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ABSTRACT

This article provides the broad historical context necessary to understand contemporary developments in federalism doctrine. It shows that dual federalism has a long and varied history and that federalism is a content-neutral principle to which both sides in major political contests have appealed. It seeks to show that the predominant perspective on federalism today — that it is an inherently conservative principle — is the result of historical misperception. This article reinterprets the history of American federalism in light of recent historical scholarship concerning various periods: principally the country's founding; slavery, the Civil War, and Reconstruction; the late nineteenth-century social question; and the Progressive Era.

INTRODUCTION

Since 1976, and especially in the last few Supreme Court terms, legal scholars have detected a "new federalism." Several decisions suggest that Congress can no longer exercise virtually unlimited control over the nation's socioeconomic life from its power to "regulate commerce among the States."[1] These decisions point toward a revival of the constitutional principle of "dual federalism," in which both federal and state governments enjoy sovereign powers.[2]

From the ratification of the Constitution until the New Deal, a consensus held that the national government was one of limited, enumerated powers and that the states reserved the vast bulk of ordinary government functions. The Tenth Amendment stated this principle, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,

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[1] *See* U.S. CONST. art. I, § 8.

[2] Edward S. Corwin coined the phrase "dual federalism." Note, *"Dual Federalism" Today*, 38 COLUM. L. REV. 142, 142 n.1 (1938). The term "new federalism" seems to have originated in the Nixon administration's greater use of revenue-sharing. *See* Jana L. Tibben, Comment, *Family Leave Policies Trump States' Rights:* Nevada Department of Human Resources v. Hibbs *and Its Impact on Sovereign Immunity Jurisprudence*, 37 J. MARSHALL L. REV. 599, 603 n.21 (2004).

or to the people."[3] In the early years of the twentieth century, the "progressive era," this dual system began to erode as Congress began to exercise local or "police powers" — the general power to legislate on matters concerning the safety, health, welfare, and morals of the people.[4] The Supreme Court and the American people were fundamentally ambivalent about this development, favoring greater national power but deeply divided about how far it should go.[5] The economic crisis of the Great Depression and political realignment of the New Deal swept that ambivalence away.[6] After 1937, the Supreme Court no longer struck down acts of Congress regulating economic activity as beyond the delegated powers of the Constitution.[7] The Court and informed public opinion accepted all regulation as coming under Congress's power "to regulate commerce among the States."

Suddenly, in 1976, the Court reopened the federal question. In *National League of Cities v. Usery*,[8] it held that Congress could not impose the Fair Labor Standards Act on state employees.[9] To do so limited an "attribute[] of sovereignty attaching to every state government."[10] Ten years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[11] the Court overturned *National League of Cities* and declared that it would no longer act as the umpire in settling federal-state boundary disputes, leaving such conflicts to the political branches.[12] After another decade, the Court effectively overruled *Garcia*, striking down the Gun-Free School Zones Act.[13] Congress could

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[3] U.S. CONST. amend. X.

[4] Black's Law Dictionary defines "police power" as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1178 (7th ed. 1999). *See also* Robert P. George, *Forum on Public Morality: The Concept of Public Morality*, 45 AM. J. JURIS. 17, 20 (2000).

[5] *See infra* notes 236–37.

[6] *See infra* notes 237–44.

[7] *See, e.g.*, United States v. Carolene Prods., 304 U.S. 144, 147 (1938) (holding that the power to regulate commerce includes the power to prohibit the shipment of articles of commerce, even where the "motive or . . . consequence [of such prohibition] is to restrict the use of articles of commerce within the states of destination," and that the power to regulate commerce is circumscribed only by limitations in the Constitution). The Court determined that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis." *Id.* at 152. The Court noted that this "presumption of constitutionality" may have less force "when legislation appears . . . to be within a specific prohibition of the Constitution." *Id.* at 152 n.4.

[8] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[9] *Id.*

[10] *Id.* at 845.

[11] 469 U.S. 528 (1985).

[12] *Id.*

[13] United States v. Lopez, 514 U.S. 549 (1995).

not claim that the criminalization of the possession of a firearm within one thousand feet of a school was a regulation of commerce among the states.[14] Two years later, the Court held that Congress could not compel state officers to help enforce the Brady Handgun Violence Prevention Act.[15] In 2000, the Court struck down the Violence Against Women Act on similar grounds.[16] "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims," the court declared.[17]

All of these decisions were 5–4, and nobody knows what they may amount to.[18] It is far too early to predict the future or to sort out profitably the intricate legal distinctions of this tumultuous and closely divided set of cases. None of the pro-federalism decisions has dealt with congressional regulation of private sector economic activity, which was the chief source of conflict in the progressive era. Rather, these decisions deal only with congressional regulations that affect states in their sovereign capacity. Thus, the Court may hold that the Fair Labor Standards Act does not apply to state employees, but it is far from striking down the entire act on dual-federalist grounds. "Although I might be willing to return to the original understanding," Justice Thomas said in *Lopez*, "I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Considerations of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean."[19]

Nevertheless, opponents describe these decisions as revolutionary. Dissenting in one case, Justice William Brennan claimed, "The portent of such a sweeping holding is so ominous for our constitutional jurisprudence as to leave one incredulous."[20] Harvard Law School professor Laurence Tribe described the new federalism decisions as "scary. They treat states' rights in a truly exaggerated way, harking back to what the country looked like before the [C]ivil [W]ar and, in many ways, even before the adoption of the [C]onstitution."[21] Tribe subsequently told a Senate committee that "[t]he current Court's effort to aggrandize itself vis-à-vis the democratically elected legislature has upset the traditional institutional balance between

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[14] *Id.* Congress neglected to claim in its legislative findings that the statute had anything to do with commerce. *Id.* at 562.

[15] Printz v. United States, 521 U.S. 898 (1997).

[16] United States v. Morrison, 529 U.S. 598 (2000).

[17] *Id.* at 618.

[18] The Court anticipated these major federalism decisions in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *New York v. United States*, 505 U.S. 144 (1992), and has also expanded state immunity from lawsuits under the Eleventh Amendment. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996). But most attention has focused on the Commerce Clause decisions, which have the greatest potential impact of the new federalism decisions.

[19] *Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring).

[20] Nat'l League of Cities v. Usery, 426 U.S. 833, 875 (1976) (Brennan, J., dissenting).

[21] *Activism in Different Robes*, ECONOMIST, July 3, 1999, at 22.

the political and judicial branches, and may threaten our system of democracy itself."[22] Another law professor described the new federalism decisions as "'part of the Burger Court's holy war against the lingering forces of bankrupt liberalism and big government. It is not an exaggeration to compare [them] to the opening salvo in a war.'"[23] Two prominent historians note that the new federalism decisions are "'strained, even silly,'"[24] and claim that "the members of the majority conceive of themselves as the triumphant perpetrators of a conservative coup."[25]

Why is the reaction so out of proportion to the cause? The explanation is partly partisan, since the devolution of power from Washington to the states is a cause championed today most often by the right. The conservative wing of the Court (particularly Justices Thomas and Scalia, as well as the late Chief Justice Rehnquist) has advanced the new federalist decisions. Newt Gingrich highlighted devolution in the 1994 "Contract with America,"[26] and Republican presidential candidate Robert Dole frequently referred to the Tenth Amendment in his 1996 campaign.[27] At a deeper level, the opponents of the new federalism fear the reopening of the constitutional and historical questions that they believe had been laid to rest in the New Deal years. The Court has lifted the veil on the New Deal's weak constitutional foundations. It has provoked fears that the Court is inviting back a "Constitution-in-exile"[28] by exposing the lack of formal foundation for the New Deal constitutional "moment."[29] Liberals have reason to fear that the New Deal constitutional revolution, done informally and politically, can be undone informally and politically.

The new federalism decisions have called into question the progressive historiography that undergirds New Deal constitutional history. Opponents of the new federalism vilify states rights and the Tenth Amendment by associating them with slavery, segregation, and child labor.[30] Thus, the dean of New Deal historians claims,

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[22] Memorandum from Laurence H. Tribe, Professor of Law, Harvard Law Sch. 3 (Apr. 5, 2001), *available at* http://judiciary.senate.gov/oldside/te062601triApndx.htm.

[23] William E. Leuchtenburg, *The Tenth Amendment over Two Centuries: More than a Truism*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 61 (Mark R. Killenbeck ed., 2002) (quoting J.M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175, 194 (1986)).

[24] *Activism in Different Robes*, *supra* note 21, at 23 (quoting Jack N. Rakove, historian at Stanford University).

[25] Leuchtenburg, *supra* note 23, at 97.

[26] *See* Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1377 (1997).

[27] Roger Pilon, Editorial, *A Matter for the States*, WASH. POST, June 18, 1996, at A13.

[28] Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 83, 84 (1995) (book review).

[29] Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1522 (1997). Ackerman calls a "moment" the informal, de facto amendment of the Constitution that took place in the New Deal. *Id.*

[30] *See* Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and*

"[a]lone of the 10 amendments that, by some reckonings, the Bill of Rights comprises, the Tenth Amendment has a sordid past."[31] Another scholar notes, "The defense of the states seemed to have too many reactionary and racist overtones."[32] Recently, a Bush administration attorney tried to discredit Californians trying to widen medical use of marijuana beyond federal law by comparing them to segregationists.[33] But this "black legend" interpretation of dual federalism is a gross historical distortion.

This article attempts to show how the history of federalism has been manipulated by defenders of unlimited national power. It will take into account the principal constitutional developments that have shaped federalist doctrine — judicial review and the Commerce Clause. It will show that, over two centuries, the federal principle has been content-neutral and has served a wide variety of causes, for left and right alike.

I. FEDERALISM AND THE FOUNDING

Federalism provided the most important device of constitutional government for the framers of the Constitution. By "constitutional" government, the framers meant effective but limited government. The chief task facing the framers of the Constitution was to provide a government that was more powerful than the Articles of Confederation, but not so powerful that it extinguished the liberties of the people. As Lincoln put it, "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"[34] Thus, the relative powers of the national and state governments produced more discussion and debate than any other topic at the Philadelphia Convention and in state ratifying conventions. The nationalists or consolidationists — those, like James Madison and Alexander Hamilton, who came to call themselves "Federalists" — had to accept in the "Great Compromise" a divided sovereignty or "compound republic."[35] As Madison put it in *The Federalist*, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[36] Madison might have called it a "triple security," for the states themselves, from their earliest colonial origins, had federal

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Rights of Belonging, 73 U. CIN. L. REV. 1347, 1369–70 (2005) (criticizing the Rehnquist Federalism Revolution and noting that states' rights was the rallying cry of pro-slavery and segregationist forces).

[31] Leuchtenburg, *supra* note 23, at 42 (footnote omitted).

[32] Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 419.

[33] Bob Egelko, *Federal Lawyer Likens Pot Law to Civil Rights: Segregationists Tried to 'Cherry Pick' the Rules*, S.F. CHRON., Aug. 10, 2003, at A25.

[34] *Message to Congress in Special Session*, July 4, 1861, *in* SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN 129 (T. Harry Williams ed., Hendricks House, 1980).

[35] THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[36] *Id.*

systems of their own, with most political activity taking place in town and county subdivisions. Emphasizing the point that both the national and state governments exercised sovereign powers, Madison wrote, "The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both."[37] Stressing the expectation that most power would remain at the local level, he wrote that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[38] The Tenth Amendment would repeat these assertions.

The Anti-federalists remained unconvinced that these guarantees would prevent the consolidation of national power and the evisceration of the states. Yet, despite the intense debate between Federalists and Anti-federalists, they shared many fundamental values. The Anti-federalists appreciated the need for a stronger national government, and the Federalists shared a concern for preserving local government. It is important to recognize, as political scientist Herbert Storing put it, "what the Antifederalists were *for*."[39]

Federalists and Anti-federalists alike believed that republican government depended on individual self-government. This belief went back to the classical idea that the character of the regime depended on the character of the soul, and the Judeo-Christian idea that internal and voluntary adherence to God's law was the basis of right rule. Republican governments depended on virtue, a willingness to sacrifice one's private interests for the good of the commonwealth, or *res publica*.[40] This kind of government could only succeed in a relatively small ambit.[41]

In republican theory, "liberty" had a local and corporate connotation for the founding generation, one that persisted, even as it weakened, into the twentieth century.[42] As one historian describes it, colonial Americans defined liberty as "voluntary submission to a life of righteousness that accorded with objective moral standards as understood by family, by congregation, and by local communal institutions."[43]

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[37] THE FEDERALIST NO. 39 (James Madison), *supra* note 35, at 246. *See also* CHRISTOPHER COLLIER, ALL POLITICS IS LOCAL: FAMILY, FRIENDS, AND PROVINCIAL INTERESTS IN THE CREATION OF THE CONSTITUTION 110–11 (2003) (discussing Anti-federalist opposition to the Constitution).

[38] THE FEDERALIST NO. 45 (James Madison), *supra* note 35, at 292.

[39] HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* (1981).

[40] *Id.* at 20.

[41] *Id.* at 15–20. Storing explains that the Anti-federalists believed only small republics could successfully secure individual liberties. *Id.* at 15. This was, in part, because republicanism required civic virtue, and civic virtue thrives only in small republics. *Id.* at 20. Small republics "daily remind[] each man of the benefits derived from and the duties owed to his little community." *Id.*

[42] 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 508–10 (7th ed., 1991).

[43] BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 4 (1994).

True freedom involved self-imposed restraint,[44] and the state had the obligation to help individuals to control themselves. Institutions, principally families, churches, and juries, enforced communal norms.[45] American individualism could flourish and keep from becoming destructive due to a high level of group cohesion. Americans until recently evinced high degrees of "spontaneous sociability";[46] America possessed a high level of social "trust."[47]

Alexis de Tocqueville made some of the keenest observations on the importance of local self-government. "[T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach," he said. "They teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty."[48] De Tocqueville noted that divided sovereignty was impossible in theory and feared the centrifugal force of disunion more than the centripetal force of consolidation.[49] "Clearly here we have not a federal government but an incomplete national government," he observed.[50] But de Tocqueville distinguished between the necessity of centralized government and the desirability of decentralized administration. Administrative centralization would mean the end of freedom in America, de Tocqueville noted; containment of power within the limited spheres of federalism was essential.[51]

Historians in the 1960s and 1970s emphasized and exaggerated the "civic republican" element in the founding period.[52] And, although historians have given greater recognition to Biblical and Judeo-Christian themes in the period, it is still too much to say that the independence movement was principally a republican or a millennial one, or a combination of both — a drive to create a "Christian Sparta," as Sam

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[44] *Id.* at 42.

[45] *Id.* at 99, 153, 209–11, 260.

[46] FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 27, 29 (1995). Fukuyama describes "spontaneous sociability" as social cooperation outside the family and outside structures established by government. *Id.* at 27. While Americans have been "antistatist" from the time of the founding, they have not been individualistic in an antisocial sense. *Id.* at 29. Instead, America "has always possessed a rich network of voluntary associations and community structures to which individuals have subordinated their narrow interests." *Id.* After all, "strong community can emerge in the absence of a strong state." *Id.*

[47] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 511 (J.P. Mayer ed., George Lawrence trans., Anchor 1969); FUKUYAMA, *supra* note 46, at 10–11. Fukuyama notes that American sociability has declined "rather dramatically over the past couple of generations." *Id.* at 10.

[48] DE TOCQUEVILLE, *supra* note 47, at 62–63.

[49] *Id.* at 118, 167, 384.

[50] *Id.* at 157.

[51] *Id.* at 88, 262, 287.

[52] Robert Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM & MARY Q. 49 (1972).

Adams put it.[53] Liberal individualism predominated, and the Anti-federalists as much as Federalists wanted to protect individual rights.[54] At the same time, all Americans shared a profound concern for local self-government[55] — either as a self-conscious and articulated belief that the states were the protectors and incubators of institutions of local liberty, or as an unstated assumption of their importance. The Anti-federalist solicitude for the state governments was clear enough, and often reflected nothing more than a desire to preserve their own prestige and status in office. But below the states lay institutions even more intimately involved with local liberty — the churches, militia, juries, and families in every part of America.[56]

The Anti-federalists demanded above all a Bill of Rights to protect these institutions. Historians in the last generation have cleared away the popular misconception that the Bill of Rights was intended to protect individual rights. Rather, the Bill of Rights reflected federalism, a desire to preserve state power against national encroachment.[57] Thus, the First Amendment intended as much to protect the established churches of New England states against national interference as it did to protect disestablishment in Virginia. The Second Amendment (setting aside the question of whether the right to bear arms was considered a collective or individual right) primarily meant to preserve state and local control of militias. Several amendments concern the jury, another institution that was vitally important in the eighteenth century. These institutions, even more than the state legislatures, provided the vital link between citizen and government. They inculcated the principles of republican government.

The family provided even more fundamental grounding in self-government than town, jury, church, and militia. Eighteenth-century Americans could hardly have imagined the way that the family has become devalued and marginalized in the twentieth century. In many ways the recent "family values" campaign reflects an explicit return to a taken-for-granted idea that families are the principal inculcators of all values. The family was a natural institution, and basically religious, for religious principles suffused local institutions. The founders assumed that a republic certainly could not

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[53] JAMES H. HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC (2003); SHAIN, *supra* note 43, at 39.

[54] STORING, *supra* note 39, at 83 n.7 (arguing that the requirements of civic virtue and the common good were not ends in themselves, but rather were instrumental in securing individual liberty); *see also* KELLY ET AL., *supra* note 42, at 67.

[55] *See* DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 827 (1989).

[56] *See* Wilfred M. McClay, *The Soul of Man Under Federalism*, 64 FIRST THINGS 21 (June/July 1996).

[57] WILLIAM E. NELSON & ROBERT C. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 105–17(1987); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); John Choon Yoo, *Federalism and Judicial Review*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 131, *supra* note 23, at 169.

function without the churches, communities, and families that all Americans belonged to, and all of these rested on a common moral and religious foundation. As John Adams put it, "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[58] Washington made a similar point in his Farewell Address: republican government depended on virtue and morality, which in turn depended on religion.[59]

Religious assumptions thus undergirded the local policing of morals. States and towns suppressed or regulated divorce, adultery, sodomy, gambling, drinking, and a host of other behaviors, on the assumption that the community needed to help individuals to control themselves. Though all states had done away with established churches by the 1830s, a broadly Protestant de facto establishment existed. "Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions," de Tocqueville observed.[60] Religious promotion of individual self-government became even more necessary as society became more democratic and as traditional, external controls were relaxed.[61]

The collapse of dual federalism in the twentieth century took place by a two-part process. Most legal scholars have only paid attention to the first part, in which the Supreme Court allowed Congress virtually unlimited power to regulate the national economy under the commerce clause — giving Congress, in the language of the Tenth Amendment, "powers not delegated." The second part came largely in the 1960s by way of the application (known as "incorporation") of the Bill of Rights to the states. Here the Court struck down traditional state and local regulation of morals, denying to the states powers not prohibited by the Constitution to them. Thus, a vital element of the founders' system, in which the habit of republican self-government was exercised by local majorities, was considerably weakened.

The history of federalism during and after the writing of the Constitution displays the widely shared cultural and political consensus regarding the importance of local self-government. The Great Compromise, by which the states were represented as states in the upper house of the national legislature,[62] presented only the most obvious way in which the Constitution protected states in their corporate identity. Almost every part of the Constitution had some federal aspect. The Senate

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[58] Letter from John Adams to Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 228, 229 (Charles Francis Adams ed., 1854).

[59] Farewell Address, Sept. 19, 1796, *in* GEORGE WASHINGTON: A COLLECTION 522 (W.B. Allen ed., 1988).

[60] DE TOCQUEVILLE, *supra* note 47, at 292.

[61] *Id.* at 292–94.

[62] *See* Miranda Oshige McGowan, *American Democracy: A Model Oxymoron, or Who Knew the Constitution Enshrined Affirmative Action for States?*, 20 CONST. COMMENT. 631, 642 (2004) (book review).

had special powers to ratify treaties and confirm executive appointments.[63] Since these included appointments to the federal judiciary, that branch possessed a federal element. Federalism shaped the executive branch, in that the President was chosen by an electoral college which was largely controlled by the states and which gave the less populous states more influence.[64] Since the founders doubted that many men would be able to garner a majority of the electoral vote, they expected that most presidents would be chosen by the House of Representatives which, when it voted for president, voted on a one-vote-per-state basis.[65] The amendment process was also a federal one, involving the Senate and (almost always) the state legislatures.[66] Although the Seventeenth Amendment did away with state legislative choice of senators in 1913,[67] no amendment can deprive a state, without its consent, "of its equal Suffrage in the Senate"[68] — the only unamendable part of the Constitution concerns state sovereignty.

Although the nationalist-Federalists argued against the addition of a Bill of Rights to the Constitution, they opposed it on the principle that the Constitution already contained enough safeguards for state power.[69] Nevertheless, they promised to propose a set of amendments demanded by many state ratifying conventions.[70] Every state had demanded a clearer statement in what became the Tenth Amendment[71] of the principle of dual sovereignty federalism.[72] When James Madison proposed that these provisions bind the state governments as well as the national government, the Senate revised them so that they applied only to Congress.[73] Madison was able to defeat efforts to have the amendment state that Congress could not exercise any power not "expressly" delegated.[74] Such language would return the government to its condition under the Articles of Confederation and exclude incidental or implied powers. Madison noted,

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[63] U.S. CONST. art. II, § 2.

[64] If the number of electoral votes were determined strictly on the basis of population, about two-thirds of the states would lose voting strength.

[65] KELLY ET AL., *supra* note 42, at 97.

[66] DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 60 (1996).

[67] U.S. CONST. amend. XVII.

[68] *Id.* art. V.

[69] James Wilson Speech in the State House Yard, Philadelphia (Oct. 6, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167, 167–68 (Merrill Jensen ed., 1976); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 35, at 511.

[70] KELLY ET AL., *supra* note 42, at 118.

[71] U.S. CONST. amend. X.

[72] Richard E. Ellis, *The Persistence of Antifederalism After 1789*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 297 (Richard Beeman, Stephen Botein, & Edward C. Carter II eds., 1987).

[73] *See* Burt Neuborne, *"The House Was Quiet and the World Was Calm: The Reader Became the Book,"* 57 VAND. L. REV. 2007, 2083 n.154 (2004).

[74] *See* Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1085 (2000).

"I admit that [the amendment] may be deemed unnecessary; but there can be no harm in making such a declaration . . . ."[75] Thus the Tenth Amendment only reinforced the principle of federalism that pervaded the Constitution. Like the rest of the Bill of Rights, it changed nothing. It was a simple declaration of fundamental constitutional principle, later described as a "truism."[76] We best understand the Tenth Amendment as "declaratory," expressing or reiterating the structure of the Constitution.[77] In this respect, it can be said to have reinforced Federalism as much as Anti-federalism.[78] It is perhaps not too much to say that the Tenth Amendment *was* the Constitution.[79]

II. NINETEENTH-CENTURY DUAL FEDERALISM

Antebellum constitutional development largely confirmed this dual-federalist consensus. Although secessionists tried to revive the confederate idea in order to protect slavery, this did not mean that nationalism was inherently anti-slavery or localism inherently pro-slavery, or that nationalism was always progressive and localism reactionary. Federalism was a content-neutral principle.

Thus, both parties appealed to local federalism in the early republic.[80] Jefferson and Madison did so in mobilizing Republican opposition to the Alien and Sedition Acts. The Tenth Amendment provided the base for the resolutions that condemned the acts.[81] Progressives overlook this localist defense of civil liberty when condemning states rights and dual federalism. By the same token, northerners and Federalists used Tenth Amendment principles to oppose dubious exercises of national power in the period before the War of 1812.[82] Northern governors essentially made a federalist claim when they resisted the use of their militia for what they regarded as an unjust war.[83] (Several Democratic governors adopted a similar position in op

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[75] Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 347 (Ronald K.L. Collins ed., 1977).

[76] United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941).

[77] *See id.*

[78] Lofgren, *supra* note 75, at 349.

[79] Jefferson made this argument in opposition to the Bank of the United States, but he usually spoke as if the Amendment contained the crucial adverb, "expressly." *See* Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (1791), *in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 115 (Melvin I. Urofsky & Paul Finkelman eds., 2d ed., 2002).

[80] *See* ARTHUR MEIER SCHLESINGER, NEW VIEWPOINTS IN AMERICAN HISTORY 222 (1922).

[81] The Kentucky Resolutions (Nov. 16, 1798), *in* 1 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY 234–38 (Kermit Hall ed., 1992).

[82] See, for example, the unsuccessful challenge to the Embargo Act of 1807 in *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

[83] JAMES M. BANNER, JR., TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE

position to President Reagan's Latin American policy.[84]) And, though they were excoriated for it, Federalists were resisting a war on the side of a tyrant, Napoleon Bonaparte. The fact that both sides appealed to the dual federalism demonstrates its paramount constitutional value.[85]

Early national jurisprudence shows a similar consensus on dual federalism. Historians recently have pointed out that John Marshall was no founding father of twentieth-century nationalism and judicial activism, and have emphasized the continuity between the Marshall and Taney Courts.[86] Marshall's decisions reflect the mainstream, moderate Federalist and dual sovereignty position. From the earliest sessions, it was clear that the Supreme Court would adjudicate federal questions. As Madison put it,

> It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But . . . . [t]he decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.[87]

Early court decisions struck down state acts that violated U.S. treaties, and upheld congressional acts.[88] Adjudication of federalism was thus inherent in the judicial power. The suggestion that Justice Blackmun made in the *Garcia* case, that the Court no longer entertain federalism issues, was historically astounding.[89] As Marshall put it, "[T]the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[90] Whenever the Court upholds an act of Congress, it declares that Congress is exercising a delegated power, and if it strikes down an act of Congress, it declares that it is exercising an undelegated power. Whenever the Court upholds a state act, it declares that the state is exercising a reserved power, and if it strikes down a state act, it declares that the state enactment is prohibited. In a real sense, then, every Supreme Court decision is based on the Tenth Amendment.

ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789–1815, at 118–21, 339–41 (1969); KELLY ET AL., *supra* note 42, at 149; SCHLESINGER, *supra* note 80, at 224–25; DE TOCQUEVILLE, *supra* note 47, at 169.

[84] *See* Fred Hiatt, *Governors Wary of Sending Guard Troops to Honduras*, WASH. POST, Apr. 5, 1986, at A1.

[85] KELLY ET AL., *supra* note 42, at 145.

[86] *Id.* at 222.

[87] THE FEDERALIST NO. 39 (James Madison), *supra* note 35, at 245–46.

[88] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[89] *See supra* notes 11–12 and accompanying text.

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

As a substantive matter, of course, Marshall almost always defended congressional power against state challenges. In his paramount federalism decision, *McCulloch v. Maryland*,[91] he vindicated the Bank of the United States and stopped state taxation of it.[92] But Marshall always maintained that the Constitution limited Congress's powers: "This government is acknowledged by all, to be one of enumerated powers," he noted, saying that this "principle is now universally admitted."[93] While he sustained congressional power in this case, he continued,

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.[94]

But Marshall exercised this painful duty only once,[95] for the main challenges to dual federalism came from state rather than national encroachments.

Latter-day nationalists also regard Marshall as the source of the all-encompassing commerce clause.[96] "Commerce, undoubtedly, is traffic," Marshall wrote in *Gibbons v. Ogden*,[97] "but it is something more: it is intercourse."[98] However, close studies of the term "commerce" confirm that it was virtually always used with regard to economic enterprise, not larger social questions.[99] And Marshall conceded power to the states to exercise powers that affected interstate commerce while Congress remained "dormant."[100] In the later years of his chief justiceship, Marshall gave greater recognition to state power. He confirmed that the Bill of Rights applied only to the national government[101] and upheld state power to tax private corporations by a

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[91] 17 U.S. (4 Wheat.) 316 (1891).

[92] *Id.*

[93] *Id.* at 405.

[94] *Id.* at 423.

[95] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[96] FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 25 (1937); EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES' RIGHTS ix–xi, 11–13 (1936).

[97] 22 U.S. (9 Wheat.) 1 (1824).

[98] *Id.* at 189.

[99] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

[100] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

[101] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

narrow construction of their charters.[102] Marshall regarded the taxing power as a vital element of sovereignty, one that could never be implicitly surrendered.[103]

Thus, Marshall was a mainstream, compound-republic, dual federalist. He dismissed the exclusive state-sovereignty or state-compact theory of the union, adumbrated in the Virginia and Kentucky Resolutions and fleshed out by John C. Calhoun,[104] but was never an exclusive popular-sovereignty nationalist. In his view, the Constitution was the work of both the states and the people: "The government proceeds directly from the people; is 'ordained and established,' in the name of the people," he said, in defense of popular sovereignty.[105] But he immediately went on to say that "[t]he assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people."[106] This was largely in keeping with Madison's compound republic view in *Federalist No. 39*.[107]

The advent of Jacksonian Democracy may have prompted Marshall to accentuate his concern for reserved state powers, but Jackson's constitutionalism did not differ fundamentally from Marshall's dual federalism.[108] It is true that Jackson sided with state power in nearly every policy dispute of the 1830s, but when push came to shove during the crisis over South Carolina's attempt to nullify the tariff, Jackson took the side of the national government.[109] He came down against those like Calhoun who argued that the Constitution was a compact among sovereign states only, and who tried to read "expressly" back into the Tenth Amendment.[110] It may be true that Jackson's settlement of the crisis actually empowered the nullifiers, but he kept alive the principle, as he put it in his proclamation on nullification, that "[t]he Constitution of the United States . . . forms a *government*, not a league."[111] When Jackson vetoed the bill to renew the charter of the Second Bank of the United States, he reiterated the point that a strong nation depended on strong states. He wrote:

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[102] Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830).

[103] *Id.* at 561.

[104] *From the Fort Hill Address*, *in* THE ESSENTIAL CALHOUN: SELECTIONS FROM WRITINGS, SPEECHES, AND LETTERS 274 (Clyde N. Wilson ed., 1992).

[105] McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 403.

[106] *Id.* at 404.

[107] THE FEDERALIST NO. 39 (James Madison), *supra* note 35, at 243. Albeit Madison viewed the ratification of the Constitution to be "not a *national*, but a *federal* act." *Id.* (emphasis in original).

[108] *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); *Providence Bank*, 29 U.S. (4 Pet.) 514; Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

[109] RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 142 (1987).

[110] *See* Calhoun Proposes Nullification (1828), *in* 1 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY, *supra* note 81, at 368–71.

[111] 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 648 (James D. Richardson ed., 1896) [hereinafter PAPERS OF THE PRESIDENTS].

> Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves . . . not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit.[112]

The President claimed that it was precisely because he was a nationalist that he was solicitous of states' rights.[113] Historians, attempting to emphasize Jackson's anti-bank confederalism, however, usually elide this section of the message.[114]

Roger Taney, Marshall's successor as Chief Justice, largely maintained his predecessor's dual federalist view, albeit making more accommodations for state power. Ultimately, though, he used the power of judicial nationalism for the sake of defending slave states' power.[115] The confederalist defense of slavery provided the most prominent element in the black legend of American federalism. Here, too, however, the association of slavery with states rights was oversimplified.

Of course, the most radical abolitionists were secessionists, the Garrisonians denouncing the Constitution's union as a "'covenant with death'" and an "'agreement with hell.'"[116] Mainstream anti-slavery activists and Republicans repeatedly denounced this extreme position.[117] As the sectional crisis advanced, there were indeed many ways in which anti-slavery advocates made essentially dual federalist arguments against excessive national power — resisting a takeover of national government by the slave power.[118] Northern states objected to the annexation of Texas by joint resolution and continued to denounce the Mexican War.[119] Fugitive slave legislation provided the clearest example of anti-slavery states' rights argument. Salmon P. Chase (as one Tenth Amendment critic notes in passing) and Joshua Giddings constructed dual federalist arguments against the Fugitive Slave Act and

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[112] *Id.* at 59. *See also* Rapaczynski, *supra* note 32, at 394 ("[I]t is by no means inappropriate to speak of a 'failure' of the national government when its operation undermines the constitutional role of the states.").

[113] PAPERS OF THE PRESIDENTS, *supra* note 111, at 590.

[114] ELLIS, *supra* note 109. *See, e.g.*, President Jackson Vetoes the Second Bank of the United States (1832), *in* 1 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY, *supra* note 81, at 344 (eliding this section of Jackson's veto message).

[115] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[116] WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 228 (1977) (quoting *Isaiah* 28:18).

[117] Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Antislavery?*, *reprinted in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 389 (Philip S. Foner ed., 1999).

[118] SCHLESINGER, *supra* note 80, at 230.

[119] *Id.* at 230–31.

other pro-slavery uses of national power.[120] The abolitionists argued that the Constitution did not give Congress power to enact a fugitive slave law;[121] the states had only an obligation to return fugitive slaves under interstate comity.[122] Nor did Congress have the power to establish slavery in the territories, nor to use the war power or the law of nations to promote slave interests.[123] In 1842, the Supreme Court upheld Congress's fugitive slave power.[124] However, in a part of Justice Story's opinion welcomed by anti-slavery and condemned by pro-slavery partisans, he maintained that the fugitive slave power was exclusively national and that Congress could not compel state authorities to help enforce the law.[125] The contemporary Supreme Court made the same point in *Printz v. United States*,[126] that Congress could not commandeer state officials to help enforce a gun control act.[127]

The Fugitive Slave Act turned many moderate northerners into abolitionists and also led them to embrace localist rather than nationalist constitutional positions.[128] Northern attempts to nullify the Fugitive Slave Act continued up to the eve of the Civil War and gave rise to the paradoxical case of *Ableman v. Booth*.[129] Here, Chief Justice Taney defended national power but in a sense nationalized southern slave law by stopping Wisconsin's attempt to nullify the Fugitive Slave Act.[130] Pro-slavery advocates rallied to this exercise of judicial nationalism, as they had in *Dred Scott*.[131] Republican critics of *Dred Scott*, on the other hand, complained that the decision removed the power of states to confer citizenship.[132] In short, during the 1850s, many southerners became Marshallian judicial nationalists, while many northerners became Jeffersonian-Jacksonian states-rights advocates.[133]

In several other points of conflict regarding slavery, the pro-slavery side might have tried to use national power. Pro-slavery forces all agreed that abolitionists should not use the mail to spread anti-slavery opinions, but they divided over whether

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[120] Leuchtenburg, *supra* note 23, at 42 n.6.; HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 111 (1982); WIECEK, *supra* note 116, at 209, 214.

[121] WIECEK, *supra* note 116, at 209.

[122] *Id.*

[123] *See id.* at 209, 214.

[124] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

[125] *Id.* at 624, 638.

[126] 521 U.S. 898 (1997).

[127] *Id.*

[128] FORREST MCDONALD, STATES' RIGHTS AND THE UNION: *IMPERIUM IN IMPERIO*, 1776–1876, at 161 (2000).

[129] 62 U.S. (21 How.) 506 (1859).

[130] *See id.*

[131] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[132] Rejoinder of Abraham Lincoln, Fourth Joint Debate (Charleston, Sept. 18, 1858), *in* THE LINCOLN-DOUGLAS DEBATES OF 1858, at 162, 198 (Robert W. Johannsen ed., 1965).

[133] MCDONALD, *supra* note 128, at 165–66; SCHLESINGER, *supra* note 80, at 239; *see also* EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 3 (1990).

Congress or the states should enforce censorship.[134] Nothing came of either strategy, and slave states effectively nullified congressional legislation requiring the delivery of all mail.[135] Southerners also feared that Congress would use the interstate commerce power to undermine slavery.[136] Though the Supreme Court ruled that slaves were not articles of commerce and therefore beyond the commerce power, southerners demanded that Congress disclaim any power over the interstate slave trade in the Compromise of 1850.[137] Yet, after the commerce power became the great engine of federal government power in the twentieth century, we could imagine, for example, Congress prohibiting the shipment of goods made by slave labor across state lines.[138] Or, one could imagine a pro-slavery Congress prohibiting goods made by free labor, upheld by a pro-slavery Supreme Court in a "third *Dred Scott* decision." But either scheme was beyond the imagination of the dual federalist antebellum polity.[139]

When secession came, northerners' fears that slave power aggression threatened their own state and local self-government motivated them to resist it.[140] Northerners fought for the Union, but especially for a *federal* union. "What many Americans admired about their nation was its federal nature, the tradition that kept in local hands the administration of local problems and that gave the people control over their own destiny," historian Phillip Paludan notes.[141] "Local institutions of democratic self-government were thus a nationalizing force, and devotion to them was the imperative bond of union.... A potent source of anti-Southern sentiment was thus a widespread fear that slavery and its proponents endangered the institutions of self-government of the nation."[142] Dual federalism was as much the enemy as the ally of slavery and secession.

III. PRESERVING FEDERALISM

Just as the Civil War was fought to save a federal union, so Reconstruction attempted to restore a federal union. Certainly northern Republicans did not seek "the Constitution as it is and the Union as it was," the extreme states-rights slogan.[143]

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[134] *See* KELLY ET AL., *supra* note 42, at 251.

[135] *Id.*

[136] *Id.* at 250.

[137] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 71 (1988); *see also* KELLY ET AL., *supra* note 42, at 260.

[138] One of the lawyers made this point in *United States v. Darby*, 312 U.S. 100 (1941). *See* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 554 (1956).

[139] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 991 (1995).

[140] Phillip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 1013, 1033 (1972).

[141] *Id.* at 1016.

[142] *Id.* at 1032, 1033.

[143] EDWARD J. BLUM, REFORGING THE WHITE REPUBLIC: RACE, RELIGION, AND AMERICAN NATIONALISM, 1865–1898, at 23 (2005).

But just as certainly, they did not intend to create a consolidated, centralized republic.[144] Historians of the last generation have emphasized the persistence of antebellum dual federalism in the Reconstruction period.[145]

Republicans framed the Fourteenth Amendment as the centerpiece of Reconstruction policy. We often forget today that there is more to the Fourteenth Amendment than its first section, which deals with the civil rights of the freedmen, one of the principal concerns of the framers of the amendment.[146] Republicans also wanted to restore the Confederate states to the Union, and the other sections of the amendment were designed to accomplish this. Clearly, the states lost some power under the Fourteenth Amendment — the power to define citizenship and to discriminate against citizens — but Republicans expected the states to remain the principal arena of ordinary law and social policy.[147] Congress would assure equal treatment with regard to certain fundamental rights, but the states would be the normal political and legal forum.[148] The war had put an end to the extreme state sovereignty interpretation of the nature of the Union, but retained the dual federalist view.[149] A standard account concludes:

> The Fourteenth Amendment nationalized civil rights, but it did so in a way that respected traditional federal values. The states had been the principal regulators of personal liberty and civil rights, and they would continue to perform that function. . . . The revolution in federalism that began under wartime exigencies thus stopped at a halfway point.[150]

As the Supreme Court put it, in a decision regarding the status of the Confederate states before readmission to Congress, the Constitution assumed "an indestructible Union, composed of indestructible States."[151]

Congress tried to preserve the Constitution's federal structure, and the Supreme Court showed a similar concern in its interpretation of Reconstruction legislation. Contemporary critics of the "new federalism" point out that the issue of states'

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[144] *See* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 40.

[145] *See id.* at 39.

[146] U.S. CONST. amend. XIV, § 1.

[147] Benedict, *supra* note 144, at 48.

[148] *Id.*

[149] *See id.*; MALTZ, *supra* note 133, at 30 (explaining that Republicans were firmly attached to "the basic structure of American federalism" and that the Union they favored "was not the Union of the 1980s, in which the federal government plays a dominant role in the lives of the citizenry"); *see also* Earl Maltz, *Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1987).

[150] KELLY ET AL., *supra* note 42, at 333–34.

[151] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

rights was the basis for the evisceration of the Reconstruction amendments and the abandonment of the freedmen.[152] But here, too, historians have corrected the legend that the Court nullified congressional intent, "motivated by the desire to cement the Union with the blood of the Negro."[153] Rather,

> When one assesses the Supreme Court's decisions within the context of the doctrines of dual federalism accepted by most Americans in the nineteenth century, however, what is remarkable is the degree to which the Court sustained national authority to protect rights rather than the degree to which they restricted it.[154]

The Court indeed held that the Civil Rights Act of 1875, which did essentially what the Civil Rights Act of 1964 would do, was "repugnant to the Tenth Amendment."[155] However, while the Court held that federalism forbade Congress to write a detailed legal code for the states — i.e., to usurp the state's "police power" — it did allow Congress to provide remedies in the courts for violations of equal rights.[156]

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy . . . .[157]

It was not until 1896 that the Court entertained this question, and then concluded that "separate but equal" accommodations were sufficient.[158] Indeed, such judicial remedies as the Court posited between 1883 and 1896 resurfaced in the 1960s, when the Court effectively overturned its post-*Plessy* precedents and essentially made the Civil Rights Act of 1964 redundant.[159] "In sum, then, the Supreme Court's construc-

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[152] Leuchtenburg, *supra* note 23, at 43.

[153] Benedict, *supra* note 144, at 62.

[154] *Id.* at 63.

[155] The Civil Rights Cases, 109 U.S. 3, 15 (1883).

[156] *Id.* at 11.

[157] *Id.* at 25.

[158] Plessy v. Ferguson, 163 U.S. 537, 552 (1896). While lower federal courts had nearly all accepted a "separate but equal" doctrine before 1896, they often insisted on a *substantial* equality that was ignored after *Plessy*. Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate but Equal' Doctrine, 1865–1896*, 28 AM. J. LEGAL HIST. 17, 29 (1984).

[159] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

tion of congressional power under the constitutional amendments hardly subverted Republican intent," one historian concludes.[160]

A related legend is that, having abandoned the freedmen, the Court then used the Fourteenth Amendment to protect big business against regulation. Here, too, historians of the last generation have dispelled a myth.[161] The "laissez-faire court" did not routinely strike down progressive legislation.[162] In this respect, *Plessy* was a typical Gilded Age decision, upholding the police powers of the states[163] — to prevent racial conflict, in the case of segregation. However, insofar as the judges did use the amendment to support laissez-faire, federalism was a progressive shield, overlooked in the later, New Deal historiography. Simply put, progressives wanted to assert traditional state police powers to control big business. In the 1870s and 1880s, there were few obstacles to doing so, as the courts gave legislatures a wide berth.[164] In the decades around the turn of the century, the courts began to use the Fourteenth Amendment's due process clause to limit property regulation according to doctrines known as "substantive due process" and "liberty of contract."[165] Progressives at the time regarded this as a pretext to protect big business, and historians exaggerated the extent of the phenomenon.[166] Most progressives wanted the federal courts to get out of the way and to allow the states to act as "laboratories of democracy," a phrase that was revived in the 1980s and 1990s.[167] "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a

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[160] Benedict, *supra* note 144, at 77. *See also* Michael W. McConnell, *Toward a More Balanced History of the Supreme Court*, *in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 152 (Christopher Wolfe ed., 2004) [hereinafter THAT EMINENT TRIBUNAL].

[161] *See* MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001); Stephen A. Siegel, Comment, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002).

[162] Justice Souter adhered to this discredited historical legend in his dissent in *United States v. Lopez*, 514 U.S. 549, 605 (1995) (Souter, J., dissenting), as does McConnell. *See supra* note 160, at 152–54.

[163] MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910, at 127 (2004); CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 80–88 (1987); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 296–97 (1985); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53 (1983).

[164] *E.g.*, Munn v. Illinois, 94 U.S. 113 (1877); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[165] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[166] Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 63 (1985).

[167] *See* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1206 (2003).

laboratory," as progressive reformer and Supreme Court Justice Louis D. Brandeis put it, "and try novel social and economic experiments without risk to the rest of the country."[168] It was precisely because state governments were relatively unlimited, having broad "police powers," that they could promote reform in this fashion.[169] Thus progressives attacked the judicial nationalists who used the Fourteenth Amendment to trump the states' Tenth Amendment powers.[170]

For example, in the labor troubles of the Pullman strike, union advocates stood up for states rights against President Cleveland's use of national power to break the strike.[171] Illinois Governor Peter Altgeld regarded the strike as an internal state matter, a position that laissez-faire liberals condemned as neo-Confederate.[172] Similarly, to the chagrin of many progressives, federal antitrust laws ended up doing more to restrain labor unions than business corporations.[173] In the twentieth century, organized labor came to depend on national legislation for its status. But there remains a history of "privatism" and use of state power in labor history.[174] Similarly, it was the most laissez-faire of Justices, Stephen J. Field, who fought the expansion of federal common law in industrial accident cases (which generally favored employers),[175] while Justice Brandeis resorted (albeit reluctantly and obliquely) to the Tenth Amendment to abolish the federal common law.[176]

Progressives disagreed about many issues, that of federalism included. Progressivism began at the local, usually city, level, expanded to the states, and finally came to Washington. While advocates of state power often became enemies of national progressive reform, many old progressives, like Brandeis, carried a

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[168] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also* Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 259 (1981); MCDONALD, *supra* note 128, at 232.

[169] Martha Derthick & John J. Dinan, *Progressivism and Federalism*, *in* PROGRESSIVISM AND THE NEW DEMOCRACY 81, 92 (Sidney M. Milkis & Jerome Mileur eds., 1999).

[170] *Id.*

[171] *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1135, 1163 n.147 (1977).

[172] RICHMOND PLANET, July 14, 1894, *reprinted in* 4 THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 80 (Philip S. Foner & Ronald L. Lewis eds., 1979).

[173] Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 948, 958 (1988).

[174] Thomas Clark, Note, *Law, Rights, and Local Labor Politics in California, 1901–1911: Reflections on Recent Labor Law Historiography*, 11 STUD. AM. POL. DEV. 325 (1997); Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 J. AM. HIST. 1021 (1979).

[175] *See* Balt. & Ohio R.R. Co. v. Baugh, 145 U.S. 368, 391 (1893) (Field, J., dissenting).

[176] EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 178–80 (2000).

localist distrust of national government into the New Deal period.[177] The principal argument between the two progressive presidential candidates in 1912 was Wilson's "new freedom" regard for states' rights versus Roosevelt's "new nationalism." Though nearly all progressives wanted to curb child labor, for example, Wilsonians wanted it done at the state level (he changed his mind after his election).[178] Indeed, the most common progressive remedy for social ills was "uniform state legislation," which they "presented as a way of restructuring the law while maintaining a federalism that idealized local self-government."[179]

> Despite its origins in the 1870s and continued viability, uniform state legislation was one of the progressives' distinctive contributions to reform. Whereas the nineteenth century was characterized by state legislation and the New Deal by national legislation, the Progressive era represented a compromise, tied to the past yet anticipating the future.[180]

The progressives marked a shift from the Founders' constitution of rights, aided by "competitive federalism," toward a constitution of powers, aided by "cooperative federalism."[181] Congress used its tax and spending powers to assist state governments by "grants in aid."[182] In the 1910 and 1920s, these modest subsidies aided state health, education, and transportation programs; during the New Deal they extended to Social Security and health insurance; more recently they have acted as blandishments to induce states to integrate schools or raise their drinking ages.[183]

Many progressives came to embrace the expansion of national power only as a last resort, in cases where the states had failed.[184] As the ardent federalist Calvin Coolidge put it in 1925, "Without doubt, the reason for increasing demands on the Federal government is that the states have not discharged their full duties."[185]

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[177] ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 213 (1967); David Brian Robertson, *The Bias of American Federalism: The Limits of Welfare-State Development in the Progressive Era*, 1 J. POL'Y HIST. 261, 279 (1989).

[178] *Cf.* Sanford Levinson, *Fan Letters*, 75 TEX. L. REV. 1471, 1477–78 (1997) (book review) (noting that Justice Frankfurter, a Wilsonian, opposed a constitutional amendment to ban child labor on the grounds that child labor was a problem appropriately addressed at the state level).

[179] William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 331, 332, 346 (1977).

[180] *Id.* at 332–33.

[181] Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 2, 19 (1950).

[182] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923) (discussing federal grants to minimize infant mortality).

[183] *See* South Dakota v. Dole, 483 U.S. 203 (1987).

[184] *See* ROBERT HARRISON, CONGRESS, PROGRESSIVE REFORM, AND THE NEW AMERICAN STATE 126, 246–48 (2004).

[185] Derthick & Dinan, *supra* note 169, at 89.

Herbert Croly, who provided the substance of Roosevelt's "new nationalism" program, maintained de Tocqueville's distinction between political and administrative centralization[186] and preferred state to national reform efforts.[187] Unlike European reformers of the same period, American progressives "were ambivalent about using the federal government as an agency of social reform," one historian notes.[188] "[T]he tradition of American federalism did as much as any single factor to shape the direction of progressive reform in the United States."[189] In short, the defense of localism constituted an important strand in progressivism.[190]

Along with socioeconomic experiments, the states continued to police morals. The common cultural standards of nineteenth-century "Victorian moralism"[191] continued the eighteenth-century idea that republican self-government depended on individual self-government.[192] Late nineteenth-century Americans believed that the state had a duty to help individuals to control themselves.[193] At the same time, Victorian moralism was also modern.[194] However radically contemporary culture has rejected it, we should recall that "Victorian ideas represented a bold, democratic, egalitarian alternative to traditional, hierarchical philosophies of society and government."[195] The state acted vigorously against drunkenness, gambling, sexual vice, and brutal sports.[196] It promoted religious observance, education, and family life.[197] Though less overtly religious than in the eighteenth century, Protestant assumptions suffused these efforts and thus provided the source of fierce ethno-cultural and religious political conflict in the states.[198] Gilded Age Americans resisted redistributionist

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[186] *See* George Carey, *Who or What Killed the Philadelphia Constitution?*, 36 TULSA L.J. 621, 635 (2001) (describing Croly's favor of "centralization of political authority at the national level"); Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403, 419 (2002) (noting Croly's opposition of "too-violent centralization" on the grounds that Americans are attached to their local political institutions).

[187] Derthick & Dinan, *supra* note 169, at 91–93.

[188] BARRY D. KARL, THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945, at 25 (1983).

[189] *Id.*

[190] Derthick & Dinan, *supra* note 169, at 91–93.

[191] Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 91, 92 (Donald G. Nieman ed., 1992).

[192] *Id.* at 104.

[193] *Id.* at 103–04.

[194] *Id.* at 92.

[195] *Id.*

[196] *Id.* at 98.

[197] *Id.* at 98–99.

[198] Robert Kelley, *Ideology and Political Culture from Jefferson to Nixon*, 82 AM. HIST. REV. 531, 547–48 (1977); *see also* PAUL KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850–1900 (1970).

or "welfare state" political economy in the belief that a free market rewarded virtuous behavior and punished vice.[199] Indeed, society needed to promote rigorous adherence to moral and religious principles precisely because the economy was so free — internal lawfulness must prevent the market from promoting moral license. Thus a century ago, America evinced a relatively unregulated economy and a highly regulated culture. The twentieth century commenced an inversion, introducing more economic regulation and greater moral freedom.

IV. PROGRESSIVES AND THE RISE OF A NATIONAL POLICE POWER

It is not surprising that the first steps toward a "federal police power" and the evisceration of dual federalism emerged as Congress tried to help the states in their efforts at moral reform. In 1873, Congress, in the Comstock Act, made it a crime to send "obscene" publications through the mail, which included contraceptive information.[200] Congress began to use its power to regulate interstate commerce and its taxing power to supervise socioeconomic matters traditionally left to the states. In 1895 it made it a crime to transport lottery tickets across state lines — even into states where lotteries were not illegal.[201] The Supreme Court upheld the act by a 5–4 vote.[202] As Chief Justice Fuller remarked in dissent, "To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment . . . ."[203]

Congress then imposed a prohibitive excise tax on colored oleomargarine — ostensibly to help prevent its fraudulent sale as butter, as well as to reduce competition for dairy farmers.[204] While Chief Justice Marshall had said that the Court would strike down acts of Congress that were "pretexts" for exercising unenumerated powers,[205] the Court in *McCray v. United States*[206] held that it could not inquire into the motives of legislators, nor correct their abuse of the taxing power.[207] To do so would violate the separation of powers; adumbrating the doctrine of *Garcia*, the Court held that federal encroachments on state power could only be remedied by the political process.[208] Other acts upheld by the Court struck at adulterated food

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[199] BAILEY, *supra* note 163, at 68, 154; *see also* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 11, 315 (1955).

[200] NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 39–40 (1997).

[201] Act of Mar. 2, 1895, ch. 191, 28 Stat. 963.

[202] Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903).

[203] *Id.* at 365 (Fuller, C.J., dissenting).

[204] The Oleomargarine Act of 1886, ch. 840, 24 Stat. 209 (1886), *amended by* Act of May 9, 1902, Pub. L. No. 57-110, 32 Stat. 193.

[205] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

[206] 195 U.S. 27 (1904) (three justices dissented without opinion).

[207] *Id.*

[208] *Id.* at 55.

and drugs,[209] narcotics,[210] and prostitution ("white slavery")[211] — all of which were widely regarded as inherently obnoxious and outlawed in most or all states. Though the Court denied that it was yielding to a "federal police power," there seemed to be no limits to Congress' power to regulate. As Justice McKenna wrote in a unanimous decision upholding the White Slave Act, "If the statute be a valid exercise of [the interstate commerce] power, how it may affect persons or States is not material to be considered."[212]

The Court finally began to set limits to the federal police power when Congress enacted a prohibition on interstate shipment of goods made by children under the age of fourteen.[213] Along with slavery and segregation, child labor is one of the most notorious abuses upon which the black legend of American federalism rests. Progressives were "increasingly distraught at the ordeal of nearly two million children employed in brutalizing slaughter houses ankle deep in blood, water, and refuse."[214] In fact, nearly three-quarters of child workers were farm hands, who would be unaffected by the act.[215] Most states already had child-labor laws,[216] but North Carolina prohibited labor by children under the age of twelve, rather than fourteen.[217] Moreover, many contemporaries, and a few today, doubted that child labor laws did more good than harm to children since, unpleasant as factory work might be, it was often preferable to the next available alternative.[218] Having already accepted de facto a federal police power under the Interstate Commerce Clause, the Court rendered an unusually strained decision to strike down the Act.[219] It distinguished not just between commerce and manufacturing, but between products that were inherently harmful and the means by which they were produced.[220] Finally, Justice Day effectively rewrote the Tenth Amendment along Jeffersonian, confederal lines, saying, "In interpreting the Constitution it must never be forgotten that the Nation is

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[209] Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (sustaining the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768).

[210] United States v. Doremus, 249 U.S. 86 (1919).

[211] Hoke v. United States, 227 U.S. 308 (1913) (upholding the White Slave Traffic Act of 1910, ch. 395, 36 Stat. 825).

[212] *Id.* at 320.

[213] Child Labor Act, Pub. L. No. 64-249, 39 Stat. 675 (1916).

[214] Leuchtenburg, *supra* note 23, at 44.

[215] Bill Kauffman, *The Child Labor Amendment Debate of the 1920s; or, Catholics and Mugwumps and Farmers*, 10 J. LIBERTARIAN STUD. 139, 142 (1992).

[216] Graebner, *supra* note 179, at 353–54 ("As of 1909, almost all states . . . had fourteen-year age limits.").

[217] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1430 (1987).

[218] HARRISON, *supra* note 184, at 138–39, 244; Epstein, *supra* note 217, at 1431.

[219] Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled in part by* United States v. Darby, 312 U.S. 657 (1941).

[220] *Id.* at 271–72.

made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved."[221] The Court also struck down Congress's imposition of a prohibitive tax on goods manufactured by child labor, this time by an 8–1 margin.[222]

Resistance to national child labor prohibition continued into the 1920s. North Carolina mill owners were only minor obstacles compared to the array of ethnic, cultural, and religious groups that fought against a child labor constitutional amendment.[223] When Congress sent a proposed amendment to the states, "a fresh coalition assembled: the Catholic Church, farmers, anti-feminists, Northern Mugwumps . . ., and ordinary families afraid of the encroachment of the state and childless do-gooders."[224] Various minority groups saw the amendment as part of the nativist swell of the postwar years, which had prohibited foreign-language instruction in Nebraska,[225] private schooling in Oregon,[226] and alcoholic beverages nationally.[227] Here federalism helped limit what could be regarded as the underside or "sordid history" of progressivism itself.

The final crisis between dual federalism and the commerce clause, and the resolution of American ambivalence about the extent of federal power in the economy, came with the Great Depression. Congress had entered into the field of national regulation with the Interstate Commerce Act of 1887.[228] There was little question that railroads were engaged in interstate commerce, and the Supreme Court had stopped state regulation that interfered with them.[229] The Court accepted the Act, and gradually Congress's power over the railroads increased, until they were effectively nationalized by 1920.[230] The national effort to regulate large-scale manufacturers, commonly known as "trusts," sparked more controversy.[231] The progressives claimed that the Court had eviscerated the Sherman Antitrust Act of 1890[232] by distinguishing "manufacture" from "commerce," as well as "direct" and "indirect" effects on interstate commerce, in the 1895 sugar trust case.[233] But this decision adhered to the contemporary understanding of the commerce power and reflected the widespread view

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[221] *Id.* at 275 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("[T]o [the States] and to the people all powers not expressly delegated to the national government are reserved.")).

[222] Child Labor Tax Case, 259 U.S. 20 (1922).

[223] Kauffman, *supra* note 215, at 157.

[224] *Id.*

[225] Meyer v. Nebraska, 262 U.S. 390 (1923) (overturning Nebraska Law).

[226] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (overturning Oregon law).

[227] U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 1.

[228] Ch. 104, 24 Stat. 379.

[229] *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908).

[230] ALBRO MARTIN, ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897–1917, at 363–64 (1971).

[231] *See id.* at 115.

[232] Ch. 647, 26 Stat. 209 (1890).

[233] *See* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

of dual federalism.[234] The decision preserved state power to act against monopolies.[235] The states chose not to act, reflecting the widespread ambivalence of the American people about big business — the desire to enjoy their obvious economic advantages, alongside fears and suspicions about their power.[236]

During the 1920s, the Supreme Court continued to maintain an uneasy balance between state and national power and between state power and individual rights. Like the postwar Republican political branches, the Court did assist in the containment of progressive innovations but also accepted quite a few.[237] This ambivalence continued into the early years of the New Deal. The great political crisis that culminated in President Roosevelt's Court-packing plan did not develop until 1935–1936, when the Court seemed to turn sharply against the New Deal. It accepted, for example, Roosevelt's national "bank holiday"[238] and Congress's subsequent devaluation of the currency,[239] and the Tennessee Valley Authority.[240] It also accepted state debtor-relief laws of a kind that it had traditionally struck down as impairing the obligation of contracts,[241] and price-fixing laws that infringed the liberty of contract.[242] But it struck down state minimum wage laws,[243] creating what President Roosevelt called a "'no-man's-land,' where no Government — State or Federal — can function."[244]

Congress's attempts to coordinate industrial and agricultural production posed deeper problems. The National Industrial Recovery Act (NIRA)[245] and Agricultural Adjustment Act of 1938 (AAA)[246] proposed to use Congress's power to regulate interstate commerce to limit production, raise prices, and limit competition in what amounted to federally-enforced cartels. The Court struck down these acts,[247] along

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[234] *See* Epstein, *supra* note 217, at 1400.

[235] *E.C. Knight Co.*, 156 U.S. at 13.

[236] KELLY ET AL., *supra* note 42, at 380; *see also* ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966).

[237] KELLY ET AL., *supra* note 42, at 443–45.

[238] Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1356 (2004) (describing the circumstances surrounding President Roosevelt's declaration of the "bank holiday").

[239] Perry v. United States, 294 U.S. 330 (1935).

[240] Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118 (1939).

[241] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[242] Nebbia v. New York, 291 U.S. 502 (1934).

[243] Morehead v. New York, 298 U.S. 587 (1936).

[244] *The Three Hundredth Press Conference*, June 2, 1936, *excerpted in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 191, 192 (Samuel I. Rosenman ed., 1938).

[245] Pub. L. No. 73-67, 48 Stat. 195 (1933).

[246] Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended in scattered sections of 7 U.S.C.).

[247] United States v. Butler, 297 U.S. 1 (1936) (striking down the AAA); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (declaring parts of the NIRA unconstitutional).

with similar statutes in the petroleum[248] and coal industries,[249] by large majorities. Federalism — the limits of the commerce power and the reservation of state powers under the Constitution — provided only one of the grounds for voiding these acts. Excessive delegation of legislative power to the President and private interest groups figured more prominently; as Justice Cardozo, among the most liberal justices, put it, "This is delegation running riot."[250] The decision striking down NIRA was unanimous;[251] that striking down the petroleum code under NIRA was 8–1.[252] The decisions striking down the AAA[253] and Bituminous Coal Conservation Act,[254] more squarely based on federalist grounds, were 6–3 and 5–4 respectively, but it is clear that Justice Brandeis dissented reluctantly in *Butler*.[255] He rejoiced when the Court struck down the NIRA.[256] Reflecting the old progressive suspicion of concentrated government power, Brandeis told one of Roosevelt's advisers to "tell the President that we're not going to let this government centralize everything. It's come to an end."[257] He told the New Dealers "to go home, back to the states. That is where they must do their work."[258]

But the New Dealers remained in Washington and succeeded in getting the Court to accept the "second New Deal": legislation more carefully crafted that accomplished first New Deal goals in a piecemeal fashion.[259] The Court began to abandon the two chief doctrinal limitations on government power: substantive due process or liberty of contract, which restrained the states, and dual federalism, which contained the federal government.[260] Historians have largely discarded the interpretation of the Court's *volte-face* in 1937–1938 as the aftermath of Roosevelt's proposal to pack the Supreme Court. It is now quite clear that the Court's swing voters, Chief Justice Hughes and Justice Roberts, did not alter their opinions in response to the Court-packing plan or even the 1936 election results.[261] Both had been ambivalent

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[248] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[249] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[250] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring).

[251] *Id.* at 495 (majority opinion).

[252] *Panama Refining Co.*, 293 U.S. 388.

[253] United States v. Butler, 297 U.S. 1 (1936).

[254] *Carter*, 298 U.S. 238.

[255] MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 133 (2002).

[256] *Id.* at 104 ("Justice Brandeis . . . stat[ed] publicly, [the day *Schechter* was decided] was the most important day in the history of the Supreme Court and the most beneficient." (quoting ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 620 (1946)).

[257] PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 352 (1984).

[258] *Id.*

[259] Claeys, *supra* note 186, at 427.

[260] The leading cases were *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

[261] Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1896 (1994).

progressives all along. There was no "switch in time that saved nine."[262] Thus there is little historical basis for claims such as those of Justice Souter, who warned that the new federalism decisions of the 1990s "ignor[e] the painful lesson learned in 1937" and revive an "old juridical pretension discredited and abandoned in 1937."[263]

But the Court's abandonment of dual federalism was nevertheless revolutionary. The 1937 cases might have represented nothing more than a return to an earlier progressive position by Justices Hughes and Roberts, but, as Roosevelt filled vacancies on the conservative wing of the Court, federal ambivalence was entirely swept away. In 1941, the Court upheld the Fair Labor Standards Act, which established a national minimum wage and finally abolished child labor.[264] As Justice Stone noted, "Our conclusion is unaffected by the Tenth Amendment . . . . The amendment states but a truism that all is retained which has not been surrendered."[265] With all economic activity understood as "commerce," the truism became a dead letter. In 1942 the Court upheld a fine against an Ohio farmer who grew more wheat than he was allotted under the revised Agricultural Adjustment Act, despite the fact that he used the wheat only for home consumption, animal feed, and seed.[266] The Court would not strike down any act of Congress as beyond its interstate commerce power until the 1990s.[267] As one standard account concludes, the New Deal "revolutionized the federal system and went far toward displacing the regime of the framers."[268]

At first glance, the New Deal Court seemed to *restore* state power, no longer using the Fourteenth Amendment to prohibit economic regulation. But Congress's unlimited authority under the commerce, taxing, and general welfare clauses preempted the states and increasingly turned them into administrative subdivisions of the national bureaucracy.[269] Nor did this centralization of policymaking always promote "progressive" ends. While the laissez-faire Court used the Fourteenth Amendment to strike down state minimum-wage laws,[270] a Congress unrestrained by the Tenth Amendment established a national *maximum*-wage policy and prohibited a state from raising the wages of its own employees.[271]

While the Supreme Court appeared to be chastened in its acceptance of the New Deal and to adopt a policy of self-restraint, it actually shifted its activism from the economic sphere into the moral, cultural, and religious arena. This shift undermined

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[262] BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); KELLY ET AL., *supra* note 42, at 488.

[263] United States v. Lopez, 514 U.S. 549, 609, 614 (1995) (Souter, J., dissenting).

[264] United States v. Darby, 312 U.S. 100 (1941).

[265] *Id.* at 123–24.

[266] Wickard v. Filburn, 317 U.S. 111 (1942).

[267] KELLY ET AL., *supra* note 42, at 683.

[268] *Id.* at 467.

[269] *Id.* at 500; *cf.* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 484 (1997).

[270] *See, e.g.*, Morehead v. New York, 298 U.S. 587 (1936).

[271] Fry v. United States, 421 U.S. 542 (1975).

state power even more profoundly than the empowerment of Congress in the economic realm. The Court signaled this development in a footnote to a decision in which it upheld a congressional prohibition of "filled milk."[272] The Court would henceforth assume that Congress had good reasons for controlling "ordinary commercial transactions."[273] But Justice Stone noted, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[274] The Court would pay special attention to the workings of the political process; to "statutes directed at particular religious, or national, or racial minorities"; and also be alert to "prejudice against discrete and insular minorities [which] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[275] In short, the Court would only protect non-property rights.

The Fourteenth Amendment provided the basis for this restriction on traditional state power to police welfare and morals. This was not altogether new; the pre-New Deal Court used the amendment to protect the rights of blacks and other minorities in property and non-property related cases.[276] The particular doctrine that did the most to impose national standards on state policy in matters of civil rights and liberties, the application or "incorporation" of the Bill of Rights to the states, is usually regarded as having begun in 1925.[277] But World War II and the early Cold War made the American public and the Court more willing to sacrifice individual liberties to the needs of national security, so the "rights revolution" did not begin in earnest until the late 1950s and especially the 1960s, the heyday of the Warren Court.

Much of the judicial leadership in the rights revolution derived from the Court's bold step against racial segregation in the *Brown v. Board of Education* decision.[278] Moreover, segregationists' resort to the Tenth Amendment and states' rights cemented progressive-liberal faith in national power and severely discredited federalism. Some of the most significant judicial steps to curb state power occurred when the Court required "one person, one vote" in legislative districts,[279] prohibited school prayer and

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[272] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[273] *Id.* at 152.

[274] *Id.* at 152 n.4.

[275] *Id.* at 153 n.4.

[276] JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS (1988).

[277] Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the First Amendment).

[278] 347 U.S. 483 (1954).

[279] Reynolds v. Sims, 377 U.S. 533 (1964).

generally limited religious expression in public life,[280] and nearly prohibited capital punishment.[281] It dismantled nearly the entire regime of "Victorian moralism," striking down laws against obscenity and pornography,[282] contraception,[283] and abortion.[284] It imposed nearly all of the criminal procedure guarantees of the Bill of Rights upon the states.[285] The Court struck down more state laws in the 1960s than it had federal laws through its entire history.[286] In short, the states became nearly as bereft of power in the moral-cultural sphere as they had become in the socioeconomic sphere.

By the 1970s and 1980s, cultural and intellectual reaction against the centralization of American society had become a strong force. Indeed, it was implicit in the calls for "participatory democracy" on the radical left in the 1960s.[287] But the liberation movements had too much at stake in national institutions, especially the federal judiciary, to embrace constitutional devolution. On the right, a feeling arose that the American people were losing or had lost the habit of self-government necessary to sustain republicanism. "Communitarians" bemoaned the weakening of "civil society" amid widespread anomie, atomization, and alienation.[288] Politically, they worried about low voter turnout and general electoral apathy. The New Deal welfare state and permissive cultural mores removed the need for individual self-government.[289] On the other side of the "culture war," liberals cheered the end of repressive Victorian moralism along with the end of the pre-New Deal, laissez-faire political economy.[290]

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[280] Engle v. Vitale, 370 U.S. 421 (1962).

[281] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[282] KELLY ET AL., *supra* note 42, at 629–30.

[283] Eisenstadt v. Baird, 405 U.S. 438 (1972) (plurality opinion); Griswold v. Connecticut, 381 U.S. 479 (1965).

[284] Roe v. Wade, 410 U.S. 113 (1973).

[285] RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES (1981).

[286] Keith E. Whittington, *The* Casey *Five* Versus *the Federalism Five: Supreme Legislator or Prudent Umpire?*, *in* THAT EMINENT TRIBUNAL, *supra* note 160, at 181, 182.

[287] *See* Port Huron Statement of the Students for a Democratic Society (1962), *available at* http://www.vtcampuscompact.org/downloadable%20documents/porthuron.pdf (last visited Dec. 1, 2005).

[288] DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS (1993); ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); BRUCE FROHNEN, THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM (1996).

[289] Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 109.

[290] JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); ALAN WOLFE, MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE LIVE NOW (2001).

Insofar as the Burger and Rehnquist courts challenged judicial centralization of civil rights and civil liberties — curtailing affirmative action[291] or abortion rights,[292] for example — these can be seen as part of the "new federalism" constitutional devolution. But there is, if anything, even less of a pattern here than in the restriction of Congress's commerce power; since 1969 the Court sustained and extended Warren Court doctrine in these areas.[293] The weakening of federalism — in Tenth Amendment terms, depriving states of powers that were not prohibited to them by the Constitution — continued even as the "new federalism" began to limit congressional power. In New Deal jargon, moral-cultural liberty, and sexual liberty in particular, composed a "no man's land" regulatable by neither federal nor state governments. As the Court put it when upholding the right to abortion, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[294] Or, in libertarian terms of the Ninth and Tenth Amendments, they are natural rights retained by the people. In short, there was, in the realm of culture, no Court counterrevolution equivalent to the "new federalism."

CONCLUSION

This alternative history shows that federalism has been a content-neutral principle to which both liberals and conservatives have appealed. It remains true today, despite the common view in academe and the national media that the "new federalism" is an inherently conservative movement.[295] Some on the left have begun to recognize this. In the 1980s, when the federal courts began to rein in their broad reading of the Bill of Rights, many civil libertarian activists counseled a move toward state judiciaries and state bills of rights.[296] The movement for homosexual marriage has depended on state court action (in Hawaii,[297] Vermont,[298] and most especially Massachusetts[299]), and opposes the nationalization of the question by statute or amendment. Gay rights advocates defended a New Jersey law that required the Boy Scouts to accept openly homosexual scout masters, and the dissenting

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[291] *E.g.*, Regents v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

[292] *E.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

[293] Mark V. Tushnet, *On the Rehnquist Court, Everyone Has Been a Judicial Activist*, CHRON. HIGHER EDUC., Nov. 26, 2004, at B9. This is a précis of Tushnet's book, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005).

[294] *Casey*, 505 U.S. at 851 (plurality opinion).

[295] Nina Morrison, Note, *Curing "Constitutional Amnesia": Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. REV. 880, 884–85 (1998).

[296] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

[297] Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

[298] Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[299] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

liberal wing of the Court asserted Tenth Amendment principles.[300] "The Calhoun/Wallace perspective of States' Rights was advanced in the *Boy Scouts* case in the dissenting opinion of Justice Stevens, in which Justices Souter, Ginsburg, and Breyer joined," a federal judge wryly noted.[301] In the litigation involving the 2000 presidential election, conservatives were embarrassed that Supreme Court activism stopped the Florida recount,[302] while "the Calhoun/Wallace perspective of States' Rights was advanced by Justice Stevens in his dissenting opinion in *Bush v. Gore*."[303] The federalization of criminal law means that, in states that prohibit the death penalty or never impose it, the death penalty is more likely to be executed.[304] "Trial lawyers" who seek state courts that are more likely to grant large damage awards in tort cases also have a stake in federalism.[305] This is one of the reasons that many on the libertarian right are suspicious of federalism.[306] And many pro-federalism conservatives are uneasy about the assertion of judicial activism that accompanies the "new federalism."[307] Like federalism, judicial review is also a content-neutral principle that has been used by both left and right in American history.

Perhaps the most obvious example of the ironic cross-currents of federalism is in the controversial area of abortion. In 2003, Congress used its commerce power to prohibit "partial-birth abortion."[308] The act imposes penalties on "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-

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[300] Boy Scouts of Am. v. Dale, 530 U.S. 640, 678–85 (2000) (Stevens, J., dissenting).

[301] William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1176 (2002).

[302] Michael C. Dorf, Book Survey, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1291 (2001) ("[N]either the initial stay nor the ultimate disposition in *Bush v. Gore* was conservative in the conventional sense. By contrast, some of the Court's most activist, conservative decisions have actually frustrated the institutional interests of the Republican Party.").

[303] Pryor, *supra* note 301, at 1177 (citing Bush v. Gore, 531 U.S. 98, 123–29 (2000) (Stevens, J., dissenting)).

[304] William Yardley, *Where Execution Feels Like Relic, Death Looms*, N.Y. TIMES, Nov. 21, 2004, at 1.

[305] Jeffrey Rosen, *Fed Up*, NEW REPUBLIC, May 22, 1995, at 13.

[306] CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM (1993).

[307] Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 720, 727 (1996) (endorsing Justice Blackmun's *Garcia* principle of judicial withdrawal from federalism issues); *cf.* Christopher Wolfe, *The Rehnquist Court and "Conservative Judicial Activism," in* THAT EMINENT TRIBUNAL, *supra* note 160, at 217. Social liberals unsuccessfully sought to protect states' rights to permit the prescription of marijuana for medical purposes, over the prohibitions of federal drug laws, in a decision that underlines the tenuous nature of the federalism revival. *See* Gonzales v. Raich, 125 S. Ct. 2195 (2005); *The New Federalism: Liberals Discover States' Rights*, WALL ST. J., Oct. 5, 2005, at A20.

[308] Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531).

birth abortion and thereby kills a human fetus."[309] The justices who oppose abortion rights are also the principal "new federalism" authors. As much as they might approve of a prohibition of partial-birth abortion, it is very unlikely that they will sustain this act on commerce clause grounds. At the same time, the California Attorney General is suing to overturn an act of Congress that threatens to cut off federal funds for states that compel insurers, physicians, and hospitals to provide and perform abortions.[310] "This is an unacceptable attack on women's rights and state sovereignty," he said.[311]

This bipartisan appeal to states' rights is in keeping with the varied and rich history of American federalism, not with the one-sided black legend. History is well served by the viewpoint of an old progressive historian who noted that federalism "must always be studied in its relation to time and circumstances. The state rights doctrine has never had any real vitality independent of underlying conditions of vast social, economic or political significance."[312] It seems likely that, as John Marshall put it, the federalism debate will continue "so long as our system shall exist."[313]

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[309] 18 U.S.C. § 1531(a).

[310] Bob Egelko, *Lockyer to Sue for Abortion Rights*, S.F. CHRON., Dec. 9, 2004, at B3.

[311] *Id.*

[312] SCHLESINGER, *supra* note 80, at 243.

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