Comments

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Federalism: Finding Meaning Through Historical Analysis

INTRODUCTION

The rebirth of the conservative wing of the Republican Party throughout the 1980s, culminating in the 1994 Republican Revolution, re-familiarized the American citizenry with the concepts of federalism, or the division of sovereignty between the federal and state governments. The rejuvenated states' rights mantra was typified by President Ronald Reagan's pedagogical rants to keep the federal government "off the backs of the American people,"[1] and later by the Contract with America.[2] The renewed debate gave a voice to Americans disenchanted by the federal government's expansion in the post-New Deal era, bringing new liberalized social and economic programs into many otherwise conservative states or localities. Consequently, the federalism debate ignited a new round of arguments by politicians, academics, and judges concerning the original intent of the Framers of the Constitution, and the instructive value of the Tenth Amendment in particular.

The political debate surrounding federalism has its historical

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[1] STEPHEN J. WAYNE ET AL., THE POLITICS OF AMERICAN GOVERNMENT 64 (2d ed. 1997).

[2] David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma over "Federal" Power*, 27 CAP. U. L. REV. 529, 529 (1999). The Contract with America was a political platform created by Republicans in 1994, led by Newt Gingrich, centered on swinging the pendulum of federalism away from the federal government, back toward state and local governmental control. WAYNE ET AL., *supra* note 1, at 71.

origins in the American Revolution. While uniform aspirations of shedding the tyrannical cloak of the British monarchical rule fused an American coalition during the Revolutionary War, the inevitable consequence of success—the creation of a new government that bound the thirteen colonial states—exposed the founding generation's "fundamentally different conclusions about what the American Revolution meant."[3] From the implementation of the Articles of Confederation to the creation of the secular American Bible—the Constitution—politically incompatible notions of revolutionary intentions led to the explosive and fractious debates of the 1790s.[4] In the wake of these polarizing debates arose the two-party system and dichotomous atmosphere that continues to permeate the American political establishment.[5] At the very heart of these ideological conflicts is federalism, or, more specifically, the unresolved and mutable determination as to what level of interaction the federal or state governments should exercise in the lives of Americans.[6]

The American debate over federalism has taken a legal form through the structural and theoretical analysis of the Constitution and its "meaning." This Comment will illuminate the "Great American Debate"[7] by providing a critical examination of the historical and philosophical underpinnings of federalism arising out of the American Revolution, focusing on the interplay and contributions of perhaps the three most influential members of the founding generation: Thomas Jefferson, James Madison, and John Marshall. This Comment aims to demonstrate that Madison's moderate federalism bearings constitute the most pragmatic balance of the theoretical desires for individualism espoused by Jefferson and the need to employ a more functional federal structure, as indicated in Marshall's nationalism. In addition, this Comment will explore the popular states' rights refrain

[3] JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 223 (2000).

[4] *Id.* at 78.

[5] *See id.* at 15.

[6] *See* WAYNE ET AL., *supra* note 1, at 62.

[7] This is simply the author's phraseology for the federalism debate. Federalism has continued to be at the heart of a great many legal and political debates since the American constitutional founding, as society struggles to determine which level of government should have the responsibility of regulating controversial issues such as abortion, environmental issues, firearms, minimum wages, drinking ages, and so forth. *See id.*

to the Tenth Amendment by focusing on the Amendment's historical origin, purpose, and most genuine interpretation.

Ultimately, the intent of this Comment is to echo a growing consensus among historians dispelling the conventional expectation that the Founding Fathers acted indivisibly to establish a government of definite design and purpose, manifested through the Constitution. Quite to the contrary, "[a]ny effort to analyze this debate in the expectation of producing a definitive understanding of what the Constitution originally meant to Americans at the moment of its adoption must accordingly fall short of perfection."[8] Similarly, differing understandings of the Tenth Amendment's role in the constitutional system have plagued its existence. However, it is the author's contention that the debate surrounding the adoption of the Tenth Amendment clarified its role as a mere "truism,"[9] rather than as a rule of interpretation.

Temporal resolutions to the federalism debate have profound effects on the regulation of popular and controversial issues such as abortion, restrictions on firearms, minimum wages, environmental rules, and so forth.[10] The recent election of George W. Bush, with the potential to restructure the U.S. Supreme Court in the image of his own conservative beliefs, may revive, with high ferocity, the partisan debate over federalism in the form of confirmation hearings. More importantly, it seems particularly likely, considering the Court's recent flirtations with reinvigorating the Tenth Amendment as an affirmative restraint on federal power, that the next Supreme Court nominees will be intimately probed for their Tenth Amendment views. The Supreme Court is only "one vote away . . . from fundamentally redefining the limits on federal power in a way that could undo sixty years of social and economic development."[11] In that regard, a nominee's historical understanding of the federalism debate and, more specifically, interpretation of the Tenth Amendment represents a sound indicator of that nominee's commitment to federalism. Therefore, a broader understanding of the origins and Framers' intent concerning federalism is critical

[8] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 134 (1996).

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

[10] WAYNE ET AL., *supra* note 1, at 62.

[11] Alan Brinkley, *The Assault on Government*, *in* NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION 15, 18-19 (1997).

in formulating an opinion that will guide legal and political minds through the crucible that is the Great American Debate.

Part I will examine the concept of federalism at the inception of the Constitution, focusing on the reasons for developing a new constitutional framework and the different perspectives of those charged with that duty. Part II will critically analyze three very different perspectives by crucial actors in the foundation of the United States: Thomas Jefferson, James Madison, and Chief Justice John Marshall. This Comment demonstrates that in the continuum between strict individualism, advocated by Jefferson, and a resolute adherence to nationalism, as promulgated by Justice Marshall, James Madison's more impartial position constitutes the most sound expression of federalism. Finally, Part III will critically examine the historical debate encompassing the adoption of the Tenth Amendment and the two modern legal approaches derived from it, drawing the conclusion that this amendment fails to act as a substantive limitation on federal power.

I

THE HISTORICAL AND PHILOSOPHICAL UNDERPINNINGS OF FEDERALISM IN THE CREATION OF THE CONSTITUTION

"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."[12] Such philosophical generalities of federalism, as conceived by the Founding Fathers and placed in the Constitution, remain a structural concept of vague meaning.[13] On a theoretical level, the division of power between "two distinct governments" enables the federal and state governments to check one another, providing greater protection to the American people by not allowing either government to become too encroaching.[14] Each sphere of sovereignty, state and federal, is to zealously guard its realm of dominion from the aggrandizements of the other. Ideally, protection is available through a recourse to the electorate. Justice Anthony M. Kennedy, more eloquent in his description of federalism, has noted that "the Framers split the atom of sover-

[12] THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Willis ed., 1982).
[13] *See* RAVOKE, *supra* note 8, at 167.
[14] THE FEDERALIST NO. 51, at 264 (James Madison) (Garry Willis ed., 1982).

eignty . . . [so] that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[15]

The constitutional parameters of federalism are laid out in "the enumeration of Congress' powers in Article I, Section 8; the undefined powers implied by the Necessary and Proper Clause; the General Welfare Clause; the Supremacy Clause; and the Tenth Amendment's reservation of powers to the states 'or to the people.'"[16] These provisions, either granting federal power over some aspect of society or expounding on the breadth of federal power in those areas, leave room for varying interpretations of the extent of those powers by virtue of the vague language employed. To relegate federalism to a hardened edict of strict formulation may run contrary to the Framers' intent, as the creation of two competing governments, each designed to confine the other within its appropriate domain, provide structural protection to the citizenry—"[a]mbition must be made to counteract ambition."[17] In other words, had the Framers intended to create a federal system with definite boundaries for the federal and state governments, they would have implemented more exacting terminology than applied in the vague empowerment provisions listed above.

The conceptual origin of American federalism is located in the Revolutionary Era. The original thirteen British colonies consolidated their efforts to castigate Britain and assure their mutual defense from outside forces seeking to capitalize on the colonies' precarious responsibility of establishing new governments to fill the void left by the elimination of British rule.[18] The colonies, precursors to modern states, preserved that unity through the creation of the Articles of Confederation ("Articles") in 1777, ratified in 1781.[19] The Articles established a confederation of the thirteen colonies held together loosely by a weak federal government, which was predominately charged with foreign relations and security.[20] Unfortunately, the folly of the Articles' faith in good governance by the states became evident almost

[15] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., dissenting).

[16] Sprick, *supra* note 2, at 530.

[17] Madison, *supra* note 14, at 262-64.

[18] *See* WAYNE ET AL., *supra* note 1, at 33-34.

[19] *Id.* at 34.

[20] *See id.* at 35.

immediately.[21]

The federal government's inability to generate revenue or assemble the U.S. Congress without state approval constrained the federal government's ability to keep the confederation unified.[22] For example, events such as Shay's armed insurrection in Massachusetts shocked leaders within the founding generation because it exposed the potential power that organized resistance within the states could have in weakening or utterly destroying the fabric of unity tentatively established among the states under the Articles.[23] As such events bleakly foreshadowed the demise of the Union, a burgeoning resolve to mute the significance of such majoritarian revolts by expanding the powers of the federal government was strengthened.[24] The expansion of the powers of the federal government would limit the ability of groups aimed at degrading the unity of the confederation by making it more arduous to organize a movement sufficient to threaten the Union's dissolution.[25] More specifically, rather than simply commanding a majority within a state to overthrow that state's commitments to the Union, an effective rebellion, under a system of heightened federal powers, would require a similar majority among the people of the entire Union in order to allow enough states to retract their adherence to federal control to dissolve the Union through an inability to govern.[26]

Another concern that arose in the wake of the implementation of the Articles was that "the strongest tendency continually betraying [a confederation] is the members to despoil the general Government of its authorities," making the federal government incapable of defending its sphere of sovereignty from state encroachments.[27] In other words, confederacies create central governments that are inherently too weak to protect themselves from destruction by the domination of the constituent members of the confederacy.[28] "[T]he experience of the ancient and modern confederacies (including their own), the shock of Shays'

[21] *See* Sprick, *supra* note 2, at 534.

[22] *Id.*

[23] DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON & THE REPUBLICAN LEGACY 87 (1989).

[24] *Id.* at 137.

[25] *See id.*

[26] *Id.*

[27] Madison, *supra* note 12, at 233.

[28] *See id.*

armed insurrection in Massachusetts, and . . . 'the gross and disreputable inequalities which had been prominent in the internal administrations of most of the States,'" led many in the founding generation to conclude that a new system, with a stronger national government, was necessary.[29] Consequently, statesmen from every state descended upon Philadelphia, in 1787, to remedy the shortcomings of the Articles by constructing a new constitutional framework for the Union that would feature a stronger central government.[30]

The Constitution was the Framers' attempt to satisfy the preamble's stated goal of forming "a more perfect union" than the Articles of Confederation had formed. From a structural perspective, the Framers had no viable alternative to a federal system because the states, having preceded any centralized American government, could not be abolished once they were established.[31] More importantly, a vast contingent of the citizenry did not want the smaller, more personal state governments to be decommissioned, because, to many Anti-Federalists, the American Revolution was a condemnation of consolidated power.[32] Instead, these Americans believed the power of governance had been returned to the people.[33] Accordingly, as John Marshall later noted in *McCulloch v. Maryland*, the legacy of popular sovereignty was built into the constitutional structure of American government through the promulgation of a written constitution and the process of using ratifying conventions to adopt it.[34] Madison claimed the Constitution "[i]s to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves."[35] Thus, Madison believed the Constitution was a coordinate act of the people, merely organized by states for the purpose of providing a forum for ratification. This notion of popular sovereignty was later employed by the Supreme Court under nationalist Justice John Marshall to justify the enlargement of

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[29] MCCOY, *supra* note 23, at 87.

[30] *See generally* Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 40-42 (1998).

[31] WAYNE ET AL., *supra* note 1, at 47.

[32] JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 266 (1996).

[33] *Id.* at 296.

[34] 17 U.S. 316, 404-05 (1819).

[35] THE FEDERALIST NO. 39, at 192 (James Madison) (Garry Willis ed., 1982).

federal powers.[36]

The ratification debates in the states emphasized the volatile and divisive nature of federalism. In fact, the division of power between the state and federal governments was the primary issue threatening to impede the adoption of the Constitution.[37] Although the futility of the Articles was widely accepted, a sizable contingent, the Anti-Federalists, remained committed to a more intimate form of governance, whereby if the individual were not the center of the governmental system, the state should remain the principal political and legal actor.[38] As a result, the Constitution represented an aversion to the spirit of the American Revolution within Anti-Federalist ranks, because it invoked "dread of the inevitable corruptions that result when unseen rulers congregate in distant places."[39] In essence, the Anti-Federalists feared the federal government's potential for future aggrandizement, quashing any state sovereignty. In a similar vein, many opponents of the Constitution were especially concerned with the document's failure to delineate a set of rights that would protect "those freedoms that no federal government could violate."[40] Moreover, the Anti-Federalists coalesced around the argument that "no republican constitution could be complete or safe unless it contained a declaration of the reserved rights of the people, however partial or imperfect."[41]

Anti-Federalist fears of federal aggrandizement constituted a valid concern because Federalists, supporters of the Constitution, disproportionately represented the upper crust of society, particularly with respect to wealth and education.[42] By contrast, the Anti-Federalists, and later the populist Republican Party under Thomas Jefferson, drew "support from less elite elements of society."[43] As the demographics suggest, the fulmination against federal consolidation was really a fear that a new American aristocracy would be erected, giving the "nobility" a stranglehold on power. Having tasted a new realm of freedom since the Revolu-

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[36] *See* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 118 (1996).

[37] *See* Sprick, *supra* note 2, at 533-34.

[38] *See*, *e.g.*, RAKOVE, *supra* note 8, at 188-91; *see also* ELLIS, *supra* note 32, at 96.

[39] ELLIS, *supra* note 3, at 9.

[40] ELLIS, *supra* note 32, at 122.

[41] RAKOVE, *supra* note 8, at 147.

[42] JOHN F. BIBBY, POLITICS, PARTIES, AND ELECTIONS IN AMERICA 29 (4th ed. 2000).

[43] *Id.*

tion, citizens of the Union were reluctant to relinquish or be divested of their newly acquired freedoms and power under popular sovereignty.

Federalists, hoping to empower the federal government in order to create a cohesive union of states that would not fracture, believed that such unity was necessary in a popular democracy to avoid the forces of faction that would work to split the states into distinctly separate sovereign entities.[44] In fact, some politically savvy Federalists began suggesting that the challenge of federalism would be for the federal government to quell "the political advantages the states would enjoy in commanding the loyalty of the people," creating a threat that the states would impose upon the federal government's constitutional realm of sovereignty.[45] By suggesting the converse of the Anti-Federalists' argument, the Federalists could generate confusion as to the inevitable repercussions of federalism. This enabled them to defuse a potentially cutting political issue within the state ratifying conventions, as Federalists could assert that increased federal power was necessary to properly bind the Union and check the otherwise limitless power the states would possess due to the states' favorable allegiance from the citizens.[46] It is important to remember that the states, having preexisted the Union in a colonial form, appeared the natural means of defining sovereignty in the vacuum created by the expulsion of British rule. Moreover, citizens were familiar with identifying themselves by colony or state, and, therefore, in an era recognized for its castigation of consolidated government, it seemed logical to assume citizen fidelity would reside in the states.[47]

While solidifying their resolve to strengthen the federal government, the Federalists ultimately convinced the Anti-Federalists to support the new Constitution in an attempt to remedy the deficiencies of the Articles of Confederation.[48] However, implicit within the agreement to obtain such support from critical members of the Anti-Federalist movement was the understanding that a Bill of Rights would be later added to the Constitution

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[44] Kathleen M. Sullivan, *The Contemporary Relevance of The Federalist*, *in* NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION 7, 8 (1997).

[45] RAKOVE, *supra* note 8, at 171.

[46] *Id.*

[47] *See id.*

[48] Sprick, *supra* note 2, at 533-34.

through the amendment process.[49] Federalists deemed that concession inconsequential, although politically expedient toward the end of ratification, because the federal government had not, to their minds, been granted the power to regulate most of the areas Anti-Federalists wanted protected in a Bill of Rights.[50]

Virginian Thomas Jefferson, in particular, was a catalyst for the agreement to include a Bill of Rights as he conditioned his support for ratification upon its inclusion.[51] Jefferson, notorious for his advocacy of states' rights, impressed upon Federalist leaders the reality that the Framers may have failed, albeit unintentionally, to create a federal government based only on enumerated powers.[52] Federalists, led by another Virginian, James Madison, perceiving the political value in Jefferson's support for ratification, concluded that "the Bill of Rights was needed as an additional assurance against the abuse of federal powers, by identifying certain prohibited means to Congress' exercise of its legitimate ends, the enumerated powers."[53] Madison's support for the Bill of Rights was at least partially politically driven, as the Federalists barely won in the Virginia ratifying convention and Madison had to crystallize Virginia's support if he was to be elected to Congress from that state.[54] Madison, as a Virginian, likely recognized the novelty of avoiding conflict with those seen as ardent protectors of Virginia's interests, such as Jefferson. Consequently, Madison not only supported the supplementation of the Constitution with a Bill of Rights, despite believing it largely unnecessary, he also drafted and proposed the amendments that eventually became the Bill of Rights in the First Congress.[55]

The ratification debates, and more specifically the debate over the proper balance of sovereignty under federalism, exposed a great political divide that has marked American government ever since. In the 1790s, after ratification placed the duty of creating a new government in the past, the political division became a hard-

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[49] *Id.*

[50] Peter A. Lauricella, *The Real "Contract with America:" The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1391 (1997).

[51] *See* ELLIS, *supra* note 32, at 123-24.

[52] David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 348 (1996).

[53] *Id.* at 349.

[54] MCCOY, *supra* note 23, at 89.

[55] ELLIS, *supra* note 3, at 53.

ened ideological dichotomy.[56] Sadly, differing views of the American Revolution's meaning led to the digression of "[t]he political dialogue within the highest echelon of the revolutionary generation," producing "a decade-long shouting match."[57] To those who championed the rights of the states, led by Thomas Jefferson, the 1790s were a betrayal of the revolutionary fervor of popular sovereignty espoused in the 1770s, because the federal government moved to assume powers that they felt were reserved to the states.[58]

These Republicans, as they came to be known, pointed to the George Washington administration's fiscal policies, as fashioned by Alexander Hamilton, as the ultimate betrayal of revolutionary principles.[59] For instance, Hamilton's policy included a measure to assume state debts arising from the Revolutionary War.[60] This proposal incensed Republicans, who believed it to be a blatant step toward federal aggrandizement because it would create an obvious need for the federal government to employ its taxation power to alleviate the debt assumed.[61] After all, taxation was seen by many then as it is seen by many today, a means of exerting control.[62] Nevertheless, for the Federalist Party, the Republicans' adversary, the 1790s allowed America to begin to shake out the rhetorical flights of idealism that were customary in reference to the Revolution, expressing a near complete devotion to individual rights, from the practical operation of government found in the progression towards nationalism. Specifically, the 1790s saw the federal government begin to attain the level of power that many Federalists believed was both necessary and manifested by the discharge of the Articles in favor of the Constitution.

In the tumultuous period following the American Revolution, in which differing ideals for a popular democracy were exposed within the founding generation, arose the dichotomies that have encompassed American society ever since: Federalist or Republican; nationalist or individualist; liberal or conservative.[63] Pro-

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[56] *Id.* at 16.
[57] *Id.*
[58] ELLIS, *supra* note 32, at 304.
[59] *Id.* at 145.
[60] ELLIS, *supra* note 3, at 48.
[61] *See* ELLIS, *supra* note 32, at 155.
[62] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).
[63] *See* ELLIS, *supra* note 3, at 15.

fessor Joseph J. Ellis contends that these dichotomies arose from the Framers' different views as to when America truly experienced her founding moment.[64] Those of the Republican persuasion, Ellis believes, were consumed by the theory of individualism and the disposal of a powerful central government far from the citizen and the citizen's immediate community.[65] This notion of individualism was prevalent in 1776, as evidenced by the idealistic language of nearly inexhaustible freedom present in the Declaration of Independence.[66] On the other hand, Federalists, conscious of the structural frustrations caused by the Articles of Confederation, discussed above, sought to manipulate the balance of federalism to pragmatically resolve the shortcomings of individualism.[67] Professor Ellis notes that an enhanced sense of nationalism marked the constitutional founding in 1787 and 1788.[68] Regardless, two dominant ideological paradigms toward federalism emerged from this era: the states' rights view, as articulated by Jefferson, and the nationalist view, as espoused by Justice John Marshall. These vanguard members of the founding generation, with the addition of James Madison's more moderate position, provide an illuminating panorama of the varying perspectives on federalism and dispel any notion that there exists a uniform original intent that can guide modern decisions on federalism issues.

II

THREE FOUNDING VIEWS ON THE ROLE OF FEDERALISM

Within the founding generation there are, arguably, no three more important figures than Thomas Jefferson, James Madison, and Chief Justice John Marshall. Jefferson played the role of literary craftsman and lead political statesmen for formation of a government predicated upon individual rights.[69] In fact, Jefferson is accredited with the most poignant articulations of personal freedoms as an imperative to democratic societies.[70] James Madison was perhaps the most adept and pragmatic tactician in

[64] *Id.* at 9.
[65] *Id.*
[66] *Id.*
[67] *See id.*
[68] *Id.* at 8.
[69] ELLIS, *supra* note 32, at 11.
[70] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

the founding generation.[71] Madison's eminent political intelligence enabled him to construct a constitutional framework that gingerly straddled application as a consolidated nation and a confederation of sovereign states.[72] Essentially, the Constitution was an attempt to provide the citizens of the various states the maximum amount of personal freedom while preserving cohesion to the Union.[73] John Marshall, on the other hand, had the unenviable task of transforming "the constitutional framework into the reality of decided cases."[74] In that endeavor, Marshall employed a nationalist sentiment that challenged the doctrine of states' rights and provided precedent for expanding federal powers.[75] Through examination of these three American pioneers it is possible not only to determine the origins of the contemporary federalism debate, but also to understand the strengths and weaknesses of individualism and nationalism at the time of founding.

A. Thomas Jefferson

On one extreme of mainstream political thought during the founding generation sat Thomas Jefferson. Jefferson's public pronouncements on individual liberty and disparagement of the intrusive effects of the Constitution on state governance made him the discernable leader of a populist movement that remained salient following the American Revolution.[76] A genius as a rhetorician and visionary, evidenced in his drafting of the Declaration of Independence, Jefferson captivated the imagination of large segments of the population that yearned for a justification for fighting the Revolutionary War and were committed to the individual empowerment it promised.[77]

Jefferson's thoughts, however, were more impressive theoretically than they were in practice.[78] In fact, he was often incapable of differentiating idealistic perception from a pragmatic political reality, as evidenced by Madison's efforts to harness Jefferson's

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[71] RAKOVE, *supra* note 8, at 37.

[72] *Id.* at 168.

[73] *See id.*

[74] Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 95 (1995).

[75] HOBSON, *supra* note 36, at 148.

[76] *See* ELLIS, *supra* note 32, at 266.

[77] *See id.* at 46.

[78] *Id.* at 164.

extemporaneous solutions long enough to explain, and often disavow, their practical application in the American constitutional system.[79] Nonetheless, when Jefferson, the trusted literary craftsman famed for showing his democratic convictions through populous rhetoric, warned of a potential infringement on their newly acquired freedoms, people listened. For example, Jefferson stated:

> I see, . . . and with the deepest affliction, the rapid strides with which the federal branch of our Government is advancing toward the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that too, by constructions which, if legitimate, leave no limits to their power.[80]

The American penchant for dichotomy was embodied in Jefferson's struggle to cope with the moral dichotomies that stewed in his mind.[81] These dichotomies led Jefferson to become an ardent partisan, convinced that those who were his political opponents were "apostates and heretics and traitors to the cause of American Independence."[82] Unfortunately, the predilection to view the world in simplistic dichotomies caused Jefferson to confuse nationalist attempts to make a more cohesive band of states with the desire to preserve a British-styled monarchy.[83] The inability to conceive of differing means of employing democracy pushed Jefferson to the dramatic conclusion that those opposed to his expansive support for individual liberties and control were evil. As a result, he tended to ignore the historical lesson provided by the failure of the Articles of Confederation that a stronger federal government was necessary to preserve the Union.

The true spirit of the American Revolution remained clear to Jefferson, "[m]y general plan would be, to make the States one as to everything connected with foreign nations, and several as to everything purely domestic."[84] Despite such a succinct descrip-

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[79] *Id.* at 131-32.

[80] THOMAS JEFFERSON, *On States Rights: Letter to William B. Giles* (Dec. 26, 1825), *in* LETTERS AND ADDRESSES OF THOMAS JEFFERSON 287, 287 (William B. Parker & Jonas Viles eds., 1905).

[81] ELLIS, *supra* note 32, at 191.

[82] *Id.*

[83] *See id.* at 305.

[84] THOMAS JEFFERSON, *Division of Authority in Government: Letter to Edward Carrington* (Aug. 4, 1787), *in* LETTERS AND ADDRESSES OF THOMAS JEFFERSON, *supra* note 80 at 63.

tion of federalism's proper application, it neglects the philosophical beliefs that belie his understanding of democracy. To Jefferson, the message of contemporary writers such as John Locke demarcated government's prudent end, namely that the government that governs least governs best.[85] This vision became transposed in the minds of many within the founding generation, Jefferson in particular, symbolizing the true meaning of the American Revolution.[86] Consolidated power was to be destroyed to return power to the people.[87]

While a desire for popular sovereignty was hardly objectionable to the vast majority of revolutionary Americans, Jefferson's idealism carried individualism to what seemed an absurd extreme.[88] Instead of advocating the mere rollback of consolidated power, Jefferson sought to limit governmental power altogether.[89] Professor Joseph J. Ellis claims "his mind and heart longed for a world where government itself disappeared."[90] Not surprisingly, the more practical element of the founding generation failed to take the idealistic leap of believing such a world was possible. To many, if taken to fruition, a total lack of governance appeared to be "a recipe for anarchy."[91] Fortunately for Jefferson, and perhaps American society, his personal correspondence with James Madison exposed the fallacies that Jefferson's arguments embraced prior to their publicity.[92] This offered Jefferson a chance for clarity and revision. By deconstructing the impractical components of Jefferson's theoretical government, Madison helped his compatriot charter a course toward individual liberation that encompassed the tangibility of human nature and history.[93] Furthermore, in matters concerning the Constitution, "Jefferson deferred to Madison's superior judgment. . . ."[94]

Jefferson's staunch support for the inclusion of a Bill of Rights to the Constitution demonstrated his skepticism of both the alleged confinement of federal powers to those distinctly enumerated and, more generally, the desire to expand federal control

[85] *See* ELLIS, *supra* note 32, at 119.
[86] *See id.* at 266.
[87] *Id.* at 119.
[88] *Id.*
[89] *Id.* at 354.
[90] *Id.* at 124.
[91] *Id.* at 11.
[92] *See* MCCOY, *supra* note 23, at 45.
[93] *See id.*
[94] ELLIS, *supra* note 3, at 66.

over the states and their people.[95] In Jefferson's mind, an energetic federal government would violate the original intentions of the Revolution; thus, Jefferson aimed to limit federal expansion to only those powers specifically created to remedy the perceived deficiencies of the Articles of Confederation.[96] Accordingly, the focal point of Jefferson's constitutional interpretation became the Tenth Amendment's apparent articulation of the enumerated powers doctrine, as incorporated into the Constitution through the adoption of the Bill of Rights. In fact, even prior to the adoption of the Tenth Amendment Jefferson declared:

> I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.[97]

Therefore, Jefferson suggested that federal powers should be limited to those "expressly" identified within the text of the Constitution. However, this position stands in stark contrast to both the prevailing understanding of the Tenth Amendment as it was eventually adopted and Jefferson's subsequent acknowledgement of the need for implied powers. Further explanation of the historical debate surrounding the meaning of the Tenth Amendment is warranted and provided in Part III.

Jefferson was forced to concede that the expansive language of the Necessary and Proper Clause, Article I, Section 8, importing the notion of implied powers into the Constitution, inherently cast doubt on the ability to define precise boundaries to which the federal government must adhere.[98] Nevertheless, Jefferson submitted his own interpretation of the Clause by stating that "only the means which are 'necessary' not those which are merely 'convenient' for effecting the enumerated powers" were allowed.[99] In order to qualify as "necessary" the federal action had to constitute a "means without which the grant of power

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[95] *See* ELLIS, *supra* note 32, at 122.

[96] *See id.*

[97] THOMAS JEFFERSON, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* THOMAS JEFFERSON: WRITINGS 416, 416 (Merrill D. Peterson ed., 1984).

[98] *See* Mayer, *supra* note 52, at 354-55.

[99] *Id.*

would be nugatory."[100] Still, even limiting federal powers to those explicitly enumerated, when viewed in conjunction with the Necessary and Proper Clause, makes Jefferson's hope of creating a finite "field of power" problematic.

The federal expansion of the 1790s, and Treasury Secretary Alexander Hamilton's fiscal policy in particular, pushed Jefferson, and even numerous political moderates, like Madison, to long for a return to the individualistic principles that they believed marked the Revolution.[101] Hence, Jefferson deemed his election to the presidency as a popular call for return to the philosophies of the American Revolution, thus giving him a mandate to reduce federal intrusion.[102] As a result, the "Revolution of 1800," as it became known, was a revolution of the doctrine of federalism.[103] Society had rallied around Jeffersonian ideals and placed Republicans in charge of fulfilling those ideals. Ironically, the "Revolution of 1800" had one very salient, and somewhat unexpected, result, the societal shift toward populism caused the Bill of Rights to protect minority rights from the majority's encroachment, rather than protecting states from the federal government as Jefferson had intended.[104] More importantly, it set a precedent that the bounds of federalism were to be determined at the ballot box.

B. James Madison

In his essays supporting the ratification of the Constitution, James Madison explained, "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."[105] On its face and in its spirit, this statement attests to Jefferson's basic understanding of a limited federal government. However, the significance of the statement in ascertaining the original intent of both the founding generation and of Madison himself has been dramatically overstated in debates on federalism. States' rights advocates have manipulated Madison's statements to imply that the Framers meant to

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[100] JEFFERSON, *supra* note 97, at 419.
[101] ELLIS, *supra* note 3, at 14.
[102] ELLIS, *supra* note 32, at 220.
[103] MCCOY, *supra* note 23, at 91.
[104] *Id.*
[105] Madison, *supra* note 12, at 236.

subordinate the federal government to the states.[106] Unfortunately, this interpretation ignores both the historical context in which the statement was set, and ignores Madison's more complete and complex articulations of the proper end of federalism. Although Madison expressed a strong desire to establish a limited federal government, his fear of creating a constitutional system plagued by the same debilitating deficiencies as the Articles of Confederation, namely an impotent federal government, "inclined him to err on the side of giving the Union 'all the necessary means' to secure 'the safety, liberty, and happiness of the Community.'"[107]

To understand James Madison is to recognize that his "political intelligence was eminently pragmatic."[108] Madison's contributions to the creation and ratification of the Constitution were not the postulates of a reclusive political theorist, but the practical solutions of a veteran legislator who had observed firsthand the inadequacies of the Articles of Confederation.[109] In fact, the nationalist views Madison exhibited during the Constitutional Convention of 1787, and subsequent debates over ratification, were not only cultivated from his immense historical knowledge of prior societies, but also from his service in Congress under the Articles of Confederation.[110] This early legislative experience taught Madison that "Congress lacked the authority and resources to carry out even its existing duties."[111]

Madison's constitutional desire was to "extend the sphere of republican government from the state level, where it was working so poorly, to the federal level, where majority factions were less likely to form and be oppressive. . . ."[112] Madison recognized that the Articles of Confederation had demonstrated that allowing states to exercise nearly exclusive control over domestic issues enabled factions to rise to prominence within the states, guiding state policies toward solely state ends.[113] This inevitably led the citizenry to demonstrate total devotion to the states, due

106 *See* Mayer, *supra* note 52, at 353-54.

107 RAKOVE, *supra* note 8, at 169.

108 *Id.* at 37.

109 *Id.* at 46.

110 *Id.* at 38.

111 *Id.*

112 MCCOY, *supra* note 23, at 43.

113 *See* THE FEDERALIST NO. 10, at 43-44 (James Madison) (Garry Willis ed., 1982).

to the states' ability to more immediately gratify the needs of local communities, while sacrificing the aggregate interests of the nation at large.[114] Consequently, Madison aimed to create a federal system that would equitably balance state and federal interests. To this end, Madison believed "the central achievement of the constitutional settlement of 1787-1788" was "to grant the federal government sufficient sovereignty to assure a national system of laws that all states and all individuals were obliged to obey."[115]

Beyond simply liberating the Union from its oppressive dependence on the states, Madison envisioned the Constitutional Convention as an opportunity to design a federal government that could rectify the innate defects that were stymieing the states.[116] This nationalist goal, containing paternalistic qualities, was best demonstrated by Madison's proposal to bestow in the Constitution a federal veto power over state policies and legislation.[117] While a federal veto power was never adopted, the federal government was given vast extensions of power through the broad language of the Necessary and Proper Clause, the Supremacy Clause, and other language in the Constitution. Madison justified the expansive grants of power to the federal government, fundamentally changing the structural design of the Articles of Confederation, by depending upon the structural protections created within the Constitution, such as separation of powers and reliance on the electoral process.[118]

Madison forthrightly believed in the structure of American government.[119] As a result, the appropriate remedy, in Madison's mind, for federal aggrandizement was the democratic process.[120] In other words, the electoral process is the structural mechanism employed by the Constitution to alleviate abuses of federal power.[121] To Madison, the genius of this solution is that it affords government the ability to change with the times, responding to the evolution of societal needs.[122] Furthermore, reli-

114 *Id.*

115 ELLIS, *supra* note 32, at 333.

116 RAKOVE, *supra* note 8, at 47.

117 *Id.* at 51.

118 *Id.* at 199.

119 MCCOY, *supra* note 23, at 127.

120 *See* THE FEDERALIST NO. 44, at 230 (James Madison) (Garry Willis ed., 1982).

121 *Id.*

122 *See* MCCOY, *supra* note 23, at 87.

ance on the democratic process is a valid means of determining the proper balance of federalism, as if "the people should in the future become more partial to the federal than to the State governments, . . . the people ought not surely be precluded from giving most of their confidence where they may discover it to be most due."[123] By this standard, federalism should be permitted to expand and contract according to societal desire. Additionally, Madison believed the states' responsibility is to notify the citizenry when federal encroachment becomes problematic or impermissible.[124] Essentially, Madison encouraged competition between states and federal governmental officials within the public arena, because it affords the citizenry greater information concerning the proper distribution of power under federalism.[125] Clearly, a citizenry of elevated public awareness is virtuous in a democratic society predicated upon the electoral process.

Madison's conception of a politicized federalism, with its boundaries defined at the ballot box, demonstrated his rejection of textualism. He believed a formalistic approach of adhering solely to the explicit language of the Constitution would prove untenable because the meaning of words change, causing the meaning of the Constitution to change.[126] Thus, instead of creating a noxious and inflexible framework for constitutional interpretation, Madison preferred a method by which modifications could be made when necessary. This allowed those charged with interpreting the Constitution the ability to refer to history and precedent, the touchstones of constitutional interpretation according to Madison, in order to render prudent decisions.[127] Ultimately, Madison tried to balance the need for stability in government with the notion of letting man govern himself.[128] By yielding to societal changes through the use of the democratic process, as evidenced by the amendment process, the founding generation's great accomplishment was to structurally formalize, in the Constitution, a stable governmental system that provides for the evolution of society. Upon this conception of the Constitution, Justice John Marshall's famed declaration that "we must never forget that it is a constitution we are expounding" finds

123 THE FEDERALIST NO. 46, at 238-39 (James Madison) (Garry Willis ed., 1982).
124 Madison, *supra* note 120, at 230.
125 *See id.*
126 MCCOY, *supra* note 23, at 78.
127 *Id.* at 82.
128 *See id.* at 52.

footing.[129]

Historical descriptions of James Madison as a devoted architect of and partisan for Jeffersonian democracy[130] drastically oversimplify the political ideals of a man who had a principal role in constructing the broad language in the Constitution that enabled federal expansion. In fact, Madison's "arguments for a fortified national government became the centerpiece around which all the compromises and revisions of the eventual document congealed, giving him the honorary title of 'Father of the Constitution.'"[131] He emphasized the historical foundations for the Constitution, particularly the failure of the Articles of Confederation, to support greater federal powers.[132] Even so, Madison "did not construe his conservative quest for stability, . . . , as in any sense unrepublican or inimical to the spirit of the American Revolution."[133]

Madison's apparent vacillations concerning federalism, advocating nationalist views during the creation and ratification of the Constitution and then supporting individualism from the 1790s forward, has caused him to be misunderstood and maligned by history.[134] Many of his contemporaries, factions on both sides of the federalism debate, charged him with deviating from the core principles of the American Revolution and Constitution. But, instead of changing his views, as many historians have been prone to assume, Madison was simply a political moderate stranded in a period of American history where political divisions were manifest and extremely polarizing. While Madison supported the expansion of federal powers at the constitutional founding, society continued to progress down a path of federal expansion, and, at some point along that continuum, Madison could simply no longer follow politically.[135] Moreover, Madison's political transition from a moderate nationalist to a moderate individualist represents the consummate affirmation of his belief in the political process as the proper conduit for determining the scope of feder-

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129 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

130 Jeffersonian Democracy emphasized a devotion to individualism and personal freedom from governmental intrusion. *See supra* notes 80-86 and accompanying text.

131 ELLIS, *supra* note 3, at 52.

132 MCCOY, *supra* note 23, at 127.

133 *Id.* at 52.

134 *See id.* at 89.

135 *See id.* at 127.

alism. Observing a continuous move towards federal domination of American government, Madison was allowed to shift his allegiance to the political ideology most representative of his federalism beliefs, without the restriction of constitutionally predetermined boundaries.

C. John Marshall

If Thomas Jefferson's individualism was on one polar extreme of the founding generation's political gradation, Chief Justice John Marshall's nationalism was firmly stationed on the other. The fiercest of rivals, Marshall, as Chief Justice of the Supreme Court, was the highest of the impetuous judicial appointments made by President John Adams just prior to Jefferson's inauguration.[136] Jefferson correctly interpreted Adams's actions as an attempt to preserve Federalist control of the judiciary.[137] As a result, Jefferson resented the fact that "a small remnant of diehard Federalists was manipulating its tenacious hold on the judiciary—the only branch of the federal government protected from the will of this Jeffersonian majority—to further its evil designs."[138] Although distant cousins, misunderstandings between the two pivotal leaders were likely inevitable, as Jefferson's predilection for envisioning the world as a series of strict dichotomies was simply inconsistent with Marshall's pragmatic conceptualization of varying shades of gray.[139]

John Marshall is a cornerstone in American law.[140] The Marshall Court, simply by virtue of being the first to consider controversial issues of federalism, had the responsibility of molding amorphous constitutional provisions into guiding principles of law.[141] In that endeavor, the Marshall Court's path-breaking decisions were inevitable.[142] Moreover, Marshall belonged to both the founding generation and the "subsequent generation that gave shape and substance to the Constitution," which enabled him to incorporate and manipulate the major political philosophies that emerged during the Revolutionary Era and constitu-

136 ELLIS, *supra* note 32, at 209.

137 *Id.*

138 MCCOY, *supra* note 23, at 69.

139 ELLIS, *supra* note 32, at 207-08.

140 *See* Schwartz, *supra* note 74, at 95.

141 HOBSON, *supra* note 36, at 138.

142 *Id.*

tional founding.[143] Therefore, an examination of Marshall's perception of federalism can provide insight into both the theory behind early constitutional jurisprudence on federalism and a countervailing view of Jeffersonian Democracy, as Marshall was a key voice in the nationalism movement at that time.[144]

Perhaps Marshall's most valuable talent was his seemingly beguiling ability to persuade others.[145] Jefferson considered Marshall the only person that he could not "outduel in behind-the-scenes political fighting."[146] In fact, Jefferson admitted in one humorous, yet poignant, declaration on Marshall:

> So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why if he were to ask me if it were daylight or not, I'd reply, "Sir, I don't know, I can't tell."[147]

Marshall's celebrated intellectual eminence often allowed him to arrive at the conclusion he desired, as he could simultaneously "grasp a subject in its entirety and . . . analyze its constituent parts and understand their relation to the whole" on complex constitutional issues.[148] This mental agility led many to charge that he would reach tentative conclusions on reason or principle, then look for law to support that view.[149] Moreover, Marshall's more brilliant decisions would seem directed toward the position of his adversaries, only to double back cunningly and resolve the case on contrary grounds.[150] Jefferson called this tactic "twistification."[151]

Beyond their personal objections with one another, the Jefferson and Marshall feud was predicated upon ideology. Clearly, the most salient discrepancy between Jefferson and Marshall, an individualist and nationalist respectively, remained their differing views concerning the division of government power. For instance, Marshall indignantly rejected the doctrine of states'

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143 *Id.* at ix.
144 *Id.* at 5.
145 *Id.* at 16.
146 ELLIS, *supra* note 32, at 264.
147 *Id.*
148 HOBSON, *supra* note 36, at 15.
149 *Id.* at 183.
150 ELLIS, *supra* note 32, at 208.
151 *Id.*

rights, a fundamental principle of Jeffersonian democracy.[152] States' rights advocates posited that the Constitution forged a confederation of states, where the states were the constituent parties.[153] Under this logic, the states "surrendered only that portion of their sovereignty necessary for the general government to carry out its expressly enumerated national purposes."[154] Marshall deemed the confederation theory antithetical to the doctrine of popular sovereignty, which was the actual foundation for the Constitution's authority.[155] In his view, the argument that "the states preceded and created the Union," therefore retaining inherent powers that the federal government could never supercede, confounded the fundamental truths of the American Revolution.[156] While Marshall recognized areas of reserved state powers, he viewed the Constitution as a collective act of the people, reflecting their conscious and deliberate repudiation of the league of states under the Articles of Confederation.[157] Thus, the state ratifying conventions were merely the constitutionally chosen venues to facilitate that manifestation. Marshall considered Jefferson and his Republican compatriots as people set to denigrate the Union by reverting it back to its failed confederate past, rather than promoting a unified nation.[158]

Popular sovereignty formed the foundation for Marshall's implemented conception of constitutional nationalism, which was buttressed by the Constitution's recognition of national supremacy.[159] Under the doctrine of constitutional nationalism, Marshall maintained that the federal government's powers should be broadly construed to "enable [the] government to operate effectively in performing its great national objects."[160] Consequently, the Marshall Court emphatically held that any enumerated power provided the federal government plenary authority.[161] In fact, in one of Marshall's more irradiant articulations of the federal government's primacy, he asserted "[l]et the end be legitimate, let it be within the scope of the constitution,

152 HOBSON, *supra* note 36, at 148.
153 *Id.* at 112.
154 *Id.*
155 *Id.* at 114.
156 RAKOVE, *supra* note 8, at 163.
157 HOBSON, *supra* note 36, at 114.
158 ELLIS, *supra* note 32, at 303.
159 HOBSON, *supra* note 36, at 111.
160 *Id.* at 113.
161 Sprick, *supra* note 2, at 559.

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."[162] Essentially, the Marshall Court sowed the legal seed of nationalism by weaving it into constitutional law.

The transition of federalism from a political debate, arbitrated through the electorate, into legalistic debate, resolved by the judiciary, unnerved Republicans. That anxiety seemed justified considering the Federalist domination of the federal judiciary and the Marshall Court's overt nationalist tendencies. Also, the broad judicial discretion employed by the Marshall Court on issues of constitutional law concerned vigilant Republicans, ever the protectorates of state powers, because decisions lacking textual explanations appeared to constitute judicial legislation.[163] However, "Marshall's task was to translate the constitutional framework into the reality of decided cases."[164] Accordingly, the Chief Justice wrote on a clean slate, allowing him to make path-breaking decisions simply by virtue of being the first to consider particular constitutional issues.[165]

In constructing this body of precedent through litigated cases, Marshall viewed his endorsement of national supremacy as "a conservative and defensive constitutional principle to enable the general government to freely exercise its limited powers and to resist state encroachment on its jurisdiction."[166] In other words, Marshall tried to integrate what he perceived to be the core lesson seized from the revolutionary era into constitutional doctrine, which was the principle of collectivism, a "virtuous surrender of personal, state, and sectional interests to the larger purpose of American nationhood."[167]

Today, many of Marshall's beliefs continue to permeate American constitutional doctrine and the federalism debate. For example, Marshall's enterprise to write the implied powers doctrine into constitutional law afforded President Roosevelt, during the New Deal Era, the flexibility Madison had originally intended the federal government to enjoy.[168] As a result, Marshall en-

162 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
163 HOBSON, *supra* note 36, at 49.
164 Schwartz, *supra* note 74, at 95.
165 HOBSON, *supra* note 36, at 138.
166 *Id.* at 122.
167 ELLIS, *supra* note 3, at 14.
168 *See* Sprick, *supra* note 2, at 536.

sured the Constitution would thwart the deficiencies that afflicted the Articles of Confederation, namely, a weak federal government.[169]

III

HISTORICAL ORIGINS AND PURPOSE OF THE TENTH AMENDMENT

> "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."
>
> —Tenth Amendment, ratified in 1791

As previously noted, the burgeoning power of the federal government in the twentieth century, particularly through the expanded application of the Commerce Clause, has reinvigorated advocates of states' rights in their cries for reform. Specifically, states' rights advocates desire a return of many of the responsibilities assumed by the federal government in recent decades to the state and local governments, also known as devolution federalism.[170] Not surprisingly, those advocates have selected the Tenth Amendment as their mechanism for employing devolution federalism.[171]

Further, the conservative dominance of the current Supreme Court has led many within states' rights circles to expect a triumphant importation of the Tenth Amendment as a limitation on federal powers.[172] The Court itself has provided validity to that expectation over the last few decades, as it has "increasingly revived a judicial solicitude for antifederalism."[173] Moreover, Justice Clarence Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton*[174] unmistakably called for utilization of the Tenth Amendment as a rule for constitutional interpretation.[175] This reactionary measure, designed to check federal expansions that

169 *See* RAKOVE, *supra* note 8, at 38.

170 WAYNE ET AL., *supra* note 1, at 71.

171 *See id.* at 72.

172 *See* Mayer, *supra* note 52, at 388.

173 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 115 (14th ed. 2001).

174 514 U.S. 779, 847-48 (1995). Justice Thomas's lengthy dissent specifies that "[w]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." *Id.* at 848.

175 Mayer, *supra* note 52, at 343.

transcend their alleged constitutional confines, promotes the development of the Tenth Amendment as an affirmative limitation on federal power.[176]

As commonly noted, the federal government's power over the states, predominately exerted under the Commerce Clause, has become essentially plenary.[177] Consequently, courts are required to search beyond the constitutionally enumerated federal powers to determine what powers have been reserved to the states, which inevitably leads to the accusation of judicial legislation.[178] While states' rights advocates beseech the use of the Tenth Amendment as the touchstone of constitutional interpretation,[179] at least one Founding Father, James Madison, believed constitutional interpretation should be guided by history and precedent.[180] Accordingly, no meaning can be read into the Tenth Amendment without adequate understanding of the political and historical context in which it was derived. By examining the debates surrounding the proposal and ratification of the Tenth Amendment it becomes evident that there was no universal design upon its inception. To the contrary, although Anti-Federalists generally sought to include a provision to ensure the encapsulation of the federal government within its enumerated powers, the Federalists crippled that objective by stripping the Tenth Amendment of the language necessary to provide affirmative protection.[181] Instead, Federalists, led by Madison, espoused the intent to recognize implied federal powers.[182] Part III will critically analyze the historical debate surrounding the adoption of the Tenth Amendment, as well as the two competing legal theories derived from the amendment. Ultimately, this Part will conclude that the Tenth Amendment was simply a political enticement for Anti-Federalist support of the Constitution, but lacking any substantive force.

A. Historical Background

As previously noted, when final ratification of the proposed

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176 *Id.*

177 Joseph Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 GEO. WASH. L. REV. 907, 912 (1989).

178 *See id.*

179 Mayer, *supra* note 52, at 343.

180 MCCOY, *supra* note 23, at 82.

181 *See* Lauricella, *supra* note 50, at 1392.

182 *See* Madison, *supra* note 120, at 228-229.

Constitution became tenuous in the state ratifying conventions, Federalists began contemplating potential political compromises that could be made with Anti-Federalists. Coalesced around a desire for a Bill of Rights and doubting the sufficiency of implied limitations on federal powers, the Anti-Federalists posed a substantial threat to the ratification of the new government.[183] More specifically, the broad language of the Necessary and Proper and General Welfare clauses incited fears in Anti-Federalists of potential federal encroachment on the states.[184] Recognizing the opportunity to forge an agreement, Federalists implicitly consented to the future supplementation, through the amendment process, of a list of unassailable rights that the federal government could not infringe upon.[185]

Many Federalists deemed the compromise for a Bill of Rights harmless because the Constitution's enumeration of powers granted exclusive powers to the national government, providing "an appropriate context in which to apply the traditional common law maxim of expressio unius est exclusion alterius--the inclusion of such a list of powers logically excludes others."[186] In other words, the federal government was inherently powerless to take action in areas where the Constitution failed to grant it power.[187] As a result, the First Congress, honoring the tacit agreement, superintended the proposal and debate of a compilation of amendments suggested in the state conventions.[188] The premise of the Tenth Amendment was so popular that it was the only supplemental measure requested by every state ratifying convention that proposed amendments.[189]

The proposal that was to become the Tenth Amendment was not of new design, rather it was modeled after Article II of the Articles of Confederation.[190] Article II declared that the states retained "every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States . . . ."[191]

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183 *See* McAffee, *supra* note 30, at 39.

184 Mayer, *supra* note 52, at 346.

185 Sprick, *supra* note 2, at 533-34.

186 McAffee, *supra* note 30, at 33.

187 *See* Mayer, *supra* note 52, at 345.

188 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 123 (1998).

189 *Id.*

190 Mayer, *supra* note 52, at 348.

191 ARTICLES OF CONFEDERATION, art. II, *repealed by* U.S. CONST. (emphasis added).

However, the amendment Congress proposed to promulgate, drafted by James Madison, neglected to adopt the term "expressly."[192] Many Anti-Federalists objected to the missing term, as the word "expressly" provided the vernacular teeth to the amendment by requiring that any potential federal action emanate directly from a specific enumeration within the Constitution.[193] In fact, during the debate over the adoption of the Tenth Amendment, Representative Thomas Tudor Tucker of South Carolina proposed to amend the version Madison had submitted by including the word "expressly."[194] Madison protested, citing arguments that would later prove the foundation for expanding the implied powers of the federal government, mainly Congress, to its modern dimension.[195]

To Madison, it was "unwise and impossible to attempt to 'confine a Government to the exercise of express powers' and . . . necessary to allow for 'powers of implication.'"[196] Essentially, the Tenth Amendment could remain congruent with the Framers' intentions to eradicate the problems plaguing the Articles of Confederation if the words "expressly" or "clearly" were not incorporated as limitations on the federal government.[197] Such limitations would negate the existence of implied powers, which Madison believed indispensable because "[w]ithout the substance of this power, the whole Constitution would be a dead letter."[198] Madison, in contemplation of the Constitution's ratification, had insisted that "[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means authorised [sic]; wherever a general power to do a thing is given, every particular power necessary for doing it, is included."[199]

The recognition of implied powers was a necessity because the federal government had to have the ability to employ the means required to effectuate its enumerated powers. In addition, it was imperative that the ability to select the means be pliable in order to allow the federal government to use its constitutional powers

192 *See* U.S. CONST. amend. X.
193 *See* Sprick, *supra* note 2, at 535-36.
194 Lauricella, *supra* note 50, at 1392.
195 *See* Lipner, *supra* note 177, at 923.
196 Lauricella, *supra* note 50, at 1392.
197 Sprick, *supra* note 2, at 536.
198 Madison, *supra* note 120, at 228.
199 *Id.* at 229-30.

effectively under varying and changing circumstances.[200] To embrace the word "expressly" was to "chain[ ] the federal government to a miserly interpretation of its enumerated powers."[201] After all, the implied powers were the source of constitutional flexibility Madison intended the federal government to have to prevent its futility, as witnessed under the Articles of Confederation.[202] Also, to have constitutionally named all the powers the federal government would possess would simply have been too cumbersome,[203] and inevitably would have "proven unavoidably negligent in predicting the circumstances and needs that the future would produce."[204]

In acknowledgment of the popular support for a reserved powers amendment, Madison declared that although the amendment "may be considered superfluous," there could "be no harm in making such a declaration, if gentlemen will allow that the fact is as stated."[205] The "fact" Madison refers to is the existence of implied powers.[206] Hence, the Tenth Amendment was a literal statement of a fact Madison thought obvious: those powers not granted to the federal government, explicitly or implicitly, would be retained by those who empowered the federal government to begin with, the citizenry.[207] Under this rendering, the Tenth Amendment was to be more symbolic than controlling.[208]

It was upon this conception of the Tenth Amendment that John Marshall, then a member of the Virginia ratifying convention, recognized that "[t]he men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word [expressly] in the [A]rticles of [C]onfederation, and probably omitted it, to avoid those embarrassments."[209] This understanding of the historical background of the Tenth Amendment, consistent with Madison's intentions and propensity not to restrict federal powers, justified Marshall's exposition of implied powers into the Necessary and Proper

200 Lipner, *supra* note 177, at 923.
201 *Id.* at 924.
202 *See* Sprick, *supra* note 2, at 536.
203 Madison, *supra* note 120, at 229.
204 Sprick, *supra* note 2, at 572.
205 JAMES MADISON, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), *in* JAMES MADISON: WRITINGS 437, 451 (Jack N. Rakove ed., 1999).
206 *See id.* at 447.
207 *See id.*
208 *See* Sprick, *supra* note 2, at 536.
209 *Id.*

Clause in *McCulloch v. Maryland*.[210] In *McCulloch*, Marshall explicitly proclaimed the Tenth Amendment "merely declaratory," as it reserved no affirmative power to the states that had not previously been retained without the amendment.[211]

Marshall's Madisonian approach toward the Tenth Amendment is not entirely surprising, because Madison tutored John Marshall on the Constitution during the Virginia ratifying convention.[212] Furthermore, both Madison and Marshall "believed that the essential purpose of the Constitution was to abridge the state sovereignties, to prevent the flagrant abuses committed by factious majorities in the state legislatures that were so prevalent in the 1780s."[213] A determination that the Tenth Amendment was "merely declaratory" was persuasively bolstered by the following: first, the Tenth Amendment was adopted with the words "expressly" and "clearly" noticeably absent, and, second, even some of the most staunch supporters of the Tenth Amendment conceded the existence of implied powers. As a matter of fact, Jefferson yielded in the debate over the existence and desirability of implied powers, reasoning that despite the fact that the federal government was "directed to particular objects, . . . even if the government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent."[214] Therefore, with principal representatives of individualist, moderate, and nationalist thought agreeing to the necessity of implied powers upon adoption, it would be inherently problematic, and inconsistent with history, to subsequently read the term "expressly" into the Tenth Amendment, annihilating the existence of those implied powers.

Embracing the Madisonian approach, which ruled the day upon ratification of the Tenth Amendment, one must ask, what mechanism was constructed to rectify egregious federal over-expansions? Madison, loyal to the constitutional structure of American government, depended on the political process, namely elections, to remedy federal abuses of power.[215] Therefore, as noted earlier, if federal aggrandizement were to reach a

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[210] 17 U.S. 316 (1819).

[211] *Id.* at 363.

[212] Garry Willis, *Introduction* to THE FEDERALIST PAPERS viii, xi (Garry Willis ed., 1982).

[213] HOBSON, *supra* note 36, at 208.

[214] Mayer, *supra* note 52, at 348-49.

[215] *See* Madison, *supra* note 120, at 230.

level offensive to society, the citizenry has the constitutional protections of both limited terms for elected officials, and, more importantly, the elections themselves to change federal policy.[216] While cautioning that too frequent a recourse to the people may breed popular mistrust of the Constitution,[217] Madison concluded that

> the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other.[218]

Perhaps the most striking quality of this remedial measure, and certainly the most objectionable to those of the minority position on an issue,[219] is the politicalization of federalism. Instead of distinct structural boundaries between state and federal control, the Madisionian constitutional approach leaves the division of power in the hands of the people.[220] Consequently, federalism issues not otherwise enveloped in a specific constitutional protection are subject to the whimsical ebbs and flows of public opinion.

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216 *See id.*

217 MCCOY, *supra* note 23, at 48.

218 Madison, *supra* note 123, at 237-38.

219 The minority position is a viewpoint that is currently contrary to the dominant societal position on a given issue. A recourse to the electoral process will likely prove an unsatisfactory solution to those supporting the minority position, as the minority position is likely to suffer defeat at the ballot box. For example, at the national level, 57% of Americans believe that abortion should be legal in certain situations; therefore, anti-abortion advocates wisely argue that the abortion debate is most appropriately waged at the state level, where, in many states, anti-abortion sentiment retains a more favorable status among the citizenry. The Gallup Organization, *Public Opinion About Abortion--An In-Depth Review*, *at* http://www.gallup.com/poll/specialReport/pollSummaries/sr020122iii.asp (last visited Mar. 21, 2002). Accordingly, the federalism debate adopts a peculiar dynamic, where "politicians adroitly chang[e] sides when it suits their political needs and their positions in government." Garrett Epps, *The Opportunist's Friend (and Foe): States' Rights*, N.Y. TIMES (Nov. 20, 2001), *available at* http://college3.nytimes.com/guest/articles/2001/11/20/883846.xml.

Professor Epps correctly recognizes that all people are hypocrites when it comes to states' rights, because a person's stance on federalism will be colored by his or her position on the underlying issue. *Id.* In other words, those whose position commands a majority at the national level are more likely to seek federal protection for their views, while those in the minority, perhaps better represented at the state level, will protest federal intervention on issues that are "more appropriately" resolved by the individual states. *See id.* Essentially, Professor Epps concludes, "[w]hen it suits our leaders, they are in favor of broad federal power; when it does not, they claim 'states' rights.'" *Id.*

220 *See* Madison, *supra* note 120, at 230.

Nevertheless, the Tenth Amendment, as historically adopted, was not intended to act as a substantive restraint on federal power.

B. Rule of Interpretation vs. Truism

Relegating the Tenth Amendment to a position of mere declaration is problematic for those not predisposed to assuming the Framers of the Constitution would be so cavalier.[221] But, herein lies a fallacy of the federalism debate: any attempt to understand the legal doctrine created by the Tenth Amendment should not be partitioned from the historical and political context in which it arose. Nevertheless, contemporary Anti-Federalists, ignoring the word's historical defeat, continue to read "expressly" into the Tenth Amendment, when, in actuality, the Tenth Amendment is devoid of any specific limitation that can be used to restrict federal power.[222] For example, during the 1996 presidential election, Republican nominee Bob Dole "proudly proclaimed he carried a copy of the Tenth Amendment . . . in his shirt pocket," implying that he would acknowledge greater reserved powers to the states as originally intended by that amendment.[223] Ironically, Dole's criticism of the expansion of federal powers may simultaneously enunciate an appropriate and inappropriate remedy to that supposed problem. While Dole was correct in suggesting that the contours of federalism could be altered through the election of officials dedicated to states' rights, he mistakenly invoked the Tenth Amendment as a legal restriction on the federal government's expansion.

Instead, courts must look to other substantive clauses, such as the Commerce Clause, to determine if a governmental action reaches beyond the proper exercise of federal power. This revelation led Justice Stone, in *United States v. Darby*, to famously, or infamously, depending upon one's persuasion, chime that the Tenth Amendment "states but a truism that all is retained which

221 *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting). Justice Thomas, rejecting the notion that the Tenth Amendment lacks an actual reservation of powers to the states, declared "[t]here would have been no reason to provide that where the Constitution is silent about whether a particular power resides at the state level, it might or might not do so." *Id.* However, Justice Thomas neglects to consider the political obstacle faced by the Federalists, and their attempts to blunt the practical impact of the Tenth Amendment by withholding the language that would enable it to act as an enforceable limitation to federal power. *See* discussion *infra* Part III.A.

222 Sprick, *supra* note 2, at 537.

223 *Id.* at 529.

has not been surrendered."[224] The Tenth Amendment should be interpreted in conjunction with the rest of the Constitution, requiring that all federal powers be predicated upon specific provisions within the Constitution.[225] In essence, the Constitution determines the boundaries of federalism by defining the powers bestowed upon the federal government, while utilization of those powers, discretionary to the political branches, remains subject to a structural check at the ballot box.

Despite their historically inaccurate venture to read substantive restrictions into the Tenth Amendment, modern states' rights advocates possess a valid grievance with the tremendous federal expansion in the post-New Deal era. The limitations once placed upon the federal government, as one concerned scholar noted, are "extinct like the great auk," because the advent of the Civil War Amendments and New Deal jurisprudence have enabled the federal government to swell to previously unimaginable levels.[226] For instance, the Civil War Amendments-–the Thirteenth, Fourteenth, and Fifteenth Amendments-–expanded the federal government's power by providing it with the ability to guard the rights of individual United States citizens from invasion by the states.[227] As a result, the federal government's paternalistic protection of individual rights has eroded state sovereignty by restricting regulation in constitutionally protected areas, such as abortion[228] and contraception.[229] Furthermore, the ascendancy of New Deal politics, characterized by the growth of federal regulation over business and industry in response to fledgling economic markets, induced inventive congressional manipulations of the Commerce Clause.[230] The federal commerce power became virtually unrestrained from 1937 to 1995, as any law that regulated an activity "in" or "affecting" interstate commerce was, in effect, rubber stamped as an appropriate exercise of federal power.[231] Such augmentations of the Commerce Clause, when coupled with the Supreme Court's refusal to adhere to the restrictive limitations of prior precedent,

224 312 U.S. 100, 124 (1941).

225 Sprick, *supra* note 2, at 544.

226 Lipner, *supra* note 177, at 917.

227 CONSTITUTIONAL LAW, *supra* note 173, at 423.

228 *See generally* Roe v. Wade, 410 U.S. 113 (1973).

229 *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

230 *See* Lipner, *supra* note 177, at 912.

231 CONSTITUTIONAL LAW, *supra* note 173, at 206.

produced a congressional commerce power that is basically plenary.[232]

Under the Anti-Federalist interpretation, the Tenth Amendment is a "reaffirmation of the internal limitations imposed by the concept of delegated powers," giving "the internal limitation doctrine an external mechanism for enforcement."[233] Accordingly, it is suggested that the Tenth Amendment should be understood to create a rule for interpreting the constitutional division of power established by federalism, enabling courts to void federal aggrandizements as repugnant to the Tenth Amendment.[234] Moreover, Professor David N. Mayer has adopted the position that in "American constitutional history, . . . 'from the presidency of Jefferson to that of Abraham Lincoln, the consensus was that Jefferson had been right in calling the Tenth Amendment the foundation of the constitutional union.'"[235] Mayer's position suggests a consensus was built within constitutional scholarship, or perhaps within the Supreme Court, that embraced Jefferson's predilection for interpreting the Tenth Amendment as affording the federal government only those powers expressly enumerated in the Constitution.[236]

Mayer's argument, however, ignores the political and historical circumstances surrounding the Tenth Amendment's adoption and existence. First, as previously discussed, Anti-Federalist attempts to have the word "expressly" included in the amendment plainly failed, succumbing to Madison's more pragmatic conception of implied powers. Thus, any post hoc judicial venture to read the word "expressly" into the amendment would amount to an activist attempt to implement a political position contrary to the Framers' original intent. Secondly, Mayer's belief that a con-

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[232] *See* Lipner, *supra* note 177, at 912.

[233] William T. Barrante, *States Rights and Personal Freedom Breathing Life Into the Tenth Amendment*, 63 CONN. B.J. 262, 279 (1989).

[234] Mayer, *supra* note 52, at 343. However, using the Tenth Amendment as a rule for interpreting the constitutional breakdown of federalism is inherently problematic, because the determination that the federal government exceeded its constitutional grant of power will be dependent upon interpretations of the substantive clauses, not any concrete restriction by the Tenth Amendment. In other words, the substantive clauses of the Constitution, like the Commerce Clause, will inevitably determine the appropriate breadth of federal power under federalism. Thus, the understanding of the Tenth Amendment as a "truism" is bolstered, as the federal government may only exercise those powers emanating from the substantive clauses that grant it the power to act.

[235] *Id.* at 361.

[236] *See id.*

sensus formed during the nineteenth century in support of Jefferson's limitation of federal powers to their express enumerations neglects the Marshall Court's clearest articulations of the extent of federal powers, namely *McCulloch v. Maryland*. Although Mayer considers *McCulloch* an anomaly in the Marshall Court's constitutional jurisprudence, Marshall's conclusion that the federal government has implied powers to effectuate the responsibilities it had been expressly granted remains a fundamental and foundational constitutional principle.[237] *McCulloch* clearly espoused the nationalism present on the Marshall Court.[238] Furthermore, placed in the weakest branch of government upon the Constitution's founding and facing skepticism from states' rights advocates that feared legislation from an unelected judiciary,[239] the Marshall Court prudently refrained from taking continuous swipes at state sovereignty. Systematic escalations of federal power, at the expense of the states, could have threatened the Court's legitimacy. Instead, the Marshall Court was forced, politically, to carefully select the cases in which it would challenge the doctrine of states' rights, as nationalist decisions often met overt defiance from the political branches.[240]

Although the populist movements experienced during the Jeffersonian and Jacksonian eras undoubtedly exhibited strong majorities for states' rights philosophies,[241] nationalism endured as mainstream opposition. As the minority political ideology, nationalism would have to wait until the twentieth century, under the New Deal, to experience the political clout necessary to fully utilize Marshall's conception of implied powers on a grander scale. Said differently, it took the societal shift toward nationalism, as the majority position, before it became politically and constitutionally en vogue to recognize expanded federal powers. That expansion, arguably, has employed an interpretation of the Commerce Clause that infringes on traditional state powers, totally eclipsing the level of federal control originally intended by

237 *See id.* at 363. The reader would be hard pressed to find a constitutional law course or casebook in America that does not include *McCulloch v. Maryland*.

238 HOBSON, *supra* note 36, at 10.

239 *See id.* at 49.

240 *Id.* at 178-79. Upon the Court's invalidation of a state law, President Andrew Jackson was alleged to have said, "John Marshall has made his decision, now let him enforce it." *Id.*

241 *See* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 187 (1997).

the Framers, either by enumeration or implication.[242] Moreover, there has been increased recognition that "Congress should not be permitted to interfere in any of the States' 'reserved powers' simply by calling the activity it wants to regulate 'commerce.'"[243] In fact, Professor Lawrence Tribe, in discussing the federal commerce power, observed, "[i]f states are to have any real meaning, Congress must also be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell."[244]

While this Comment is not designed to thoroughly analyze and debate the role of the Commerce Clause under the American constitutional system, suffice it to say that a legitimate argument can be made that the commerce power has far exceeded its intended utility. Yet, even accepting this premise as established, for the sake of the current argument, to contemporaneously ascribe the Tenth Amendment a role as a substantive limitation on federal powers not only is contrary to the Framers' intent upon ratification, but, more importantly, assails the constitutional protections already provided. Federalism's proper lineament, not wholly state or federal, is a query to be resolved largely by the political process. In the words of Madison, "powers are not given to any particular set of men—they are in the hands of the people—delegated to their representatives chosen for short terms . . . ."[245] As a consequence of republican democracy, the political process affords government the opportunity to stay abreast of societal changes and needs. Moreover, the judicial activism promulgated by modern states' rights advocates, creating a new limitation on federal power through the Tenth Amendment, primarily designed to check the expansion of the Commerce Clause, abdicates the American governmental blueprint of "rule by elected individuals, rather than unelected judges."[246]

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court correctly acknowledged that the Tenth Amendment was not judicially enforceable by stating that "[i]f there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look else-

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[242] *See* Mayer, *supra* note 52, at 376.

[243] Barrante, *supra* note 233, at 273.

[244] LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 310 (1978).

[245] JAMES MADISON, *Speech to the Virginia Ratifying Convention* (June 6, 1788), *in* JAMES MADISON: WRITINGS, *supra* note 205, at 354, 358.

[246] Lauricella, *supra* note 50, at 1407.

where to find them."[247] Under the rubric of limiting the federal commerce power, there appear but two adequate solutions: first, allowing the political process to reflect societal needs and desires by the election of representatives poised to confine the federal government's control; and, second, judicially restricting the commerce power to a level more congruent with the Framers' original intentions. Under the first scenario, it is emphatically the responsibility of political parties, activist groups, and state officials to expose federal encroachments on state domain to the public. States' rights advocates maintain the ability to restrict, and possibly even retract, federal expansion through a well-communicated campaign to educate the populous on the virtues of state and local control. To the second scenario, the Supreme Court, while having to negotiate almost seventy years of hostile precedent, can breach the doctrine of stare decisis by restricting congressional power under the Commerce Clause. The federal commerce power should, arguably, no longer be interpreted as plenary. As one scholar suggests, "[I]t is time that the Supreme Court rein in the Commerce Clause so that it regulates only what is truly commerce."[248]

The judicial invention of the Tenth Amendment as a substantive limitation on federal powers, on the other hand, constitutes an inappropriate remedy to combat what may be deemed an inappropriate expansion of federal power. Accordingly, the substantive limitation solution should fall in a constitutionally equivalent category to the aphorism "two wrongs don't make a right." While states' rights advocates, adopting the Jeffersonian perspective, argue that the essential purpose of a written constitution is to restrain government,[249] the Constitution was the Framers' attempt to strengthen federal powers as a remedial response to a fledgling Articles of Confederation. Additionally, it seems probable the Framers' created a written constitution, in part, because that precedent had previously been established by the Articles of Confederation,[250] and only a new document could replace it.

In *United States v. Lopez*, Justice Kennedy correctly depicted the historical intentions of Federalists, whose constitutional inter-

[247] 469 U.S. 528, 547 (1985).

[248] Barrante, *supra* note 233, at 278.

[249] Mayer, *supra* note 52, at 416.

[250] McAffee, *supra* note 30, at 33.

pretations found favor during the ratification of both the Constitution and the Bill of Rights, claiming that questions of constitutional federalism would be better left to the political process rather than the Court.[251] If, as Madison suggests, history and precedent truly are the touchstones of constitutional interpretation, then the Tenth Amendment must remain a gutted relic from our confederate past. Although its role as a rhetorical reminder of the structural limitations of federal power should be preserved, the Amendment should not become a judicially invented external mechanism for enforcing the internal limitations doctrine of delegated powers. Instead, federalism should remain a doctrine designed to facilitate societal change through the political process. The great vice and virtue of federalism is its flexibility, which is predicated upon the maturation and evolution of the public's aspirations for society.

Conclusion

The nineteenth century French political scientist Alexis de Tocqueville noted "[t]he first difficulty which Americans had to face was how to divide sovereignty so that the various states . . . continued to govern themselves in everything to do with internal prosperity but . . . the Union should still be a unit and should provide for all general needs."[252] Federalism is a structural concept designed to facilitate that division between the federal and state governments. However, in the founding generation's endeavor to establish a federal system, it was unable to develop a unified consensus as to how governmental powers should be split. The Founding Fathers were men of very different backgrounds and beliefs, who "disagreed violently with one another" about the role the state and federal governments should assume under the newly formed constitutional system.[253] As a result, federalism developed as an amorphous doctrine, characterized, at best, by the definition society temporally accords it. Regardless, vagary has become a virtue, as the undefined boundaries of federalism have enabled American government to respond to the evolution of society. Tocqueville recognized "[i]t was impossible to define in advance, completely and exactly, the share of author-

[251] 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

[252] Alexis de Tocqueville, Democracy in America 114 (J.P. Mayer ed., Harper Perennial 1969) (1966).

[253] Lipner, *supra* note 177, at 915.

ity which should go to each of these governments dividing the sovereignty," because "[w]ho could foresee every detail of a nation's life?"[254] What was foreseeable, at least to Madison, was that changes in society, both through modernization and social beliefs, would require society's ability to adapt.

While any attempt to ascertain a single original intent for the boundaries of federalism is a futile undertaking, the historical documentation of the founding generation can and should be used to cultivate a constitutional interpretation that remains genuine to the political and historical lessons the Framers had learned. With that objective in mind, the following conclusions can be drawn concerning proper understanding of federalism. First, the Constitution was the founding generation's attempt to rectify the shortcomings of the Articles of Confederation by granting the federal government greater powers, in an attempt to create a collective interest among the states, and to preserve the Union. Second, in the stratification of federalism between individualism, on the one extreme, and nationalism, on the other, the Constitution was adopted in a spirit of moderation, represented by the pragmatic design and compromises made by its principle architect, James Madison. Third, the general scope of federalism, made ambiguous through the vague language of the constitutional clauses empowering the federal government and the importation of the implied powers doctrine, is appropriately determined by the citizenry through the political process. Finally, the Tenth Amendment, principally implemented as a rhetorical political appeasement to Anti-Federalists, fails to constitute a substantive limitation on federal power.

[254] TOCQUEVILLE, *supra* note 252, at 114.