justice Arthur Goldberg, concurring, appeared to consider defending the proposition that the language of the Ninth Amendment might stand alone as a barrier between individual personal rights and the powers of both the federal and state governments:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.³⁵

And yet he quickly retreated:

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.³⁶

The fact that the Court would have resorted to the Bill of Rights to determine the constitutional validity of a state statute would almost certainly have shocked a nineteenth century reader. The historical context in which the first eight amendments were proposed, debated, and ratified reveals that they were viewed as a check on the powers and prerogatives of the national government. Justice Douglas was the chief architect in a twenty-year campaign to find a wholesale incorporation of those limitations on the authority of state government in the Due Process Clause of the Fourteenth Amendment. At the time he spoke for the majority in *Griswold*, his theory of wholesale incorporation did not command the support of Justices Warren, Brennan, Goldberg, or Stewart.

33. 381 U.S. 479 (1965).

34. *Id.* at 484.

35. *Id.* at 491 (Goldberg, J., concurring). Justice Goldberg was joined in his concurring opinion by Chief Justice Warren and Justice Brennan.

36. *Id.* at 492.

The debate which surrounded the ratification of the proposed second constitution had, as we have seen, produced calls for an explicit bill of rights in numerous state conventions. Unfortunately, insufficient contemporary evidence survives to clarify the intent of many who gave voice to this call. The terms of the Massachusetts resolution suggest an emphasis upon protecting the status of the states, while the near successful attempt to condition ratification in New York centered on language more suggestive of an emphasis on individual rights. The final provision of the Madisonian Bill of Rights addressed these issues:

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.³⁷

The debate in the House of Representatives outlined a dispute which has erupted in each succeeding decade. Unfortunately for the respective schools of political thought and interpretation, the intendment of the "amending framers" must be deduced both from what they said and what they declined to say. Those most jealous of preserving the powers and prerogatives of state government made an unsuccessful bid to insert the word "expressly" before the phrase "delegated to the United States." The amendment was defeated in the House by a vote of seventeen to thirty-two.³⁸

Thirty years later, the debate flared in the judicial forum with the written and oral submissions of the Attorney General of Maryland which denied that the federal government possessed a power to create corporations in the absence of explicit constitutional language reserving or creating such authority. Students of the early court will instantly recognize *McCulloch v. Maryland*.³⁹ Chief Justice Marshall, who

37. U.S. CONST. amend. X.

38. 1 ANNALS OF CONG. 767-68 (Joseph Gales ed., 1789). We also know that the motion was rejected in the Senate but no record of the vote survives.

39. 17 U.S. (4 Wheat.) 316 (1819).

Although Justice Marshall elected to present the issue as one of first impression, it had a prior history in the Supreme Court. In *Calder v. Bull*, Justice Chase was clearly mindful of the Tenth Amendment, though he did not cite it in making the following observation:

It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive

played a vocal role in arguing for ratification of the Constitution in the closely divided Virginia convention, set the stage with dramatic emphasis on the character of the players as well as their roles:

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. 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 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. On the Supreme Court of the United States has the constitution of our country devolved this important duty.⁴⁰

In ultimately rejecting the submission of the State of Maryland, Marshall advanced a concept of implied federal powers using as his foil the "Necessary and Proper" Clause in the original text.⁴¹ To Marshall it was dispositive that the framers of the amendment had consciously

province, and duty of the State Legislatures: All the powers delegated by the people of the United States to the Federal Government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the State Governments are indefinite; except only in the Constitution of Massachusetts.

3 U.S. (3 Dall.) 386, 387 (1798).

40. *McCulloch*, 17 U.S. (4 Wheat.) at 400-01.

41. *Id.* at 419-21. The Chief Justice used as the justification for the assertion of federal authority the very language from the Constitution which the Attorney General of Maryland had relied upon to exclude that power. Marshall spent the great bulk of the Court's opinion reacting to the following proposition:

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*," is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory.

Id. at 413.

refused to include the word "expressly" which, as he noted, had formed the heart of the Articles of Confederation.⁴² This critical difference between the formulations in the Articles and the Constitution sufficed to extinguish claims of a textual answer and left future generations with a context-specific controversy. It would be difficult to improve upon Marshall's formulation of the enduring question: "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument."⁴³

III. THREE AND ONE-HALF ERAS OF "FAIR CONSTRUCTION OF THE WHOLE INSTRUMENT"

I believe that the decisions of the Supreme Court can be divided into three eras. Let me offer a brief recapitulation of my reading of our constitutional history as a prelude to my suggestion that we have clearly entered a fourth.

A. *The Marshall Court*

Almost single handedly Chief Justice Marshall fashioned a series of opinions which sought to enhance the authority of the national government at the expense of the states.⁴⁴ This authority achieved its figurative, if not literal, high water mark in *Gibbons v. Ogden*.⁴⁵

It is a literal fact that the Chief Justice had barely been accorded a dignified funeral before a majority of his surviving colleagues began a

42. *Id.* at 406-07.

43. *Id.* at 406.

44. Marshall's work to achieve this end commenced in *Fletcher v. Peck*, which held a Georgia statute that annulled a conveyance of state land authorized by prior legislation violative of Art. I, § 10, the impairment of contracts clause. 10 U.S. (6 Cranch.) 87 (1810). Nine years later, *McCulloch v. Maryland* recognized "implied powers" in the national government even as the Court limited the authority of states to tax federal instrumentalities. 17 U.S. (4 Wheat.) 316 (1819). In that same year, Marshall authored *Trustees of Dartmouth College v. Woodward*, which upheld the inviolability of contracts from amendment by states. 17 U.S. (4 Wheat.) 518 (1819). *Osborn v. Bank of the United States* repeated the Court's view that states were precluded from levying a tax on any federal instrumentality. 22 U.S. (9 Wheat.) 738 (1824).

45. 22 U.S. (9 Wheat.) 1 (1824). *Gibbons* had been presaged by the cryptic remark in *Cohens v. Virginia*, that "[i]n all commercial regulations, we are one and the same people." 19 U.S. (6 Wheat.) 264, 413 (1821).

blistering counter-attack. In *New York v. Miln*,⁴⁶ the Court announced its judgment in a case heard before, but decided after, Marshall's death.⁴⁷ Justice Barbour, writing for the majority, rejected the contention that the Court distinguish *Gibbons*, on the premise that the New York legislation did not directly affront an act of Congress:

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the burden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.⁴⁸

As forceful as this expression was, Barbour's role as an anti-federalist Jacksonian Democrat was subordinate to that of Roger Taney. Having served as Attorney General during Jackson's war on the National Bank, Taney saw the Senate reject his initial nomination to the Court.⁴⁹ His second chance, the nomination for the post vacated upon Marshall's

46. 36 U.S. (11 Pet.) 102 (1837).

47. Marshall died in office on July 6, 1835. SUPREME COURT JUSTICES, *supra* note 28, at 65. Andrew Jackson had been elected President in 1829. During his first term he had made only one appointment to what was then a seven member Court, Henry Baldwin of Pennsylvania. *Id.* at 108. On December 28, 1835, he nominated Roger B. Taney of Maryland to succeed Marshall and Philip P. Barbour of Virginia as the successor to Gabriel Duval. 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-1864 33 (1974). Barbour served less than five years during which time he was closely identified with Taney's strong support of state authority. *Id.* at 55-58.

48. *Miln*, 36 U.S. (11 Pet.) at 138. Justice Story dissented, noting that prior to his death, Marshall had reached the conclusion that the New York statute was unconstitutional. *Id.* at 160.

49. SWISHER, *supra* note 47, at 22-28.

death, was decided by a Senate far more inclined to do business with a re-elected Andrew Jackson.⁵⁰ As Chief Justice, Taney's strong inclination to support states' rights received a full exposition in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*.⁵¹

B. *Redressing the Balance: From Jackson to Hoover*

The second era, which Barbour and Taney began in 1837, lasted a century and was marked by a near uniform tendency to construe the powers of the national government narrowly and thus, with or without citation to the Tenth Amendment, to stress the limited nature and extent of federal authority. A pro-State result was most likely if the specific controversy involved an attempted application of federal authority to the offices or officers of state or local government.

In *Collector v. Day*, the Court reflected, with what was probably deliberate irony, on Marshall's famous aphorism in *McCulloch* that the power to tax is the power to destroy.⁵² While broadly validating the constitutionality of a national income tax, the Court found in the Tenth Amendment a bar to a levy of such a tax upon the salaries of state officers.⁵³ The articulated reasoning came close to awarding foes of federal power the victory they had narrowly been denied in the first Congress and had failed to attain during the era of John Marshall. While it did not construe the Amendment as requiring that federal authority be grounded on express delegation, the *Collector* Court appears to have achieved an equivalent reading: "[T]he States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."⁵⁴ Perhaps even more significant was the Court's decision a term earlier in *United States*

50. *Id.* at 33-37.

51. 36 U.S. (11 Pet.) 420, 536 (1837). A blistering dissent by Justice Story lamented the Court's retreat from the Marshall era and its use of the impairment of contract clause as a federal restraint on state legislative authority. *Id.* at 582. For a useful exposition of Taney's views on the Tenth Amendment as a subsequent expression of the will of the people to limit the powers of the national government, see *The License Cases*, 46 U.S. (5 How.) 504, 573 (1847).

52. 78 U.S. (11 Wall.) 113 (1870).

53. *Id.* at 124.

54. *Id.* *Collector* was expressly overruled by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 468 (1939).

v. *Dewitt*,⁵⁵ which gave a very narrow reading to the commerce clause. In the eyes of the Court the commerce clause added nothing to the powers delegated to the national government:

[The] express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.⁵⁶

Two notable cases extended this view in contexts which ultimately proved embarrassing for foes of federal authority. In 1883, the Court examined the Civil Rights Act of 1875 and concluded that the attempted criminalization of a denial of equal access to inns, theaters, and public conveyances exceeded the authority of Congress and unconstitutionally infringed on powers reserved to the States.⁵⁷ From the perspective of the nation's inheritance of English laws and customs, few decisions could have been so anti-historic. Indeed, securing access to inns and ferries had been identified as a duty of the national sovereign since the time of Henry de Bracton in the thirteenth century.⁵⁸ Notwithstanding, this denial of federal authority continued to dominate well into the current century being firmly repudiated only in 1965.⁵⁹ In *Hammer v. Dagenhart*,⁶⁰ a five member majority found in the Tenth Amendment a command to nullify a federal child labor law which sought to prohibit the interstate transportation of goods produced by child labor.

Nor was the Court any more receptive to assertions of federal power in the context of national economic regulatory schemes. A trilogy of cases taken up in the Court's 1935 and 1936 Terms did not quarrel with legislative objectives, but found that the means had invaded powers reserved to the several states. Chief Justice Charles Evans Hughes,

55. 76 U.S. (9 Wall.) 41 (1869).

56. *Id.* at 44.

57. *The Civil Rights Cases*, 109 U.S. 3 (1883).

58. *See generally* CHARLES M. HAAR & DANIEL WM. FESSLER, *THE WRONG SIDE OF THE TRACKS* 60-66 (1986) (discussing Bracton's theory of governance).

59. In the wake of *United States v. Darby*, Congress has managed to pursue federal guarantees of equal access to public accommodations using the Commerce Clause. 312 U.S. 100 (1941). *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (declaring the Civil Rights Act of 1964 a valid exercise of Congress' power).

60. 247 U.S. 251 (1918).

writing for a five member majority in *A.L.A. Schechter Poultry Corp. v. United States*,⁶¹ summarized this second era even as he unmasked the force which was to overthrow it. His major premise was simple: National economic emergency conditions did not justify the national legislative and executive branches' assumption of "extraconstitutional authority."⁶² A year later in *United States v. Butler*,⁶³ a six Justice majority declared unconstitutional a federal tax on the processing of agricultural products, the proceeds of which were used to support farmers who complied with federal production quotas.⁶⁴ During that same Term, the Court in *Carter v. Carter Coal Co.*,⁶⁵ invalidated an attempt by Congress to levy a federal excise tax on coal produced by nonmembers of a working agreement known as the "Bituminous Coal Code" which was established as part of a federal regulatory scheme.⁶⁶

C. *From Dual Sovereign to Mere Truism*

Few contemporary observers predicted that, within a single year, the Court would turn 180 degrees and conclude that the power of Congress over interstate commerce is complete in itself finding no limitations on Congress' power other than those articulated in the Constitution. Justice Owen Roberts, who had voted with the Court's unreconstructed foes of expanded national authority, abandoned their cause as well as their company⁶⁷ to join an apparently converted Chief Justice Hughes in forming a majority sustaining the validity of the National Labor Relation Act. The shifting attitudes and personnel soon focused on the issue of

61. 295 U.S. 495 (1935).

62. *Id.* at 528-29.

63. 297 U.S. 1 (1936).

64. *Id.*

65. 298 U.S. 238 (1936).

66. *Id.* at 278-79.

67. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). It is important to note that the history of Justice Roberts and the "Four Horsemen" is not necessarily a happy one from the perspective of those who favor state authority. Indeed, in the period in which they made war on the economic programs and ambitions of the New Deal, this majority also rejected numerous state statutes which aimed to improve conditions in the work place. As recently as the prior term they had decided *Morehead v. New York ex rel. Tiplido*, 298 U.S. 587 (1936), striking down a minimum wage law for women. Here, too, Roberts' sudden conversion was decisive. In 1937 he joined the dissenters in *Morehead* to form a majority which sustained a broader state minimum wage statute in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

federalism. In 1941, Justice Harlan F. Stone spoke for the Court in *United States v. Darby*.⁶⁸ The occasion was the revisitation of the Commerce Clause, the Tenth Amendment, and the authority of the national government with respect to fair labor standards. Not only was *Hammer v. Dagenhart* expressly overruled,⁶⁹ but the Tenth Amendment was reduced to the status of "a truism that all is retained which has not been surrendered."⁷⁰ The third era crested with Stone's assertion for a unanimous Court.

D. *A Truism Revisited in a Period of Political Discontent*

Thirty-five years is a modest moment in the history we have just reviewed. And it was for that period that the "truism" slept until the advent of its "Bicentennial Moment." In *National League of Cities v. Usery*,⁷¹ Justice William Rehnquist spoke for a bare majority in language which dramatically revived the debate. At issue was the constitutionality of subjecting state government, in its capacity as an employer, to the minimum wage and maximum hour requirements as set forth in the Fair Labor Standards Act (FLSA).⁷² For those anticipating a routine affirmance of national power, the storm warning was raised early in the opinion: "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."⁷³ In *Fry v. United States*,⁷⁴ the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their

68. 312 U.S. 100 (1941). Justice Stone was promoted to the post of Chief Justice by Franklin Roosevelt soon after this decision was handed down.

69. *Id.* at 116-17.

70. *Id.* at 124.

71. 426 U.S. 833 (1976).

72. *Id.* at 835-37.

73. *Id.* at 842.

74. 421 U.S. 542 (1975).

ability to function effectively in a federal system.⁷⁵

Having warmed to his subject, Justice Rehnquist returned to the theme which had marked the second era, the concept of dual sovereignty and the inviolate nature of essential state and local functions:

The question we must resolve here, then, is whether these determinations [fixing the terms and conditions of state employment] are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.⁷⁶

As the Court noted,

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.⁷⁷

The *National League of Cities* Court then proceeded to expressly overrule a 1968 precedent, *Maryland v. Wirtz*, which had found no constitutional inhibition to the power of Congress to subject state schools and hospitals to the FLSA.⁷⁸

So startling was the ruling in *National League of Cities* that many missed the fact that the critical fifth vote, that of Justice Harry Blackmun, was accompanied by a brief concurring opinion which betrayed a troubled mind.⁷⁹ By 1982, Blackmun's disenchantment with

75. *National League of Cities*, 426 U.S. at 842-43 (citations omitted).

76. *Id.* at 845-46 (quoting *Coile v. Smith*, 221 U.S. 559 (1911)).

77. *Id.* at 845.

78. 392 U.S. 183 (1968).

79. *Id.* at 856 (Blackmun, J., concurring). The dimension of the *National League of Cities*'s majority's departure from what had become the "conventional wisdom" can best be understood by noting several third era opinions. In *Case v. Bowles*, a six member majority concluded that "the Tenth Amendment '[did] not operate as a limitation upon the powers, express or implied, delegated to the national government.'" 327 U.S. 92, 102 (1946) (quoting *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945); *United States v. Darby*,

National League of Cities was strongly suggested in his opinion for a divided Court in *Federal Energy Regulatory Commission v. Mississippi*.⁸⁰ At issue was the constitutionality of critical provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA).⁸¹ The announced goal of the federal legislation was to promote energy conservation and to encourage the development of non-utility generation in the form of cogeneration and small power production facilities.⁸² To achieve this objective, Congress directed the Federal Energy Regulatory Commission (FERC) to exempt such "qualifying facilities" from certain state regulations.⁸³ The truly unique feature, however, was the requirement that FERC promulgate rules requiring utilities to purchase power from these facilities.⁸⁴ State commissions were then obligated to enforce the FERC policies by issuing conforming regulations of their own and serving as a forum for the resolution of disputes between utility purchasers and non-utility generators.⁸⁵ The energy conservation goals were to be advanced in a substantively less intrusive manner. The Act obliged state ratemaking agencies to follow specific procedures for the *consideration* of such innovations as time-of-day, seasonal, and interruptible rates.⁸⁶ Thus, while the state was not obligated to *adopt* such policies, its procedures were conscripted as part of an agenda dictated by the federal government.

The State of Mississippi reacted with considerable vigor. It initiated a suit in the local federal district court against both the FERC and the Secretary of Energy, seeking a declaration that the features of Policies Act of 1978 were unconstitutional as beyond the scope of congressional

312 U.S. 100, 124 (1941)). One year later, the Court concluded that the Tenth Amendment did not deprive the national government of authority to resort to all means "appropriate and plainly adapted to the permitted end." *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). The Court surely reached a low point when Chief Justice Earl Warren repeated, for a unanimous Court in *Sperry v. Florida*, the observation that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." 373 U.S. 379, 403 (1963).

80. 456 U.S. 742 (1982).

81. *Id.* at 745.

82. *Id.* at 750.

83. *Id.* at 751.

84. *Id.*

85. *FERC*, 456 U.S. at 751.

86. *Id.* at 746-47.

power under the Commerce Clause and as an affront to state sovereignty in violation of the Tenth Amendment.⁸⁷ The district court ruled in favor of the state, placing its Tenth Amendment reliance squarely on *National League of Cities*.⁸⁸

Blackmun's majority opinion reversed the district court and dismissed the state's petition for relief.⁸⁹ In the eyes of the majority, it was of great consequence that the Act did not require state adoption of energy conservation goals and standards, but merely their *consideration* of such a step.⁹⁰ Further, the majority was of the view that the Commerce Clause provided ample authority for Congress to entirely occupy the field of regulation of investor owned utilities.⁹¹ Thus, to the degree that the challenged legislation obliged the state commissions to perform certain functions and attorn to specific federal standards, Congress was indulging a lesser included power.⁹²

Two years later, *National League of Cities* was dead, specifically overruled in a second five to four Blackmun decision announced in *Garcia v. San Antonio Metropolitan Transit Authority*.⁹³ I will return to the majority's rationale for abandoning *National League of Cities* as an experiment in constitutionalism which had proven unworkable in a moment. Justice Powell spoke for what we may term the "*National League of Cities* four," concluding that the majority had repudiated *Marbury v. Madison* and left the states to the mercy of what he termed "federal political officials."⁹⁴ Justice Rehnquist, writing separately,

87. *Id.* at 752.

88. *Id.* at 753.

89. *Id.* at 745.

90. *FERC*, 456 U.S. at 764.

91. *Id.*

92. Indeed, the majority saw in this Congressional strategy evidence of the "cooperative federalism" recognized in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Justice O'Connor, in a dissent joined by Chief Justice Burger and Justice Rehnquist, concluded that the attempt by Congress to set an agenda for state utilities commissions defied the nation's constitutional history. *FERC*, 456 U.S. at 775. Justice Lewis Powell, the other member of the *National League of Cities* majority abandoned by Blackmun, wrote a separate dissenting opinion. *Id.* at 771.

The vitality of *FERC v. Mississippi* may be in question given the views of the six member majority marshalled by Justice O'Connor in *New York v. United States*, 505 U.S. 144 (1992).

93. 469 U.S. 528, 531 (1985).

94. *Id.* at 567 (Powell, J., dissenting).

defiantly declared: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."⁹⁵ Somewhat more restrained was Justice O'Connor's assertion that: "With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."⁹⁶

Lest I conclude this section on a misleading note, I hasten to add that *Garcia* was not the exquisite last word on the subject of state versus federal relations. In 1991 and 1992, Chief Justice Rehnquist's prediction that time was on the side of those determined to revisit Blackmun's opinion appears to have come true. Justice O'Connor, emerging as one of the most thoughtful, resourceful, and persistent defenders of state and local government, put together back to back majorities in *Gregory v. Ashcroft*⁹⁷ and *New York v. United States*.⁹⁸ Each case represents a vindication of federalism, although neither contained a bid to explicitly overrule *Garcia*.

Since *Garcia* retains some apparent vitality, I have reread it in quest of greater understanding. I have concluded that the key to the decision lies in *National League of Cities*, the case it overruled. In 1985, Justice Blackmun's switch reversed the Court's nine year experiment, begun in *National League of Cities* and refined in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,⁹⁹ to identify the essential functions of state and local government as defining Tenth Amendment limitations on

95. *Id.* at 580 (Rehnquist, J., dissenting).

96. *Id.* at 588 (O'Connor, J., dissenting).

97. 501 U.S. 452 (1991). The majority consisted of Justice O'Connor, Chief Justice Rehnquist, and newly appointed Justices Scalia, Kennedy, and Souter.

98. 505 U.S. 144 (1992). The majority had grown to six with the addition of Associate Justice Clarence Thomas. At issue in this case were three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required that a state which refused to meet congressionally set deadlines for disposing of such waste products take title to the waste from the generators and incur any consequential damages suffered by those generators. *Id.* at 149-54. The majority held these provisions unconstitutional concluding that "[w]hether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177. Justices White, Blackmun and Stevens, all that remained of the "*Garcia* five," dissented with respect to the determination of unconstitutionality.

99. 452 U.S. 264 (1981).

the scope of Congressional authority. The genius of *National League of Cities* was to be found in its departure from an inquiry into whether national authority might be recognized and its admission that, even in circumstances in which that authority was to be conceded, the Tenth Amendment posed a barrier to its exercise with respect to the core instrumentalities and personnel of state and local government.

This innovation, which may in truth have been a revival of the nineteenth century line of cases beginning with *Collector v. Day*,¹⁰⁰ was the source of a fatal pragmatic defect. In the view of the five to four majority in *Garcia*, the inability of the federal judiciary to devise an adequate test for distinguishing those essential attributes of sub-national sovereignty constituted a persuasive reason to abandon the effort. However, the Court identified a dysfunctional approach to federalism as the compelling reason to overrule *National League of Cities*:

The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. . . .

We therefore . . . reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is “integral” or “traditional.” Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government’s power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them.¹⁰¹

100. 78 U.S. (1 Wall.) 113 (1870).

101. *Gracia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-47 (1985). Ten years later, Justice Kennedy seemed to view the matter as unimproved. In his concurring

I agree, and in closing would like to suggest that alternative focus as well as some pragmatic steps to deploy such a strategy.

IV. SUBSIDIARITY: THE KEY TO THIRD CENTURY FEDERALISM

A. *Origin and Meaning of the Concept*

In 1994, Professor George Bermann wrote a provocative piece, entitled *Taking Subsidiarity Seriously*, which examined federalism in the European Union as well as the United States.¹⁰² Noting that subsidiarity “has dominated discussions of European federalism for over five years,”¹⁰³ the author informs us that “the drafters of the Maastricht Treaty on European Union . . . chose to make the principle a central tenet of the Community’s latest constitutional reform.”¹⁰⁴ There followed an excellent discussion of this concept, its moral and pragmatic implications, and its historical role in political thought. Only later does the author turn to the topic in the context of American federalism. Let me assert his major conclusion in Professor Bermann’s own words:

It is reasonable to suppose, given subsidiarity’s evident conceptual and operational difficulties, that those architects [of the emerging European Union] might also have inquired into the role, if any, that the notion of subsidiarity plays in the workings of U.S. federalism and into its efficacy in that setting. I conclude, however, that not only would the Europeans not have found subsidiarity in the lexicon of U.S. constitutional law, but they would not have found it to be a central feature of U.S. constitutional practice. In other words, the

opinion in *United States v. Lopez*, he noted:

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. . . . These standards are by now well accepted. Judicial review is also established beyond question Our role in preserving the federal balance seems more tenuous.

115 S. Ct. 1624, 1637-38 (1995) (citations omitted).

102. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

103. *Id.* at 332.

104. *Id.* at 333-34.

U.S. system offers few political or legal guarantees that the federal government will act only when persuaded that the states cannot or will not do so on their own.¹⁰⁵

With great deference to a scholar of obviously prodigious talent, I respectfully disagree. In my view, subsidiarity in both its classical concept and modern formulation is decidedly congruent with American political thought running the gamut: from those who participated in the Constitutional Convention of 1787 to Justice Sandra Day O'Connor and her colleagues in the majority in *New York v. United States* in 1992. Further, conscious deployment of this principle at both the legislative and judicial level is the superior strategy Justice Blackmun longed for in *Garcia*. To accomplish this objective in the course of concluding this Article requires that I borrow further from the contribution of Professor Bermann.

Bermann informs his reader that advocates of subsidiarity in the European Community trace the concept to twentieth-century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno*. According to that document, subsidiarity requires that “[s]maller social units . . . not be deprived of the possibility and the means for realizing that of which they are capable [and] [l]arger units . . . restrict their activities to spheres which surpass the powers and abilities of the smaller units.”¹⁰⁶

This encyclical, aimed at the growing centralization of statist power in Europe, was ridiculed in Nazi Germany and Fascist Italy. Today this explicit “preference for governance at the most local level consistent with achieving government’s stated purposes” is a central feature of the German Constitution (*Grundgesetz* or Basic Law).¹⁰⁷ Article 72(2) provides that in areas of shared competence the federal government may legislate only if necessary, that is, if the states cannot effectively achieve the goals sought.¹⁰⁸

105. *Id.* at 403.

106. *Id.* at 339 (citations omitted) (quoting Franz-Xaver Kaufmann, *The Principle of Subsidiarity Viewed by the Sociology of Organizations*, 48 *THE JURIST* 275, 280 (1988)).

107. Bermann, *supra* note 102, at 339.

108. Article 72(2) provides:

The Federation shall have the right to legislate on [matters within the concurrent legislative powers of the Federation and the *Länder* (states)] to the extent that a need for regulation by federal law exists because:

1. a matter cannot be effectively regulated by the legislation of individual

Bermann next turns his attention to convincing the reader that subsidiarity matters because it draws "connections between local governance and certain more fundamental values."¹⁰⁹ Those values are identified as: (1) self-determination and accountability, (2) political liberty, (3) flexibility, (4) preservation of identities, (5) diversity, and (6) respect for internal divisions of component states.¹¹⁰ I ask that you keep both this definition and those values in mind as we recall key aspects of the American constitutional history we have just reviewed.

B. *Subsidiarity in Our Constitutional Context*

I have concluded that while the term is not used, there is clear evidence that the concept of subsidiarity was alive and well and reflected the conscious choice of a majority of those who framed the Constitution. On May 28, 1787, the Convention which met to amend the Articles of Confederation voted on the Sixth Resolution, which sought to re-define national authority. Here is the text of their resolve:

That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the confederation; and moreover

To legislate in all cases, . . . to which the separate States are incompetent . . . or in which the harmony of the united States may be interrupted by the exercise of individual legislation.¹¹¹

I am struck by the remarkable congruence between this resolve and the encyclical letter of Pius XI. Consider the defense of federalism advanced by Justice O'Connor in *Gregory v. Ashcroft*:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in

Länder, or

2. the regulation of a matter by a *Land* law might prejudice the interests of other *Länder* or of the entire community, or
3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a *Land* necessitates such regulation.

Id. at 338 n.17.

109. *Id.* at 339.

110. *Id.* at 339-42.

111. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 47 (Max Farrand ed., 1966).

democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

...
In the tension between federal and state power lies the promise of liberty.¹¹²

C. *Subsidiarity in Practice*

If I am correct in my belief that there is a mirrored image between the concept of subsidiarity and the vision of American federalism, it would appear that we lack only the recognition of the term as a predicate for devising tools to more effectively deploy the principle in the revitalization of the Republic on the threshold of its third century. May I conclude with two pragmatic strategies: the first aimed at the field of legislation, the second at the exercise of adjudication.

How might the Congress go about implementing a commitment to subsidiarity? To borrow from an in-progress experiment with democracy, it could begin by framing a "Contract for a Federalist Future." The essence of the bargain would be the requirement that, before there is any enactment of substantive legislation which invades the traditional police powers of the several states, there be both factual inquiry and policy hearings designed to determine the presence of a national interest which lies beyond the competence or willingness of state or local government.¹¹³

At the judicial level, the Court need not repudiate Marshall's proposition that the national legislature enjoys implied as well as explicitly delegated powers, but it could require as part of its "rational basis" test evidence of Congressional fact finding and policy determinations consistent with the principle of subsidiarity. In the absence of such a record, the Court could remand the matter to the Congress for such

112. 501 U.S. 452, 458-59 (1991). See also *New York v. United States*:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

505 U.S. 144, 181 (1992).

113. Thoughtful commentators have not despaired that like concerns are within the grasp of democratically elected representatives. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987).

explicit and visible political determinations.¹¹⁴ In this manner we can test the conviction of James Madison and Harry Blackmun that fully alerted citizens will exert political pressure in defense of federalism. Failing such a demonstration, the Court could resolve the ambiguity against the expansion of federal legislative or administrative regulation into local affairs.¹¹⁵

The issue before the Court in *Finley v. United States*¹¹⁶ arose from tragic circumstances. Petitioner's husband and two of her children lost

114. In its most recently concluded term the Court had occasion to visit the notion that Congress might be required to make explicit findings with respect to federalism issues. In *United States v. Lopez*, 115 S. Ct. 1624 (1995), a five member majority concluded that the Commerce Clause did not extend the authority of the national government to a local school yard. At issue was the constitutionality of the Free School Zones Act of 1990 which made it a federal offense to possess a firearm in a school zone. *Id.* at 1626. Chief Justice Rehnquist surveyed the history of judicial interpretation of the Commerce Clause and concluded that it supported the authority of Congress to regulate in three broad categories: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relationship to interstate commerce. *Id.* at 1629-30. In the eyes of the majority the first two grounds were not even facially implicated in an attempt by Congress to regulate the possession of a firearm on local school premises. *Id.* at 1630. Thus, if the legislation were to be sustained, it would have to be on the premise that possession of such a weapon bore a substantial relationship to interstate commerce. In this context, Rehnquist had occasion to speak to the utility of Congressional findings and the problems inherent in their absence:

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding [the] effect on interstate commerce, . . . the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

Id. at 1631-32 (citations omitted).

115. Given their position on the need for a substantial restraint as a sensible prerequisite for invoking the Sherman Act, as articulated in their dissent in *Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991), such a rule of statutory interpretation might well appeal to Justices O'Connor, Scalia, Kennedy, and Souter.

There are other recent Court decisions upon which such a limited judicial role might be crafted. See, e.g., *Finley v. United States*, 490 U.S. 545 (1989) (reflecting a rather strict enforcement of the limited nature of explicitly delegated subject-matter jurisdiction).

116. 490 U.S. 545 (1989).

their lives when a private plane in which they were passengers became ensnared in electric transmission lines on its approach to the San Diego airport.¹¹⁷ Mrs. Finley initially brought a tort action in California state court. Later she learned that the Federal Aviation Authority was responsible for the maintenance of the runway lights whose faulty condition may well have contributed to the disaster.¹¹⁸ She then commenced an action against the United States in federal district court using as her predicate the Federal Tort Claims Act.¹¹⁹ Approximately one year later, she moved to amend the federal complaint to add the local utility and the city of San Diego as defendants in the state court action. It was admitted that there was no independent basis for the assertion federal jurisdiction over these pendant parties. The district court granted the motion, only to have its judgment summarily reversed by the court of appeals.¹²⁰

On appeal to the Supreme Court, the majority, speaking through Justice Scalia, affirmed the court of appeals.¹²¹ The majority expressed the view that it was upholding settled law and rejected an invitation to change it: "Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."¹²² In elaborating on the policy choice which animated the decision, Scalia left no doubt as to the Court's concern with issues of federalism, citing a 1934 precedent for the proposition that: "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."¹²³

117. *Id.* at 546.

118. *Id.*

119. *Id.*

120. *Id.* at 546-47.

121. *Finley*, 490 U.S. at 556.

122. *Id.* at 549.

123. *Id.* at 552-53 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Even more useful is Justice O'Connor's 1991 opinion for the Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Her majority opinion concluded that the federal Age Discrimination in Employment Act should not be interpreted to prohibit Missouri's practice of mandatory retirement for its judicial personnel at age 70. *Id.* at 473. Of greatest interest was her tool for reaching this conclusion—a forceful reiteration of the rule of construction that an invasion by Congress of the "usual constitutional balance of federal and state powers" will never be presumed but must arise from the plainest possible statement of that intent. *Id.*

Taking the simple step of federal judicial restraint in local affairs would move subsidiarity from an instinct for federalism into an operational concept of governance in the Republic's third century. It would restore the vision of the framers of the Second Republic that the national government, as an entity of limited delegated power, was "to legislate in all cases . . . to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."¹²⁴

at 460. The *Gregory* Court then cited *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989), for a collection of authorities in support of the proposition that: "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" 501 U.S. at 460 (citation omitted).

124. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1966). This amended version of the Sixth Resolution of the Constitutional Convention was adopted in May, 1787, and reported to the Committee of Detail which then drafted the Constitution upon the explicit premise that it reflect the Resolutions passed by the Convention. On August 16, the Convention, in turn, adopted the Committee's recommendation setting forth the enumerated powers of the "Legislature of the United States." Among those provisions was the recommendation that the Legislature be permitted "[t]o regulate commerce with foreign nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. See generally 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 308 (Max Farrand ed., 1966).

