FROM FEDERAL UNION TO NATIONAL MONOLITH: MILEPOSTS IN THE DEMISE OF AMERICAN FEDERALISM

LINO A. GRAGLIA*

The Anti-Federalists were correct, as history has shown, in predicting that adoption of the Constitution would result in an all-powerful central government. Ironically, these so-called Anti-Federalists were really federalists or anti-nationalists,[1] while the Federalists were really anti-federalists or nationalists. As often happens in politics, the success of the Federalists in obtaining ratification of the Constitution was due in large part to their self-appropriation of an attractive label that better described their opponents.[2]

The Constitution was adopted upon the representation of its proponents that it would create only a limited central government with powers relating primarily to trade, finance, and defense. Most matters of domestic social policy were to be left exclusively to the states. As Madison stated in *The Federalist Number 45*:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of

* A. Dalton Cross Professor of Law, University of Texas School of Law. This paper expands on a part of Lino A. Graglia, *Judicial Review, Democracy, and Federalism*, 1991 DET. C.L. REV. 1349.

1. "[The Anti-Federalists] usually denied, in fact, that the name was either apt or just, and seldom used it themselves. They were, they often claimed, the true federalists." HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 9 (1981). Most of the Anti-Federalists were proponents of a union of partly sovereign states—a federation.

2. "Unquestionably the Federalists saw the advantage of a label that would suggest that those who opposed the Constitution also opposed such a manifestly good thing as federalism." *Id.* Some of the Anti-Federalists "seemed to think that their proper name had been filched, while their backs were turned, as it were, by the pro-Constitution party, which refused to give it back . . . ." *Id.*

the State.[3]

How, then, did it happen that today no area of social policy is beyond the constitutional authority of the national government and no area is left exclusively to the states? How and when did the federalist system on which this nation was supposedly founded come to an end? Working back through constitutional history, many events that have contributed to the demise of federalism can readily be identified.

The Supreme Court's 1954 decision in *Brown v. Board of Education*,[4] although daring and precarious at the time, has come to be seen, at least by academics and other intellectuals, as establishing the superiority of policymaking by Supreme Court justices for the nation as a whole over policymaking by mere politicians on a state-by-state basis. As a result, today cities and states are able to make policy on even so local a matter as vagrancy control only to the extent permitted by officials of the national government's judicial branch.[5]

Under President Franklin D. Roosevelt's New Deal, the federal government assumed and asserted centralized powers of economic and social control in the 1930's and 1940's far beyond anything that had previously been contemplated. The Supreme Court's abandonment in 1937 of any attempt to impose constitutional limits on these powers[6] has meant that the legislative authority of the national government would never again—with one minor exception, quickly overruled[7]—be successfully challenged on federalism grounds.

The year 1913, which saw the adoption of the Sixteenth and Seventeenth Amendments, was also a very bad one for federalism. The Sixteenth Amendment, establishing the income tax, effectively gave the national government unlimited control of the nation's wealth and, consequently, a virtually unlimited

3. THE FEDERALIST No. 45, at 292-93 (James Madison)(Clinton Rossiter ed., 1961).

4. 347 U.S. 483 (1954).

5. *See, e.g.*, Kreiner v. Bureau of Police, 765 F. Supp. 181 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992)(holding that exclusion of vagrants from public libraries does not violate the First Amendment); Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 516 (1990)(holding that restriction of panhandling on subways does not violate the First Amendment).

6. Steward Machine Co. v. Davis, 301 U.S. 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

7. National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

spending power. The Seventeenth Amendment, providing for direct election of senators, undermined the Senate's contemplated role as protector of state autonomy. By extracting money from the now-defenseless states and offering to return it with strings attached, the national government is able to control by promises of reward—some would say bribery—whatever it might be unable or unwilling to control by threat of punishment.[8]

Less frequently noted, but also of major importance to the decline of federalism, are the Supreme Court's decisions in *Champion v. Ames* (the *Lottery Case*)[9] in 1903 and *McCray v. United States*[10] (the oleomargarine tax case) in 1904. In the *Lottery Case*, the Court held that Congress could legislate to suppress gambling—that is, to advance moral ends clearly not within the intended scope of national power—by simply prohibiting the interstate shipment of lottery tickets under the pretext of exercising its power to regulate interstate commerce. In *McCray*, the Court held that Congress could eliminate margarine producers—surely the most despised and oppressed minority in American history[11]—by simply imposing an oppressive financial exaction upon them under the pretext of exercising its power to tax. In 1819, Chief Justice John Marshall, in *McCulloch v. Maryland*,[12] had said that Congress would not be permitted to use its enumerated powers as a pretext for the regulation of matters that the Constitution left exclusively to the States. The *Lottery Case* and *McCray* decisions effectively removed that limitation, and today there is nothing Congress cannot do through its powers to tax and regulate interstate commerce, if it is willing to engage in a little trickery.

Congress has no constitutional authority to prohibit kidnapping or prostitution, for example, but that hardly means that there are no federal laws on those subjects. It merely means that federal regulation is somewhat circuitous. Federal law does not prohibit kidnapping or prostitution per se (everybody knows the federal government cannot do that), but it does pro-

8. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987)(holding that congressional withholding of highway funds to encourage establishment of a minimum drinking age is a valid use of the spending power).

9. 188 U.S. 321 (1903).

10. 195 U.S. 27 (1904).

11. Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

12. 17 U.S. (4 Wheat.) 316 (1819).

hibit the transport of kidnapped persons[13] or prostitutes[14] across state lines because that is just a (wink, nudge) "regulation of interstate commerce." Theoretically, Congress has no power simply to prohibit the manufacture and sale of narcotic drugs, but Congress can and does "tax" them rather heavily. This enables Congress to require drug dealer-taxpayers to fill out various forms which, unfortunately for these individuals, are impossible to obtain.[15] Drug dealers can then be jailed, not for drug dealing, but for tax evasion. As a professor of constitutional law, my job is to teach these sleights-of-hand to a fresh crop of young innocents each year so that they may understand the true meaning of federalism today. I am always chagrined, therefore, when I hear complaints about the underhandedness of lawyers. People don't seem to appreciate that this professional competency is the result of hard work. Creating constitutional scholars is no easy task.

Surely the climactic events in our constitutional history, however, were the Civil War and the subsequent adoption of the Fourteenth Amendment. The Fourteenth Amendment, though adopted for a limited purpose—to guarantee certain basic civil rights to blacks[16]—has become our second constitution, largely replacing the first. In the hands of such skilled constitutional operatives as Justices Douglas and Brennan, the Fourteenth Amendment has become the means of converting a system of government *by* the people into a system of government *of* the people by their moral and intellectual superiors, the Justices of the Supreme Court. The people of each state, therefore, enjoy the right of self-government today only to the extent that the laws they enact do not meet the disapproval of five members of the Court.[17]

The Civil War, which precipitated the Fourteenth Amendment, established that South Carolina and the other southern states did not have that most important of all rights—recently asserted successfully by the Baltic states—the right of freedom of *dis*association. Although the southern states had voluntarily

13. 18 U.S.C. §§ 1201-02 (1988).

14. 18 U.S.C. § 2421 (1988).

15. *See* Minor v. United States, 396 U.S. 87 (1969).

16. For an account of state laws which infringed on the civil rights of blacks prior to adoption of the Fourteenth Amendment, see CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 110-17 (Paul A. Freund ed., 1971).

17. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

joined the Union, the North had grown so attached to southerners as to prefer killing them to permitting them to depart. Even Patrick Henry, the most ardent Anti-Federalist, could not have imagined in his worst nightmare that in signing the Constitution the states had created a central government so powerful and independent that it would be willing and able to wage war against them. The loss of the right to secede cost the states their ultimate defense against national encroachment upon any element of independence. From then on, as we have seen, the national government, and particularly the courts of the national government, have acted with the full realization that the states were now helpless before national power.

Federalism also suffered a serious blow in 1819 when Chief Justice John Marshall, in *McCulloch v. Maryland*,[18] interpreted congressional power so broadly that the practical effect was to abandon judicially-imposed limits—except for the prohibition of pretext usages later abandoned in the *Lottery Case* and *McCray*. Five years later, in *Gibbons v. Ogden*,[19] the Court came very close to holding explicitly that the scope of Congress' power under the Commerce Clause did not present a justiciable question, but only a "political question" for decision by Congress itself.[20]

Finally, it can be argued that the Framers of the Constitution never intended to create a federalist system in the first place, and that the emergence of a unified central government was inevitable from the beginning. James Madison and Alexander Hamilton, the principal instigators of the constitutional convention, favored a totally unified government or something very close to it. Madison shrewdly arrived at the convention with a plan for a unified government already in hand.[21] It pro-

18. 17 U.S. (4 Wheat.) 316 (1819).

19. 22 U.S. (9 Wheat.) 1 (1821).

20. The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Id. at 197. Recently the Supreme Court has ruled that, absent some showing that the political process doesn't work, states must resort to the political process to defend against unwanted interference in their affairs by the federal government's use of its Commerce Clause power. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

21. Madison arrived early with the Virginia delegation to the Constitutional Convention—they were the first to settle in, better prepared than any other

vided for a complete national government with its own legislature, executive, and system of courts; instead of enumerated powers it would have simply given Congress power to "legislate in all cases to which the separate states are incompetent" and it provided for a congressional veto of state legislation.[22] The remainder of the convention was largely a process of placing or appearing to place limits on the powerful central government contemplated by Madison's plan. Hamilton went so far as to essentially favor a totally centralized national monarchy.[23]

The problem, of course, was to obtain ratification. In order to do so, Hamilton, Madison, and the other proponents of the Constitution represented that the new central government would be limited to a few enumerated powers and that the states would remain the primary units of government with regard to domestic affairs.[24] It was obvious to the Anti-Federalists, as it should have been to everyone, that this was not to be so.[25] The national government's enumerated powers might have been described as "few," but they were hardly "defined," as Madison claimed;[26] they were obviously vast and potentially all-embracing, and no attempt was made to limit their scope. For example, Congress was given the unlimited power to "Regulate Commerce . . . among the several States,"[27] not merely the power to remove state-imposed impediments to interstate trade, which was the primary problem that led to the convention.[28]

If the ratifiers of the Constitution actually believed Madison's representations that the new central government would have

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for the protracted struggle of wits. He masterminded the Virginia Plan that Governor Randolph presented—a constitutional sketch that proposed not a "stronger" Confederacy, as is often misleadingly said, but a federated Republic with effective powers to govern the people directly.

Adrienne Koch, *Introduction* to JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 xvi (1984).

22. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 31 (1984).

23. *Id.* at 129-39; *see also* Walter Berns, *Does the Constitution "Secure These Rights?", in* HOW DEMOCRATIC IS THE CONSTITUTION? 62, 64 (Robert A. Goldwin & William A. Schambra eds., 1980)(arguing that the independent judiciary "was intended to take the place of the hereditary monarch, with his absolute veto, and the aristocratic House of Lords.").

24. *See supra* text accompanying note 3; *see also* THE FEDERALIST No. 14, at 102 (James Madison)(Clinton Rossiter ed., 1961).

25. *See* STORING, *supra* note 1, at 10-11.

26. *See supra* text accompanying note 3.

27. U.S. CONST. art. I, § 8, cl. 2.

28. *See* 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 310-12 (1916).

only limited power and that the states would remain partly autonomous, then political wisdom and sophistication were not nearly so widespread among the Founding generation as we have been led to believe. This conclusion would appear to be true unless it was assumed that the states retained the right to secede. Patrick Henry, at least, had no illusions on this score.[29] The Anti-Federalists have indeed proven to be prophets in predicting that the new national government would be all-powerful, but it was hardly a difficult call.

Federalism, I might note in closing, has always suffered, like the general interest in limiting government spending, from the inescapable political reality that it is extremely difficult to overcome the forces of focused special interests with an abstract general principle, no matter how attractive and valuable that principle might be. Imagine, for example, that Doris Day, noted for her commendable solicitude for the welfare of animals, has come to Congress to urge adoption of federal legislation protecting the interests of cats and dogs. "But Miss Day," someone might object, "don't you think that in our federalist system the welfare of cats and dogs is a matter appropriately left for the states?" "Senator," she might reply, "I yield to no one in my enthusiasm for federalism, but do you have any idea how much those cats are suffering? This is a special case in which local control will not do and national action is imperative."[30]

Even so ardent a proponent of federalism as President Ronald Reagan signed legislation creating a national minimum drinking age, which would seem to be about as local as an issue can get. "The problem," President Reagan declared at the signing ceremony, "is bigger than the individual states."[31] Unfortunately, the only problems that are not bigger than the individual states are the problems in which one happens not to be interested.

29. *See* 5 THE COMPLETE ANTI-FEDERALIST 207, 221-224 (Herbert J. Storing ed., 1981)(statement of Patrick Henry in the Virginia ratifying convention).

30. *See* 7 U.S.C. § 2131 (1988).

31. Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, at A15.