



1-1-1984

Foreword: The Ever-Whirling Wheels of American Federalism

John Minor Wisdom

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

John M. Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 Notre Dame L. Rev. 1063 (1984).

Available at: <http://scholarship.law.nd.edu/ndlr/vol59/iss5/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Foreword: The Ever-Whirling Wheels of American Federalism*

*John Minor Wisdom***

“Federalism is dead.” So, in 1970, distinguished constitutional authority Professor Philip B. Kurland announced—and not with tongue in cheek.¹ In 1934 Professor Edward S. Corwin started his Storrs Lecture at Yale Law School, *Dual Federalism² versus Nationalism, and the Industrial Process*, with the question: “Does the existence of the states furnish an independent determinant of, or limitation upon, national power?”³ He concluded that “ineluctable forces have chosen” nationalism over dual federalism.⁴ Nevertheless, midway in time be-

* Because this Foreword is only a foreword, the subject of American federalism is considered in broad, often over-simplified terms.

A caveat: It must be remembered that The Federalist Papers were letters published in the newspapers by Alexander Hamilton, James Madison, and John Jay, to influence public sentiment in favor of ratification of the Constitution. At the time, the federalists took over the term “Federalists” from opponents of the Constitution. These opponents, “anti-Federalists,” in fact advocated federalist principles, in the sense of classical federalism, as opposed to nationalist principles structuring the new government.

** Senior Judge, United States Court of Appeals for the Fifth Circuit.

1 P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 96 (1970); cf. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 787-88 (5th ed. 1976) (“‘Dual Federalism’ is apparently dead beyond revival. . . . The enlargement in the scope of federal sovereignty and the death of dual federalism have not brought about the destruction of the federal system or of the several states as essential members of that system. Federal functions have admittedly increased greatly since 1933, but the sphere of state activities has not undergone a decline; on the contrary, state functions have increased substantially since the inception of the New Deal.”).

2 “Dual federalism” has been defined as follows: “This doctrine, it will be recalled, held that the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way as to intrude, even incidentally, upon the sphere of sovereignty reserved to the other.” A. KELLY, W. HARBISON, & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 517 (6th ed. 1983).

3 E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 1 (1934).

4 *Id.* at 51. Professor Corwin noted:

In the pregnant words of the Court [in *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 211 (1930)], “Primitive conditions have passed; business is now transacted on a national scale”; and, it may be added, so is crime. For which reasons, as well as others, while invocation of the doctrine of dual federalism may still be pardonable as a gesture of farewell to an era that will return no more, it is certainly of limited helpfulness in solving the problem of fitting our constitutional system to present-day needs. As between the thesis of dual federalism and that of nationalism ineluctable forces have chosen.

tween the publications of Professors Kurland and Corwin, Professor Herbert Wechsler, in a paper considered a classic on federalism, wrote: "[M]y thesis [is] that the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and scope of our national legislative processes from their inception."⁵

Federalism did not die: its wheels, always busy, keep whirling. In 1971, the year following Professor Kurland's announcement of the demise of federalism, the Supreme Court decided *Younger v. Harris*,⁶ holding that a federal court may not enjoin a pending good faith, state criminal proceeding. Eloquently, and because he regarded federalism as very much alive, Justice Hugo Black wrote in *Younger*:

["Comity" requires] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism,"

Id.

Professor Corwin regarded Hamilton's and Madison's contributions in *The Federalist* as "the first beginnings of two divergent theories of national power." *Id.* at 47. Hamilton's nationalistic theory was held by the Framers of the Constitution and founders of the national government. *Id.* Nevertheless,

[f]or all that, the [Hamiltonian] outlook embodied in the theory was not that of the great mass of the American people either in 1789 or even three quarters of a century later. Their experience was local, their immediate interest local, and through Jefferson and Madison [the later Madison] this localistic outlook found expression in a far different version of the Constitution, one which treated it as resulting primarily from a compact among the states and which required that its interpretation be directed to the preservation in the states of their accustomed powers and to the maintenance of that greatest of constitutional contrivances, dual federalism.

Id. at 48.

Professor Corwin has been credited with first using the term "dual federalism." D. ELAZAR, *THE AMERICAN PARTNERSHIP* 11 (1962).

5 Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

6 401 U.S. 37 (1971). In *Younger* the Supreme Court set aside a district court injunction against a pending state criminal proceeding although the plaintiff sued under a civil rights act, invoked the first amendment, alleged the facial unconstitutionality of the state statute on which prosecution was based, and modeled the complaint on the complaint filed in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). In *Dombrowski* the plaintiffs alleged both that state subversive control statutes were void for overbreadth under the first amendment and that state law enforcement officers were about to harass the plaintiffs by a bad faith prosecution. Professor Owen Fiss has written: "The great significance of *Younger v. Harris* is that it shrank *Dombrowski* down to [an] empty universe [of bad-faith harassment claims]." Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1116 (1977) (footnote omitted). Justice Black did not participate in *Dombrowski*. See also note 21 *infra*.

and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of our States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.⁷

Over the years since the Constitutional Convention of 1787 there have been many different perceptions of the concept of American federalism, and catchphrases have often been used to identify a particular perception. Some perceived that the tenth amendment⁸ was adopted to clarify the doctrine of overriding "reserved (state) powers"; that is, the states are supreme within the sphere of sovereign powers reserved to the states. In spite of the tenth amendment and the opposition of anti-Federalists (Jeffersonian Republicans) to exercise of national authority, Professor Corwin concluded that the period after ratification of the Constitution, 1789 to 1801, ought to be termed "the period of *nationalist* domination."⁹ During this period the Supreme Court decided *Chisholm v. Georgia*,¹⁰ and Congress en-

7 401 U.S. at 44.

8 The 10th amendment provides: "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."

9 E. CORWIN, *supra* note 3, at 3 (emphasis in original).

10 2 U.S. (2 Dall.) 419 (1793). In that case the Supreme Court accepted jurisdiction of a suit against a state by a citizen of another state. Justice Wilson wrote: "*As to the purposes of the Union, therefore, Georgia is not a sovereign state.*" *Id.* at 457 (emphasis in original). At the first session of Congress following the decision, the 11th amendment was proposed and promptly ratified. It provided for state immunity from suits "by citizens of another state." *Hans v. Louisiana*, 134 U.S. 1 (1890), extended the immunity to suits brought by the state's own citizens, or by a foreign state. The orthodox view has been that *Chisholm v. Georgia* was contrary to the original understanding. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91-96 (rev. ed. 1935). Justice Powell has recently explained: "After reviewing the constitutional debates concerning the scope of Art. III, the Court determined [in *Hans*] that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900, 906 (1984). But in Judge John J. Gibbons's recent, thorough review of the constitutional background of the amendment, he concluded

acted the Alien and Sedition laws.¹¹ John Marshall presided over the Supreme Court from 1801 to 1835. In Marshall's years our federalism could scarcely be characterized as "dual federalism." Marshall, relying on the supremacy clause, the necessary and proper clause, and the commerce clause, firmly established the dominance of the central government against state attempts to make the federal union a compact/confederation of sovereign states.¹² Those were the years

that article III, § 2 of the Constitution was intended to apply to such suits and that the amendment was *not* intended to remove federal question suits from federal jurisdiction. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

11 These laws, however, provoked the Virginia and Kentucky resolutions of 1798 and 1799, asserting that the Constitution rested primarily on a "compact among the sovereign states." Thomas Jefferson, anticipating John C. Calhoun, drafted the Kentucky Resolutions declaring that when the federal government assumes powers not delegated, state nullification is the constitutional remedy. The resolutions are lumped together, but Madison's Virginia Resolutions are milder than Jefferson's. "It is clear that whatever remedies Madison had in mind, they did not include the power of individual states, or the legislatures of all the states, to nullify federal laws." I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800, at 463 (1950).

12 Marshall's strong views did not stop the debate over federalism. Jefferson was aided by such able and respected men as St. George Tucker, John Taylor of Caroline County, Virginia, and Spencer Roane, Judge of the Virginia Court of Appeals. Tucker, editor of the first American edition of *Blackstone's Commentaries*, said in his appendix to that edition: The Constitution

is a compact by which the federal government is bound to the several states. . . . The federal government then, appears to be the organ through which the united republics communicate with foreign nations, and with each other. Their submission to its operation is voluntary: its councils, its engagements, its authority are theirs, modified, and united. Its sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, in the most unlimited extent.

1 BLACKSTONE'S COMMENTARIES 170, 187 app. (G. Tucker ed. 1803).

Justice Joseph Story, in his *Commentaries on the Constitution*, devoted nearly fifty pages to disagreeing with Tucker, concluding:

We are to treat it, as it purports on its face to be, as a CONSTITUTION of government; and we are to reject all other appellations, and definitions of it, such, as that it is a compact, especially as they may mislead us into false constructions and glosses, and can have no tendency to instruct us in its real objects.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 372 (3d ed. 1858).

Mr. Jefferson asserts, that the constitution of the United States is a compact between the states. . . . It would, I imagine, be very difficult to point out when, and in what manner, any such compact was made. The constitution was neither made, nor ratified by the states, as sovereignties, or political communities. It was framed by a convention, proposed by the people of the states for their adoption by congress; and was adopted by state conventions, — the immediate representatives of the people.

Id. § 311, at 207 n.3.

of *M'Culloch v. Maryland*,¹³ *Marbury v. Madison*,¹⁴ and *Gibbons v. Ogden*.¹⁵ At the same time, as Judge Henry Friendly has noted, "[d]espite the Marshall Court's resounding affirmation of the breadth of the powers conferred on the national government, the use made of these powers through the first century of our history under the Constitution was restrained."¹⁶

13 17 U.S. (4 Wheat.) 316 (1819). The Court, "vindicating the Hamiltonian version of federalism," A. HOLCOMBE, *OUR MORE PERFECT UNION* 365 (1950), upheld the power of Congress to incorporate a second Bank of the United States and denied the power of Maryland to tax it. The opinion flatly rejected the Jeffersonian strict-construction-compact theory of the Union. Chief Justice Marshall penned those famous words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421. This is virtually a paraphrase of Madison's statement in *The Federalist*: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it, is included." *THE FEDERALIST* No. 44, at 285 (C. Rossiter ed. 1961).

14 5 U.S. (1 Cranch) 137 (1803). Whatever else *Marbury v. Madison* decided, this is the case that established the predominance of the nationalist, unifying influence of the Constitution, as interpreted by the Supreme Court. The Supreme Court upheld the right of federal judicial review of congressional legislation, finding that right as a necessary result of a written constitution. Professor Wechsler would find the right in the supremacy clause. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959). But see A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 11-12 (1962). Hamilton put forth the basis for judicial review in *The Federalist*: "A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body," and, in case of irreconcilable differences between the two, to prefer the will of the people declared in the Constitution to that of the legislature. *THE FEDERALIST*, No. 78, at 467 (C. Rossiter ed. 1961).

15 22 U.S. (9 Wheat.) 1 (1824). Marshall embraced the Madisonian view that the commerce power was exclusively national, but he "distinguished the commerce *power* from the *subject matter* upon which that power *operated*: while a state could not regulate 'commerce' for its own sake, it might, in the pursuit of other legitimate state goals, take actions which impinged, to some extent, upon the commercial intercourse among the states." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-3, at 322 (1978). The power to regulate, said Marshall, "is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." 22 U.S. (9 Wheat.) at 197. Marshall took a broad view of the necessary and proper clause: "[W]e must never forget, that it is *a constitution* we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." 17 U.S. (4 Wheat.) at 407, 415. *National League of Cities v. Usery*, 426 U.S. 833 (1976), may be read as a limitation on the plenary power of Congress over commerce whenever the congressional statute in question "directly displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

16 Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1020 (1977) (footnote omitted). For example, Congress and the President were reluctant to have the federal government participate in local internal improvements. In 1822 President James Monroe vetoed a bill appro-

"Dual federalism" came into its own with the Taney Court¹⁷ in 1835 and continued to represent the generally accepted view of our government until the constitutional revolution that legitimated legislation of the New Deal. This long period was interrupted for a time by a drastic revision of the relationship between the states and the national government brought about by the thirteenth, fourteenth, and fifteenth amendments, and the civil rights acts these amendments generated. But, by about 1877, and certainly no later than 1896,¹⁸ dual federalism rose again and remained dominant until the Great Depression, the New Deal, and World War II increased the influence of the central government at the expense of state government. "Cooperative federalism" is the polite term for that expansion

prising money for the "repair of the Cumberland road." His veto message is a major paper on dual federalism:

There were two separate and independent governments established over our Union, one for local purposes over each State by the people of the State, the other for national purposes over all the States by the people of the United States. The whole power of the people, on the representative principle, is divided between them. The State governments are independent of each other, and to the extent of their powers are complete sovereignties. The National Government begins where the State governments terminate, except in some instances where there is a concurrent jurisdiction between them. This Government is also, according to the extent of its powers, a complete sovereignty. I speak here, as repeatedly mentioned before, altogether of representative sovereignties, for the real sovereignty is in the people alone.

The history of the world affords no such example of two separate and independent governments established over the same people, nor can it exist except in governments founded on the sovereignty of the people.

2 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 148 (J. Richardson ed. 1897); *see generally id.* at 142-43.

17 Chief Justice Taney himself succinctly defined dual federalism: "[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Abelman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858). In that case, the Court reversed the Wisconsin Supreme Court which had issued a writ of habeas corpus releasing a fugitive slave.

The leading advocate of state sovereignty (states' rights) during this period was John C. Calhoun. His assumption that the central and state governments were perfect coordinates led him to view sovereignty as unitary and indivisible and to adopt the idea of a mutual negative (veto) by each government of the acts of the other. As a party to the constitutional compact, a state might exercise its sovereign right to determine the extent of its obligations and, if necessary, *interpose* itself between the central government and an act the state found to be void, *nullifying* the federal act.

18 In 1877 the Hayes-Tilden bargain ended Reconstruction. *See generally* C. WOODWARD, ORIGINS OF THE NEW SOUTH 23-74 (1950); C. WOODWARD, REUNION AND REACTION (1951). In 1883 the Civil Rights Cases, 109 U.S. 3 (1883), greatly limited the scope of the thirteenth amendment, in its application to "badges and incidents of slavery," and restricted the fourteenth amendment to state action. In the 1890's came Jim Crowism. *See* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (rev. ed. 1957). In 1896, in effect, the Supreme Court approved Jim Crowism in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

of national authority when there was an overlapping of national and state authority, some increase in state authority, and considerable bypassing of state legislatures and centralized state authorities in programs rendering federal aid to cities and local governments.¹⁹ As Professor Sedler shows in his study of the Canadian Constitution,²⁰ many of the features of American judicial review—and of federal judicial activism—are a result of our unique combination of federal supremacy and concurrent state and federal authority in nearly every area of human endeavor. These features are largely absent in Canada, but they are appropriate in the development of our system.

Now we have “New Federalism,” arguably descriptive of such decisions as *Younger v. Harris*,²¹ *National League of Cities v. Usery*,²² and

19 See D. ELAZAR, *supra* note 4. Professor Elazar takes the interesting position that the pattern of the American government has always been “co-operative federalism,” not “dual federalism.”

20 Sedler, *Constitutional Protections of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191 (1984).

21 401 U.S. 37 (1971); see note 6 *supra*. In *Younger* Justice Stewart, joined by Justice Harlan, specially concurring, cautioned that although the decided questions were important, “[p]erhaps as important, however, is recognition of the areas in which today’s holdings do not necessarily extend.” *Id.* at 54. Disregarding some of the cautions, the Court promptly expanded *Younger*. A federal court may not enjoin state criminal proceedings begun *after* the federal complaint was filed, *Hicks v. Miranda*, 422 U.S. 332 (1975), nor state *civil* proceedings “in aid of and closely related to criminal statutes.” *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). In *Judice v. Vail*, 430 U.S. 327 (1977), the Court held that *Younger* and *Huffman* were “not confined solely to the types of state actions which were sought to be enjoined to those cases,” 430 U.S. at 334, and applied *Younger* to a state contempt action. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court invoked the principles underlying *Younger* in disapproving a federal injunction requiring a municipal police force to set up *administrative* procedures to handle complaints of police brutality. The Court also applied *Younger* later in a § 1983 action for damages to redress the allegedly unconstitutional administration of a state tax system. *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100 (1981). In *Middlesex Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423 (1982), the Court held that federal courts should abstain from considering a constitutional challenge to disciplinary rules that are the subject of state bar proceedings. The Court said: “The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.” 457 U.S. at 423 (quoting *Moore v. Sims*, 442 U.S. 415, 423 (1979) (an injunction action challenging the constitutionality of state child protection laws)).

One commentator has noted:

After *Rizzo* [v. Goode, 423 U.S. 362 (1976)] and *McNary* [Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 (1981)], the *Younger* doctrine can apparently function as a freewheeling, judicial metaprinciple, available to trump virtually any federal equitable intervention into the affairs of state or local governments. This is a radical departure from the practice of the federal courts for many years

Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1338 (1982).

22 426 U.S. 833 (1976). In *National League of Cities*, the Court held that the extension of the Fair Labor Standards Act to certain public employees was unconstitutional. This was the

Michigan v. Long.²³ *Younger v. Harris* and its progeny added muscle to dual federalism generally. Specifically, the health of the tenth²⁴ and

first time since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), that the Supreme Court held a congressional regulation of commerce to be an unconstitutional intrusion upon state sovereignty.

Professor Tribe entitles one section of his treatise "National League of Cities: Linking the *New Federalism* to the Affirmative Rights of Individuals." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-22 (1978) (emphasis added). According to Tribe, "*National League of Cities* may be taken to have established new 'rights' of states as against the national government—rights beyond those derived simply from the constitutional requirement of a meaningful existence for states as separate entities". *Id.*, § 5-22, at 310-11.

As recently noted, however, by Justice Stevens:

To come within [*National League of Cities*], an exercise of Commerce Clause power must (1) regulate the States as States, (2) address indisputable attributes of state sovereignty, and (3) directly impair the traditional functions of the States. *EEOC v. Wyoming*, [103 S. Ct. 1054, 1061] (1983); *FERC v. Mississippi*, 456 U.S. 742, 764 n.28 (1982). . . ; *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 287-88 . . . (1981). Even then, the claim fails if the federal interest outweighs those of the states. See *EEOC v. Wyoming*, [103 S. Ct. at 1061]; *Hodel*, 452 U.S. at 288 n.29.

South Carolina v. Regan, 104 S. Ct. 1107, 1136 n.18 (1984) (Stevens, J., concurring and dissenting).

23 103 S. Ct. 3469 (1983).

24 See note 8 *supra*. The tenth amendment has had a checkered career. Both Houses of Congress, after vigorous debate over the amendment, declined to insert the word "expressly" before the words "delegated to the United States." 5 B. SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS*, 1150-51 (1980); 1 *ANNALS OF CONGRESS* 767 (J. Gales ed. 1789). "Expressly" had qualified the delegation of powers in the cognate section of the Articles of Confederation. St. George Tucker, see note 10 *supra*, had moved in the House to insert the word "expressly." Madison, usually the last to speak on an issue, was the first to speak on this issue. He said: "It was impossible to confine a government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutia." See I. BRANT, *supra* note 11, at 274. Marshall stressed this omission in his opinion in *M'Culloch v. Maryland* and declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument." 17 U.S. (4 Wheat.) 316, 406 (1819). The Taney Court took a different view and held that the amendment withheld internal police matters from the delegation, putting the Court in the position of an umpire over the competing sovereigns; a state is free to regulate so long as the act does not conflict with federal legislation. See *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *License Cases*, 46 U.S. (5 How.) 504, 572 (1847) (separate opinion of Chief Justice Taney). In *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870), holding that Congress could not tax the salary of a state judge, the Court applied the doctrine of reserved powers of the states to nullify, for the first time under the tenth amendment, an act of Congress: "[T]he States within the limits of their powers. . . . 'reserved' are as independent of the general government as that government within its sphere is independent of the States." 78 U.S. at 124. Then in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court did what the original advocates of the amendment were unable to do; it inserted the word "expressly" before the word "delegated" in the amendment. The Court held that Congress could not prohibit the transportation in interstate commerce of goods produced by child labor; that the act was *not* a regulation of commerce among the states but an invasion of powers reserved to the states. Later, in *United States v. Darby*, 312 U.S. 100 (1941), the Court explicitly over-

eleventh amendments²⁵ improved. The commerce clause became more vulnerable to attack than it was once thought to be.²⁶ And, as Dean David A. Schlueter points out, *Michigan v. Long*²⁷ enunciated a new rule of judicial restraint: "Unless it clearly appears on the face of the state court's decision that it relied on independent and adequate state grounds, the Supreme Court will assume that no such grounds were present."²⁸ But, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we [the Court], of course, will not undertake to review the decision."²⁹ As Dean Schlueter says,

ruled *Hammer v. Dagenhart*, in upholding the Fair Labor Standards Act. Justice Stone wrote for a unanimous Court:

The power of Congress over interstate commerce 'is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden* [citation omitted]. . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . [T]he Tenth Amendment . . . states but a truism that all is retained which has not been surrendered.

Id. at 114-24. The Court had previously upheld the Social Security and National Labor Relations Acts. One could fairly say that in 1941 the Court had boxed the compass: it had returned to the position of the Marshall Court on the tenth amendment. One cannot say the same today. In *Fry v. United States*, 421 U.S. 542, 547-48 n.7 (1975), Justice Thurgood Marshall, writing for the Court, referred to the tenth amendment as declaring that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system"; but held that the application of the 1970 Economic Stabilization Act to state employees "constituted no such drastic invasion of state sovereignty." In *National League of Cities*, the Court held that the Fair Labor Standards Act could not be extended to state and municipal employees. Justice Rehnquist, for the Court, quoted from *Fry* the statement quoted above, but he referred to the amendment as an *express* declaration of the state sovereignty limitation upon the commerce, not its source. 426 U.S. at 842.

25 See note 10 *supra*. *Edelman v. Jordan*, 415 U.S. 651 (1974), involved a program of federally-subsidized benefits administered by state officials. The Court held that a federal court could not order the state officials to comply with federal regulations and "release and remit" benefits wrongfully withheld. The Court concluded that the "funds to satisfy the award . . . must inevitably come from the general revenues of the State of Illinois, and thus the award resembles more closely the monetary award against the State itself. . . . than it does the prospective injunctive relief rewarded in *Ex Parte Young*." 415 U.S. at 665.

26 See *National League of Cities v. Usery*, 426 U.S. 833 (1976). Compare Madison's statement that the power had been granted Congress over interstate commerce mainly as "a negative and preventive provision against injustice among the States," 4 J. MADISON, LETTERS AND OTHER WRITINGS 14-15 (1865), with the recent statement, "In short unlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce clause." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring).

27 103 S. Ct. 3469 (1983).

28 Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions*, 59 NOTRE DAME L. REV. 1079, 1980 (1984).

29 103 S. Ct. at 3476.

this "case marks an important milestone in the Burger Court's so-called 'new federalism.'"³⁰ Furthermore, as Gordon and Gross note, under *Pennhurst*³¹ "the eleventh amendment bars the federal courts from granting relief based on pendent state law claims against state officials. The effect of the *Pennhurst* decision is that these state claims must now be pressed, if at all, in state court."³² *Pennhurst* will augment the role of state courts as enforcers of both federal and state law.

Whatever our variety of federalism may now be called or however considered, interstitially and structurally or according to the letter and intent of the Constitution, the emphasis now is on deference to the states in any matter not clearly within the enumerated powers delegated to the national government; even then the integrity of the states as states must be honored. This is especially evident in conflicts between state and federal proceedings, whether criminal or civil. There is less federal intrusion in the states' administration of criminal justice through injunctive relief and the use of federal habeas corpus. Under the "New Federalism" the national taxing power and the plenary power over commerce may not be as unbridled as once thought. The tenth amendment has been exalted to a position that would have astounded Justice Harlan Fiske Stone.³³ Indeed, these new developments may lead us back to the "classical" model of dual federalism that Professor Welsh defends, with state courts relying primarily upon state law to render a decision even when federal law is available to resolve the dispute.³⁴

It is reasonable to regard the provisions of the Constitution as "organic, living institutions,"³⁵ the fundamental law for all time, and therefore subject to varying constructions that will allow some accommodation to varying social and economic conditions as long as the basic structure of our government is preserved. It may be that

30 Schleuter, *supra* note 28, at 1080.

31 *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984). In his dissent Justice Stevens stated that the decision overruled at least 28 cases. *Id.* at 922 (Stevens, J., dissenting). Some of these cases may be distinguishable. The footnotes, some directly addressed to the dissent, narrow the holding. For example, a suit is not against the state, for purposes of the eleventh amendment, if the officers sued are acting "ultra vires," that is "without any authority whatever." *Id.* at 908 n.11.

32 Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1146-47 (1984).

33 Stone said that the tenth amendment "states but a truism." See note 24 *supra*.

34 Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984).

35 *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

the existence of the states as governmental entities can be considered a prime determinant of the American federal structure. But arguing both by inference from structure and relationship as well as from textual exegesis, one can also say that the existence of the nation is a prime determinant of the American federal structure. The relative position of the states vis-a-vis the national government is what counts. That position today is entirely different from the position of the states at the time the Constitution was adopted. Today, individual civil liberties and civil rights may suffer from the lack of protection the federal courts were intended to provide. This shift of power to the states is a challenge. Many states have accepted the challenge and reacted positively.³⁶ But it is illusory, if not misleading, to argue that we are keeping faith with the Framers by narrowing the powers of the central government because of the states' reserved power as sovereigns.

The Articles of Confederacy in 1777 correctly referred to the United States of America, as established in that document, as a "confederacy." In explanation, Article III decried the confederation as a 'league of friendship.' Article II provided that "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States in Congress assembled." There is no equivalent provision in our Constitution; the tenth amendment falls short of equivalency.³⁷

The ineffectiveness of the confederacy to function is too well known to discuss at any length. In No. 15 of *The Federalist*, Alexander Hamilton pointed out: "The great and radical vice in the construction of the existing confederation, is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra-distinguished from the INDIVIDUALS of whom they consist."³⁸ Many years later, Professor Wechsler agreed with that assessment of the essence of our federalism: "Our constitution makers established a central government authorized to act directly upon individuals through its own agencies—and thus formed a

36 See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); sources cited in *Developments in the Law, supra*, at 1328-29 n.20.

37 See note 24 *supra*.

38 THE FEDERALIST NO. 15, at 108 (C. Rossiter ed. 1961) (emphasis added).

nation capable of function and of growth."³⁹

"We the People," the opening clause of the Preamble to the Constitution, were fighting words to the anti-Federalists. Patrick Henry in the ratifying convention in Virginia asked: "Who authorized them to speak the language of *We, the people*, instead of *We, the States*? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states." Edmund Pendleton replied: "[W]ho but the people can delegate powers? Who but the people have a right to form government?"⁴⁰

James Madison, joint author of *The Federalist* with Alexander Hamilton and John Jay, was closer in his thinking to Hamilton's than to Thomas Jefferson's.⁴¹ Irving Brant has written: "State sovereignty had virtually no place in the scheme of government Madison outlined to Washington, Randolph and Jefferson on the eve of the Constitutional Convention. The state governments were to be regarded as 'subordinately useful' local authorities subject to 'a due supremacy of the national authority.'"⁴² Madison asked: "Was, then, the American Revolution effected, . . . was the precious blood of thousands spilt, . . . not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?"⁴³ Although Madison argued strongly for the first ten amendments, he seems to have attached little importance to the tenth amendment. In the de-

39 Wechsler, *supra* note 5, at 543.

40 3 J. ELLIOTT, ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 22, 37 (2d ed. 1836).

41 One passage from *The Federalist* frequently quoted by anti-Federalists, dual federalists, and new federalists is the following statement by Madison:

The 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. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 293 (C. Rossiter ed. 1961).

But as Brant observes: "Quoted out of context, as it has been many times, this appears to carry Madison's strict construction back to the *Federalist* Papers. In reality he was minimizing the sacrifice of state sovereignty in order to bulwark a doctrine of implied powers as broad as Marshall's." I. BRANT, *supra* note 11, at 182.

42 I. BRANT, *supra* note 11, at 13.

43 THE FEDERALIST NO. 45, at 289 (C. Rossiter ed. 1961).

bate on Hamilton's proposal to establish a national bank, while the amendment was pending, Madison declared: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."⁴⁴

Hamilton put it well in No. 15 of *The Federalist*: "There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty. . . . But if . . . we still will adhere to the design of a national government . . . we must extend the authority of the Union to the persons of the citizens—the only proper objects of government."⁴⁵ The anti-Federalists, he said, "aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union and complete independence in the members . . . [a] political monster."⁴⁶ As Professor Wechsler put it, Hamilton recognized federalism as "the means and price of the formation of the Union."⁴⁷

What the Framers did was to establish a new kind of government structure. No one understood this better than Madison:

The proposed Constitution, therefore, . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.⁴⁸

In other words, the Framers altered traditional federalism by subtracting elements characteristic of classic federalism—e.g., the complete sovereignty of member states—and adding elements national in character. Tocqueville, who had studied *The Federalist* carefully, discerningly described the United States government in these terms:

In this case the central power acts directly upon the governed, whom it rules and judges in the same manner as a national gov-

44 2 ANNALS OF CONGRESS 1897 (1791).

45 THE FEDERALIST NO. 15, at 108-09 (C. Rossiter ed. 1961).

46 *Id.* at 108.

47 Wechsler, *supra* note 5, at 544.

48 THE FEDERALIST NO. 39, at 246 (C. Rossiter ed. 1961).

ernment, but in a more limited circle. Evidently this is no longer a federal government, but an incomplete national government, which is neither exactly national nor exactly federal; but the new word which ought to express this novel thing does not yet exist.⁴⁹

Looking back to the Constitutional Convention and to *The Federalist*, it would appear that the Framers' principal concern was to establish the national government as truly sovereign. The supremacy clause recognized the dominance of the national government in conflicts with the states. The commerce clause was virtually limitless in its reach. "[W]hen the Federal Government is asserting its sovereign power to regulate commerce," as Justice Holmes wrote, "it is not a controversy between equals The interests of the nation are more important than those of any states."⁵⁰ Similarly, while the federal government is one of enumerated powers, the Hamiltonian theory held it to be a truly sovereign government within the scope of these powers, "under no constitutional compulsion . . . to take account of the coexistence of the states or to concern itself to preserve any particular relationship of power between itself and the states. And this was the theory of the men who 'put across' the Constitution and who set the national government going. Also, it is the theory which underlies Chief Justice Marshall's famous decisions."⁵¹

Nevertheless, dual federalism has survived the Marshall Court, the Civil War and the Civil War amendments, the concentration of federal power in the 1930's, as well as the further concentration of powers in the federal government brought about by two World Wars and the civil rights litigation and legislation. Thomas Jefferson is still an active spirit. By 1978, protean James Madison had changed his spiritual body to one more like Jefferson's.⁵² Both hover as omnipresences over any judicial decision involving a possible conflict between a state's interests and the national government's interests.

It may be that the federal structure *was* bruised by heavy judicial emphasis on the rights of individuals, particularly through the incorporation of almost all the rights of the first eight amendments into the fourteenth amendment. It is striking indeed that so many of the authors in this symposium, called upon to write on the subject of "Civil Rights and Federalism," have focused on the growing role of the *states* in protecting civil rights, in some cases going beyond Supreme Court guidelines.

49 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 159 (P. Bradley ed. 1945).

50 *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925).

51 E. CORWIN, *supra* note 3, at 47 (emphasis omitted).

52 In 1798 Madison authored the Virginia Resolutions. *See* note 11 *supra*.

Fortunately for the development of civil rights, we live and enjoy Jeffersonian individual liberties and rights in a world protected by Alexander Hamilton and the James Madison of the Constitutional Convention and *The Federalist*. Were it not for federal courts willing to protect federally guaranteed rights at the expense of state rights, freedom riders, peaceful marchers, protesters delivering handbills, demonstrators kneeling in prayer on the steps of segregated churches, and other advocates of civil rights would have languished—who knows how long—in local jails while they pursued their remedies in state courts. Although the substantive source of civil rights and civil liberties lies preeminently in article V of the Constitution, the first eight amendments, and the Civil War amendments, the predicate for enforcement of constitutional rights lies in Madison's foresight in insisting on a judiciary that would exercise a federalizing function as well as a dispute settling function. Some members of the Convention argued that state judges would uphold the federal Constitution. This convention is echoed today in many levels of discussion and, of course, most federal systems do not have two sets of courts. Madison insisted:

[U]nless inferior tribunals were dispersed throughout the republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree. . . . What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. . . . An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would be the mere trunk of a body, without arms or legs to act or move.⁵³

The New Federalism is not the federalism of the Framers. It would have shocked Madison and Hamilton. John Marshall could not have lived with it. It involves a recognition of states' rights that seems to extend beyond "Our Federalism" of Justice Black. In spite of *Younger*, the New Federalism appears, at least to the writer, out of character for Justice Black, who believed firmly in the doctrine of incorporation as the basis for far-reaching incursions into state law. Indeed, the New Federalism seems close to the Dual Federalism of the Taney Court and the Waite Court.

In all the great crises in our history—the adoption of the Constitution of 1787, the Civil War, the Great Depression, the New Deal,

53 5 J. ELLIOTT, *ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION* 159 (2d ed. 1836)(emphasis in original).

World Wars I and II, and the civil rights movement—state interests and state sovereignty have necessarily yielded to national interests and national sovereignty. Even aside from the centripetal effect of a national crisis, the transformation of our one-time simple agrarian society into a complicated, high-technology, industrial society has inevitably concentrated power in the national government. This concentration of national power necessarily demands national legal supremacy.

Counterforces of decentralization and deregulation, legitimated recently by a judicial shift of emphasis in the direction of more state and local controls, just may be the right medicine for overcentralization. Just now, the states may be the proper laboratories for the experimentation that Justice Brandeis had in mind as one of the roles of the states.⁵⁴ Certainly, no one should object if the states which at one time, in all three branches of government, turned their backs on civil rights, now face forward and vigorously enforce state constitutional rights arguably as important to individual rights and to justice as federally guaranteed rights. If this new activity reduces the burdensome caseload of the Supreme Court, so much the better. There is no necessary conflict between the nation and a state when a state court goes beyond the Supreme Court in the protection of human rights. Problems arise when state standards fall short of federal standards.

Federalism is alive and well and living in the United States. I conclude, deferentially however, because of my great respect for the Supreme Court and for more learned scholars than I, that the Framers would have given little support to the extension of state sovereignty as exemplified in the so-called "New Federalism." The Framers put their faith in a strong national government, supported by federal legal supremacy, as Madison and Hamilton envisioned it and as John Marshall expounded it.

54 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1931) (Brandeis, J., dissenting).