

-INTRODUCTORY REMARKS-

ENUMERATED AND RESERVED POWERS: THE “PERPETUALLY ARISING QUESTION”

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My assignment is to provide a context, or set the stage, for the principal papers and commentary which follow. Our topic is federalism, or the new federalism, or, to be precise, the new “new federalism.” Whichever—and, of course, they are all part of one whole—I hope I can impart an enthusiasm for the topic for it is, to my mind, the most intriguing of the several topics which make up the broad field of American constitutional law. And, aside from any peculiarities of my intellectual tastes, certainly federalism—which is, of course, making something of a comeback as our symposium witnesses—is one of the master issues of our constitutional system. So, I welcome our topic.

This matter of “our federalism,”¹ as Justice Harlan liked to ennoble this concept, is, of course, very complex; but the central question can be stated easily enough: What is the proper balance of power between the national and the state governments? Or, in the terms of our symposium’s title: What is the proper balance between the enumerated powers of the national government and the autonomy of the states? I tend to think of this question as a question of the vertical separation of powers, but perhaps that model, setting one seat of authority above the other, gives the game away, reveals the modern bias which is to some extent under challenge from the new “new federalism.”²

I take my text from John Marshall’s elegant formulation of the issue in *McCulloch v. Maryland*:

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.³

Now this struggle for power between the national and state governments occurs at many points, but the principal battles have taken place upon the fields

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1. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 624 (1966) (Harlan, J., dissenting); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

2. Of course, by virtue of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the national government is supreme within its sphere, but beyond its sphere the states presumably hold sway.

3. 17 U.S. (4 Wheat.) 315, 404 (1819).

of the Commerce Clause,⁴ the Tenth Amendment,⁵ and the last section of the Fourteenth Amendment.⁶ It is upon these sites that our speakers principally will focus today.

For lawyers, the story of the ebb and flow of national power is a familiar one. We constitutional law types rehearse it every year like an old saga. One version of it is so familiar that the scholar Bruce Ackerman has dubbed it the “bicentennial myth” or dominant “constitutional narrative.”⁷ One of the most effective tellings of at least the first part of this “bicentennial myth” was by Professor, later Justice, Felix Frankfurter in a series of lectures which he gave in 1936 in the midst of the crisis of the New Deal and the Supreme Court. These lectures were later published under the title, *The Commerce Clause Under Marshall, Taney, and Waite*,⁸ one of the classic texts of our constitutional culture. In effect, Frankfurter’s lectures amounted to an adversarial brief, which takes on a special cogency because of its scholarly guise, in behalf of that view of national power which the Roosevelt administration had until then been unsuccessfully urging on the courts. What he portrayed was “a coherent evolutionary process” of constitutional interpretation that began with John Marshall, was carried on by Roger Taney, and ended with the Chief Justiceship of Morrison Waite in 1888. By beginning the tale with Marshall, he was, of course, suggesting that proper understanding begins with him. While acknowledging that “no judge writes on a wholly clean slate,”⁹ Professor Frankfurter goes on to contend that Marshall, when called upon to apply the Commerce Clause had available “no fund of mature or coherent speculation,”¹⁰ no “current of important thought,”¹¹ and “no constructive criticisms”¹² from either the 1787 Convention or the ratification debates, upon which to draw. And by stopping with Waite, Frankfurter could maintain his apparent distance as a disinterested scholar. Yet it was obvious to any informed reader that, in Frankfurter’s view, after 1888, the Court went astray. From then on, the Court turned from the truth, and wandered under the spell of *laissez faire* theory in a

4. U.S. CONST. art. 1, § 8, cl. 3 (“The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”). This and other specific grants of power are, of course, enhanced by the supportive power given by the Necessary and Proper Clause. *Id.* cl. 18.

5. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

6. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

7. BRUCE A. ACKERMAN, *WE THE PEOPLE*, FOUNDATIONS 34-35 (1991).

8. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (Peter Smith, ed., 1978).

9. *Id.* at 12.

10. *Id.*

11. *Id.*

12. *Id.*

wilderness of error.¹³

Some years later Professor Wallace Mendelson added a coda to the story which Frankfurter had told. In an introduction to Frankfurter's text, he wrote: "After a brave effort to confine the New Deal, the old Court surrendered to the Marshall-Taney-Waite view of national power."¹⁴ Writing in 1964, Mendelson noted that since that famous capitulation, no federal act passed under Congress' Commerce power had been invalidated by the Court. In short, it seemed that the story of the vicissitudes of the commerce power had been wrapped up in the early forties with the *Darby*¹⁵ and *Filburn*¹⁶ cases. In the latter, a unanimous Court sanctioned an exercise of Congress's power that seemed to reach into a farmer's kitchen flour bin. In *Darby*, Justice Stone famously concluded that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."¹⁷ The Tenth Amendment was thus revealed as but a residue, the substance of which could be determined, as with a residuary clause in a will, only after the specific bequests had been measured.

I can recall that in my days as a law student the tale of the Commerce power seemed pretty much told. My constitutional law teacher, a veteran of the New Deal struggle—he had worked in the Solicitor General's office—spoke to us of a war won and over with. Even in my early days as a law teacher, attention to the standard story of the rise, fall, and rise of the national power was apt to be justified as an exercise in constitutional history, an illustration of settled doctrine. The notion that the Tenth Amendment might ever rise again from Justice Stone's *Darby* malediction was the hope only of crackpots and cranks.

A somewhat parallel tale can be told of the evolution of Congressional powers under the enabling sections of the Civil War Amendments.¹⁸ This story is not so long and had not been thought to have quite reached an end, although a good many thought they could guess the ending. From a restrictive reading in the *Civil Rights Cases*¹⁹ of 1883, the scope of Congressional authority was gradually expanded—an expansion propped up in part by drawing upon Marshall's broad view of national power in *McCulloch*.²⁰ By 1965 Congress was deemed able to reach certain types of private conspiracies against civil rights and to regulate behavior not itself violative of the substantive portions of the amendments. Congress, it was even hinted, might adjust—upwardly only—the substantive protections of the amendments themselves.²¹

13. See *id.* at 46-114.

14. *Id.* at 116.

15. *United States v. Darby*, 312 U.S. 100 (1941).

16. *Wickard v. Filburn*, 317 U.S. 111 (1942).

17. *Darby*, 312 U.S. at 124.

18. U.S. CONST. amends. XIII-XV.

19. 109 U.S. 3 (1883).

20. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (noting the establishment of Congress' broad powers under the Necessary and Proper clause established in *McCulloch*).

21. See, e.g., *United States v. Guest*, 383 U.S. 745, 754-55 (1966). The Court stated:

But even from his remote vantage, Marshall proved more prescient than most mid-Twentieth Century commentators. As he forewarned, questions “respecting the extent of the powers actually granted” to Congress, and of “the conflicting powers of the general and state governments” are, indeed, “perpetually arising, and will probably continue to arise, so long as our system will exist.”²²

There are, of course, many ways to divide up constitutional history. Until 1976 at least, the standard approach, Professors Frankfurter and Mendelson’s version, had three chapters: Chapter One told of the era from Marshall through Waite, in which the scriptures regarding the powers of Congress were unfolded according to their true meaning; in Chapter Two, we learned of the period in the wilderness²³ which lasted until 1937; Chapter Three picks up to lead us through the final era in which the truth was rediscovered²⁴ and the nation set once again on a proper course. But now, it seems, a new story is being told which extends the “bicentennial myth”²⁵ both backwards and forwards in time. First, there has been added a new prologue built on a rich lode of writings from the revolutionary and ratification eras, the times before Marshall which Frankfurter had found so barren.²⁶ Second, both the political and legal atmosphere have changed so that the old story has been resurrected. It has turned out that it was not over, it was just hibernating. The Tenth Amendment has been given a new

[W]e therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other broader legislation Congress might constitutionally enact under Section 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.

Id. See, e.g., also *Morgan*, 384 U.S. at 648 (quoting *Ex parte Com. of Virginia*, 100 U.S. 339 (1879), “It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.”); but see *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (“In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States’ powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.”).

22. *McCulloch*, 17 U.S. (4 Wheat.) at 404.

23. The standard story of “Chapter Two” is told effectively in Paul Kens, *Dawn of the Conservative Era*, VOL. I, 1997 J. SUP. CT. HIST. 1, and Benno C. Schmidt, *The Court in the Progressive Era*, VOL. I, 1997 J. SUP. CT. HIST. 14. For a somewhat revisionist look at the era, see Hadley Arkes, *A Return to the Four Horsemen*, VOL. I, 1997 J. SUP. CT. HIST. 33.

24. The cases in which the Court rediscovered its way are ordinarily thought to be *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the latter dealing with state regulatory authority over the economy.

25. See FRANKFURTER, *supra* note 8, at 12.

26. See, e.g., Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993 (1997) (discussing the impact of the American Revolution on federalism principles); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (discussing the foundation of federalism found in writings from the ratification process).

body.

It is a little ironic that the so-called “bicentennial myth” should begin to unravel in the bicentennial year. The latest chapter begins in 1976 with the *National League of Cities v. Usery*²⁷ decision in which a bare majority held that application of the Fair Labor Standards Act²⁸ to state employees trenching upon certain integral aspects of state sovereignty protected by the Tenth Amendment.²⁹ If this decision did not immediately bear fruit in subsequent cases,³⁰ it caused a storm of protest. Justice Brennan, in an apoplectic dissent, called the decision “pernicious,”³¹ a “catastrophic judicial body blow.”³² For most commentators, it was, at best, an unwelcome atavism.³³ In fact, less than ten years later, it appeared that the heresy had been rooted out when another bare majority—made possible by Justice Blackmun’s jump to the other side—overturned *National League*, explaining that the proper safeguards of federalism were to be found not in the courts but in political structure and process.³⁴ Finding himself once again dissenting, Justice Rehnquist closed with this prophecy: “I do not think it

27. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528 (1985).

28. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994).

29. *National League of Cities*, 426 U.S. at 851-52.

30. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (holding that the “extension of the [Age Discrimination in Employment Act] to cover state and local governments was a valid exercise of Congress’s powers”); *FERC v. Mississippi*, 456 U.S. 742, 759 (1982) (holding that the Public Utility Regulatory Policies Act authorizing the Federal Energy Regulatory Commission to exempt qualified power facilities from state laws and regulations was a valid exercise of Congress’ powers); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 690 (1982) (holding that Congress’ regulation of a state owned railroad under the Railway Labor Act was a valid exercise of Congress’ powers because it did not undermine the role of the states in our federal system); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (holding that the Surface Mining Act did not violate the Tenth Amendment).

31. *National League of Cities*, 426 U.S. at 860 (Brennan, J., dissenting).

32. *Id.* at 880.

33. *See, e.g.*, Sotirios A. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 161 (commenting, “If anything seemed settled in contemporary American constitutional law, it was the meaning of the Tenth Amendment.”); Bernard Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1115 (1978) (commenting, “Like Hamlet’s father, state sovereignty is a ghost that refuses to remain in repose.”). A few commentators, however, saw some virtues in the decision. *See, e.g.*, Robert F. Nagel, *Federalism As A Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 81 (stating, “My major purpose is not to insist that *Usery* was ultimately ‘correct,’ but to suggest that the inability to understand *Usery* demonstrates the extent to which the capacity to appreciate some important constitutional principles is being lost.”); Andrej Papaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 341 (implying that *National League of Cities v. Usery* may have provided a federalism framework from which to work).

34. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-56 (1985).

incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”³⁵

Rehnquist proved as prescient as Marshall. Within little more than a decade, in a trio of cases—*Gregory v. Ashcroft* in 1991,³⁶ *New York v. United States* in 1992,³⁷ and *Printz v. United States* in 1997³⁸—the spirit of *National League* was reborn. Once again, the Tenth Amendment was seen as reservoir of reserved powers and immunities which could be described, at least in part, independently of Congress’ enumerated powers.³⁹ The reconfiguration of the federal balance emerged as well in what for some were even more unexpected places. In *United States v. Lopez*,⁴⁰ the Court for the first time in over sixty years found a limit to Congress’ power over commerce inhering in the Commerce Clause itself.⁴¹ Even the mysterious Eleventh Amendment was refurbished in a manner that enhanced state sovereignty.⁴² Finally, in *City of Boerne v. Flores*,⁴³ the Court struck down the immensely popular Religious Freedom Restoration Act⁴⁴ as being in excess of Congress’ authority under the Fourteenth Amendment.⁴⁵

The Court, of course, has not been alone in its renewed concern for the federal balance; perhaps it is has been as much follower as leader. What during the Reagan era had, under the catch phrase, “the New Federalism,” seemed more political rhetoric than substantive policy, has today become a policy polestar.⁴⁶ Federalism is back in town!

Is this a good thing, a long-needed corrective to the burgeoning of national power? Or is it merely a momentary, impractical, and wrong-headed reaction—even, in the minds of some, a masked form of racial politics? As I began, let me say again that this is a very complex topic—as a matter of policy and as a matter of constitutional law. Nor do I suppose we are even now writing

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

36. 501 U.S. 452 (1991).

37. 505 U.S. 144 (1992).

38. 117 S. Ct. 2365 (1997).

39. *See New York*, 505 U.S. at 155-56.

40. 514 U.S. 549 (1995).

41. *Id.* at 557-59.

42. *See Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997) (finding a state immune from suit brought by an Indiana tribe because of the Eleventh Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (finding that Congress did not have the power under the Indian Commerce Clause to abrogate the states’ immunity from suit under the Eleventh Amendment).

43. 117 S. Ct. 2157 (1997).

44. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

45. A five-justice majority concluded that “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.” *City of Boerne*, 117 S. Ct. at 2172. In concurrence, Justice Stevens found the act also violated the Establishment Clause, U.S. CONST., amend. I. *Id.* (Stevens, J., concurring).

46. *See, e.g.*, Unfunded Mandate Reform Act of 1995, 2 U.S.C. §§ 1501-1571 (Supp. I 1995).

the final chapter. If we will think, for a moment, of the Constitution as a landscape with geopolitical significance, we can see that our topic today concerns one of those borderlands where, as Marshall said, there will always be skirmishes and battles. At any point in time, however, there are three main issues for consideration: (1) What does a new “New Federalism” have to offer us in the Twenty-first Century? Is it but a vestige of what, two hundred years ago, was only a necessary political compromise? Or, has it intrinsic value for us today? John Yoo sees a need for a coherent theory of federalism which expresses the normative values which underlie it;⁴⁷ (2) What, both as a matter of law and as a matter of wise policy, ought to be the nature of the balance? Martin Redish explores the relationship between national power and state courts after *Printz*.⁴⁸ Attorney General Modisett describes the effects of the “new federalism” from the standpoint of a state policy-maker.⁴⁹ Ronald Rotunda focuses on Congress’ power under the Fourteenth Amendment after the *City of Boerne* decision;⁵⁰ (3) Whose job is it to police the federal balance? Does the court have a role? Or, as Justice Blackmun argued in 1985,⁵¹ is it a matter to be left to the political structure and process? John Yoo makes the case for a central judicial role in the maintenance of the federal balance.⁵² The articles and comments which follow shed new light on these questions.

47. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998).

48. *Printz v. United States*, 117 S. Ct. 2365 (1997); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998).

49. Jeffrey A. Modisett, *Discovering the Impact of the “New Federalism” on State Policy Makers: A State Attorney General’s Perspective*, 32 IND. L. REV. 141 (1998).

50. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

51. Perhaps the definitive argument is Jesse H. Choper’s, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

52. Yoo, *supra* note 47, at 41-42.