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# FEDERALISM AND THE CONSTITUTION: THE FOUNDERS' DESIGN AND CONTEMPORARY CONSTITUTIONAL LAW\*

*Murray Dry\*\**

Interest in federalism issues was revived by the Supreme Court just in time for our bicentennial celebration of the Declaration of Independence. In 1976, by a 5-4 vote, in the case of *National League of Cities v. Usery*,<sup>1</sup> it overturned a law on tenth amendment grounds. Then in 1985, by another 5-4 vote, in *Garcia v. San Antonio M.T.A.*,<sup>2</sup> it reversed itself on the same law, replacing one view of the tenth amendment with another. Furthermore, in a special demonstration of Bicentennial rhetoric, a dissenter in each case—Justice Brennan in *Usery*, Justice Powell in *Garcia*—claimed that that decision repudiated nearly two hundred years of constitutional federalism. I shall discuss these cases shortly, but first I want to say something about the general subject of original intent.

How can a Constitution that was written two hundred years ago properly be said to govern us today, in light of the massive changes in our territory as well as our population's size and heterogeneity? This question has given rise to what is commonly known as the battle between interpretivism and noninterpretivism. The scholars who introduced these terms a decade ago meant by "interpretivism" that constitutional adjudication must be limited to norms inferable from the text, those demonstrably expressed or implied by the framers. Finding this inadequate to justify decisions they thought were correctly decided, notably the abortion case but also the apportionment and school desegregation decisions, they advocated "non-interpretivism," which licenses courts to apply con-

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1. 426 U.S. 833 (1976).

2. 105 S. Ct. 1005 (1985).

temporary norms not demonstrably expressed or implied in the text.<sup>3</sup> This important debate came out of the academic closet in 1985, when Attorney General Edwin Meese gave public addresses on constitutional jurisprudence. In one, after noting that the new terms replaced the older ones of strict versus loose construction, he quipped: "Under the old system the question was *how* to read the Constitution; under the new approach, the question is *whether* to read the Constitution."<sup>4</sup> He called for a return to a "jurisprudence of original intention," (a clearer term for interpretivism). Acting on that principle, he said the Justice Department stood prepared to challenge the incorporation doctrine, according to which nearly all of the provisions of the original Bill of Rights have been applied against the states under the fourteenth amendment.<sup>5</sup> This drew from Justice Brennan a defense of an activist approach to individual rights and a twentieth-century reading of the Constitution.<sup>6</sup> For Justice Brennan and his supporters, the choice is between being ruled by the dead hand of the past or the living present; for Attorney General Meese and his supporters, the choice is between courts that say what the law is, which is their job, and courts that make law and policy, which is the job of legislatures.

This debate on constitutional interpretation originated in individual rights cases, but it affects federalism. First, when the Court upholds anyone's claim under the fourteenth amendment, it restricts the state's political process. Second, and more directly, the Attorney General thinks that the *Garcia* decision "disregard[ed] . . . the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan," and therefore should be overturned.<sup>7</sup> The "interpretivists" tend to give far greater weight to the judicial protection of states' rights, while the "noninterpretivists," or traditional judicial activists, tend to give the greater weight to judicial protection of individual rights.

In Part I, I will examine the two Supreme Court decisions re-

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3. Thomas C. Grey originated this terminology. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV., 703 (1975). See also J. ELY, *DEMOCRACY AND DISTRUST* (1982).

4. Address by Attorney General Edwin Meese, American Bar Association 4 (July 17, 1985), excerpted in Apple, *Meese Asserts U.S. Favors Press Code*, N.Y. Times, July 18, 1985, at A7, col. 1.

5. Address by Attorney General Edwin Meese, American Bar Association 15 (July 9, 1985), excerpted in Taylor, *Meese, in Bar Group Speech, Criticizes High Court*, N.Y. Times, July 10, 1985, at A13, col. 1.

6. Address by Associate Justice William Brennan, Georgetown University (Oct. 12, 1985) (entitled *The Constitution of the United States: Contemporary Ratification*, excerpted in Taylor, *Brennan Opposes Legal View Urged by Administration*, N.Y. Times, Oct. 13, 1985, at 1, col. 2).

7. Address, *supra* note 4, at 7-8.

ferred to, with special emphasis on the different theories of the enumeration of powers and the tenth amendment that different Justices presented. In Part II, I will look to the constitutional founding to determine what light can be shed on this constitutional controversy. In my conclusion, I will reflect on the federalism analysis in light of the subject of constitutional interpretation generally. My inquiry assumes the appropriateness of having recourse to the founders' design in constitutional controversies, and in that respect I am on the side of the Attorney General. But I think he makes the task appear more straightforward than it is.

## I

*National League of Cities v. Usery* was the first Supreme Court decision ever invalidating an act of Congress solely on tenth amendment grounds.<sup>8</sup> The Court overturned the extension of the wage and overtime provisions of the Fair Labor Standards Act to state employees. In his court opinion, then Justice Rehnquist acknowledged congressional power under the commerce clause to regulate wages and overtime for private employers. He read the tenth amendment, however, to preclude the exercise of such power "in a fashion that impairs the States' 'ability to function effectively in a federal system.'"<sup>9</sup> While this phrase was first used in a 1975 case upholding a temporary wage and price freeze, Justice Rehnquist gave it, and with it the tenth amendment, a new meaning. When the minimum wage provisions were first upheld under the commerce clause in 1941, Justice Stone, speaking for the Court, said

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8. Previously when it struck down an act of Congress on federalism grounds, the Supreme Court started with a strict construction of an enumerated power of Congress, and then buttressed its argument with reference to the tenth amendment. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 293-308 (1936) (construing the commerce clause to not permit Congress to regulate the wages, hours, and working conditions of coal miners, and including a reference to the tenth amendment as additional support for the argument); *United States v. Butler*, 297 U.S. 1, 67-68 (1936) (construing the general welfare clause to not permit federal regulation of agriculture, and then referring to the tenth amendment for confirmation). For more on what came to be called "dual federalism," see *infra* note 14 and accompanying text. I am grateful to David L. Shapiro for emphasizing the significance of this use of the tenth amendment. He noted it in his article *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 306-07 (1976).

In her essay supporting Garcia, Martha Field notes that in his *Usery* opinion, then Justice Rehnquist "carefully avoided tying his doctrine to the tenth amendment," but instead "spoke of protecting 'the essential role of the states in our federal system.'" Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 90 (1985). Granted, but in the context of the case at hand, the general discussion about the role of the states, which in other contexts might refer to congressional apportionment, must refer back to the tenth amendment. And here, as noted above, the tenth amendment argument stands on its own, independent of a strict construction of congressional power.

9. *Usery*, 426 U.S. at 852 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

that the tenth amendment "states but a truism that all is retained which has not been surrendered."<sup>10</sup> In *Usery* it was given an independent reach:

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.<sup>11</sup>

Justice Rehnquist's only reference was to a 1911 case which suggested that Congress could not relocate state capitals or tell a state how to raise its taxes.<sup>12</sup> But neither hypothetical example comes under Congress's enumerated powers to regulate commerce or to tax.

The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."<sup>13</sup> This effects a compromise between states' rights and a liberal construction of federal power under the commerce clause. It is a modified version of what used to be called "dual federalism."<sup>14</sup> Under that regime, the federal and state governments were regarded as equal in their separate spheres, and the congressional powers, especially under the commerce and taxing and spending clauses, were construed strictly. Congressional attempts to regulate monopolies were often frustrated, and similar attempts to support collective bargaining and regulate industries during the Depression were completely rebuffed. The *Usery* Court's opinion deferred to expediency and precedent on the commerce power issue, but it struck a blow for states' rights on the tenth amendment issue, thereby introducing a novel constitutional doctrine.<sup>15</sup>

Justice Blackmun concurred, providing the fifth vote, and wrote a brief opinion emphasizing the need for balancing the federal and state interests. Justice Brennan's dissent, which was joined by Justices Marshall and White, challenged the majority's tenth amendment analysis.<sup>16</sup> Neither he nor Justice Rehnquist made reference to founding materials. Both sides do so in *Garcia*.

If the new version of dual federalism was to work, the Supreme

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10. *United States v. Darby*, 312 U.S. 100, 124 (1941).

11. *Usery*, 426 U.S. at 845.

12. *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911).

13. *Usery*, 426 U.S. at 852 (footnote omitted).

14. *See, e.g., Corwin, The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

15. *See Shapiro, supra* note 8.

16. Justice Stevens also dissented.

Court had to be able to delineate the states' protected government functions. After nine years and several difficult cases,<sup>17</sup> in each of which the federal power was upheld, Justice Blackmun finally concluded that the distinction between traditional and non-traditional functions could not be maintained. Consequently, in *Garcia v. San Antonio M.T.A.*, the Supreme Court overturned *Usery* and revalidated the extension of the Fair Labor Standards Act to all state employees.<sup>18</sup> In his court opinion, which the previous minority of Justices Brennan, Marshall, Stevens, and White joined, Justice Blackmun rejected the state sovereignty approach to the tenth amendment and articulated the following principle: "Apart from the limitation on federal authority inherent in Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the federal Government itself."<sup>19</sup>

Justice Blackmun also cited James Madison's discussion in *The Federalist* No. 39, of how federalism is reflected in the structure of our government, and his statement in the First Congress that the test was whether Congress had the power, not whether it interfered with the laws of the state.<sup>20</sup>

The dissent consisted of the remaining members of the old majority, with Justice O'Connor replacing the retired Justice Stewart and joining Justices Rehnquist, Powell, and Burger. Justice Rehnquist wrote a one-paragraph opinion, joining the dissents of Justices Powell and O'Connor in predicting that the rule in this case would not last long.

Both Justice Powell and Justice O'Connor referred to selected numbers of *The Federalist* for the proposition that the powers of the federal government are "few and defined" and that most of the business of government would remain in the states.<sup>21</sup> Justice Powell, in addition, stated that the tenth amendment was adopted "to ensure that the important role promised the States by the proponents of the Constitution was realized."<sup>22</sup> Noting that the amendment "explic-

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17. *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

18. This could be done because the *Usery* Court did not strike down the amendment, it only invalidated its application to state employees in traditional state functions.

19. *Garcia*, 105 S. Ct. at 1018.

20. *Id.* at 1017-18; 2 ANNALS OF CONG. 1897 (1791). Justice Blackmun quotes from Madison's speech against the constitutionality of the proposed national bank.

21. THE FEDERALIST NO. 45, at 313 (J. Madison) (J. Cooke ed. 1961). Powell cites THE FEDERALIST NOS. 45, 17, and 46 in *Garcia*. 105 S. Ct. at 1025-29 (Powell, J., dissenting); O'Connor cites THE FEDERALIST NOS. 45 and 51. *Id.* at 1034 (O'Connor, J., dissenting).

22. *Garcia*, 105 S. Ct. at 1027 (Powell, J., dissenting).

itly reserv[es] powers in the states," which, however, is not the same as reserving explicit powers, he wrote that "eight States voted for the Constitution only after proposing amendments to be adopted after ratification," and each included "some version of what later became the Tenth Amendment." On this basis, Justice Powell concluded that "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."<sup>23</sup>

Justice O'Connor's dissent offered a different route to the same conclusion. She reinterpreted Chief Justice John Marshall's argument for liberal construction in *McCulloch v. Maryland* that the legitimacy of the end sanctions all means that are consistent "with the letter and spirit of the Constitution."<sup>24</sup> Emphasizing "spirit" and applying it to the tenth amendment, Justice O'Connor concluded that the states must "retain their integrity in a system in which the laws of the United States are nevertheless supreme."<sup>25</sup>

The other interesting part of her opinion concerned the reach of the commerce clause. After claiming that the framers thought the clause "important but limited," Justice O'Connor hastened to add that she did not think it "should be as narrowly construed today."<sup>26</sup> The needs of the twentieth century combined with the purpose of the tenth amendment required a new form of judicial balancing. There may be something to such a balancing position in policy terms. The question is whether it is constitutionally compelled, which is after all the prerequisite for judicial invalidation of an act of Congress. Since the main division on the Court turns on the tenth amendment, I will start my historical examination with the Bill of Rights and then turn to the enumeration of legislative powers.

## II

When the absence of a bill of rights from the Constitution became an issue in ratification, the Federalists first responded by saying it was unnecessary, since under the federal Constitution, whatever power was not given was retained.<sup>27</sup> The Anti-Federalist reply was twofold: first, substantial powers were granted, and second, since some rights provisions were already included (no ex post

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23. *Id.* at 1027-28.

24. 17 U.S. (4 Wheat.) 316, 421 (1819).

25. *Garcia*, 105 S. Ct. at 1036 (O'Connor, J., dissenting) (citation omitted).

26. *Id.* at 1034-35.

27. See THE FEDERALIST NO. 84 (A. Hamilton); Address by James Wilson (Oct. 6, 1787), reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 143-50 (J. McMaster & F. Stone ed. 1888).

facto laws, no bills of attainder, no state laws impairing the obligation of contracts) the logical inference might be that only those rights were secured.

The opponents had a good argument, and the Federalists had to find a way to respond to it without opening up a second convention, which they dreaded. The strategic move came in Massachusetts in January, 1788, where John Hancock and Samuel Adams successfully urged that Convention to vote for unconditional ratification, with the understanding that amendments would be recommended and sent on to Congress. It worked: Massachusetts ratified the Constitution by a vote of 187-168. Their recommended amendments included, among others, a limit on federal taxation to foreign imports, a prohibition on the granting of monopolies under the commerce clause, guarantees for trial by jury in civil cases and the following general statement: "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised."<sup>28</sup> This was the Anti-Federalist form of what became the tenth amendment. The adverb "expressly," which was in the second article of the then existing Articles of Confederation, would have dictated strict construction of the enumeration. And it would have been a strict construction of substantially limited powers, if the Anti-Federalists' amendments had been accepted. In addition to those named, several states wanted a prohibition on standing armies in peacetime.

As a result, James Madison proposed a bill of rights early in the first session of the House of Representatives in June, 1789.<sup>29</sup> In

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28. *Massachusetts Ratification Convention*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (J. Elliot ed. 1891) [hereinafter DEBATES].

29. 1 ANNALS OF CONG. 424, 431-42 (J. Gales 1789). His proposals, with a few important changes, became the first ten amendments, or the Bill of Rights. Most notable among the changes was the form: Madison proposed inserting the amendments into the original text; others, following the model of many state constitutions, wanted them at the head; the majority, wanting to keep the original text distinct from subsequent changes, voted to put the amendments at the tail. See Storing, *The Constitution and the Bill of Rights*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 32-48 (M. Judd Harmon ed. 1978). Next, Madison, in keeping with his concern that the rights of minorities are often abused in the states, proposed that "no state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." It was not adopted, but it reveals Madison's concern about the threat that state governments posed to individual rights. Finally, Madison's first proposed amendment took the form of a declaration, found at the head of many state constitutions, that "all power is originally vested in, and consequently, derived from the people," and that "it must be exercised for their enjoyment, and that they retain the "unalienable and inalienable right to reform or change [it]," etc. Describing this provision alone as "what may be called a bill of rights," Madison said he never considered it essential but that it was "neither improper nor altogether useless." Unlike the Anti-Federalists, who tended to place great emphasis on general expressions of a people's rights against the government, Madison was most interested in a structure that checks power with power. The propo-

his speech introducing these amendments, Madison made it clear that this was a Federalist's bill of rights. It was his response to what he regarded as the people's legitimate concerns about the security of their rights, individual and collective. It was not a response to states' rights. Referring specifically to proposals to change the structure and to limit the federal powers, Madison said: "I doubt, if such a door were opened, . . . we should be very likely to stop at that point which would be safe to the Government itself."<sup>30</sup>

Madison's speech virtually ignored federalism, as the Anti-Federalists understood that principle: there was no reference to the need for a balance of power between the states and the federal government. His only reference to state legislatures occurred in a reply to a Federalist objection, which he had formerly held, that an incomplete enumeration of rights might cause some to be inadvertently lost to the government. (The proposal which became the ninth amendment attempted to address this concern.) Madison argued that incorporating a bill of rights would make the courts "in a peculiar manner the guardians of those rights," and he expected the state legislatures to "jealously and closely watch the operations of this Government."<sup>31</sup> Madison gave this example of an inappropriate exercise of federal power: that Congress might enforce the collection of revenues with general warrants, without probable cause. This was an individual rights example, not federalism. Speaking about what became the tenth amendment, Madison conceded that it "may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated."<sup>32</sup>

Two House votes reveal how Madison's views were adopted against an Anti-Federalist version. Thomas Tucker, of South Carolina, moved to give the people the right to instruct their representatives, which would have permitted popular removal from office for non-compliance. It was defeated 41-10. Then Tucker moved to put "expressly" into what became the tenth amendment. First it was defeated without a recorded vote, and when it was brought up again, by Elbridge Gerry, it was defeated 32-17.<sup>33</sup>

On the basis of this account of Madison's understanding of the

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sal passed the House but not the Senate, but we find an echo of its sentiment in the final four words of the tenth amendment, since Madison's original version did not contain the words "or to the people." 1 ANNALS OF CONG. 433-34, 436 (J. Gales ed. 1789).

30. *Id.* at 433.

31. *Id.* at 439. Jefferson had presented this argument to Madison three months earlier. Letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in THE PORTABLE THOMAS JEFFERSON 438 (M. Peterson ed. 1975) [hereinafter PETERSON].

32. 1 ANNALS OF CONG. 441 (J. Gales ed. 1789).

33. *Id.* at 147, 768.

tenth amendment, which was also the House's understanding, I think we may safely conclude that Justice Stone got it right in 1941 when he said the tenth amendment is a "truism" that merely refers back to the enumeration of powers. If any addition is required, it is that it also refers back to the people's pre-political powers.

There was no full debate in the Federal Convention on the scope of congressional powers. We can only consider the context within which the enumeration was framed, the alternatives that were known or considered, and two decisions bearing on commerce.

To begin with, in 1787 federal systems were understood by all to give primary political power to the states composing the larger political association. The Articles of Confederation exemplified this with its incomplete federal structure, congressional reliance on the states for requisitions of men and money, and state control of the congressional delegates. The Virginia plan,<sup>34</sup> which Madison authored and which became the basis of the Constitution, boldly proposed a complete national government. It included a general grant of legislative power, along with a national negative on the states, and a nationally based apportionment. The negative was dropped, in favor of national supremacy, which it was assumed the judiciary would enforce. The general grant was replaced by the enumeration, along with the necessary and proper clause, and the Great Compromise, which Madison opposed, established state equality in the Senate. Within this context, how should we understand the shift from a general grant to an enumeration of powers?

I draw on Madison here, because of his importance as a framer and because he reflected deeply on these constitutional matters. First, he explained his original formulation, the general grant, as preferable to an enumeration, since the latter might leave out something important. Second, in the speech of his that prefigured the famous defense of the extended sphere in *The Federalist* No. 10, Madison argued that the objects of the proposed government included not only defense, security, and foreign relations generally, as Roger Sherman suggested, but also "the security of private rights, and the steady dispensation of Justice."<sup>35</sup> Then, when asked how the states would retain some portion of their sovereignty under the Virginia Plan, Madison, after saying the threat would be from the states, offered this principle for determining federal power:

As far as its operation would be practicable it could not in this view be improper; as

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34. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-22 (M. Farrand ed. 1911) [hereinafter FARRAND].

35. *Id.* at 134; cf. THE FEDERALIST numbers cited by Justices Powell and O'Connor, *supra* note 21.

far as it would be impracticable, the conveniency of the Genl. Govt. itself would concur with that of the people in the maintenance of subordinate Governments. Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts. the people would not be less free as members of one great Republic than as members of thirteen small ones.<sup>36</sup>

This exceedingly broad principle surely covers anything that Congress has ever enacted under the commerce clause. However, the speech came before the Great Compromise on representation, before the Convention voted to delete the congressional negative on state laws, and before the Committee on Style transformed the general grant into an enumeration, complete with the necessary and proper clause. How much did that change Madison's principle?<sup>37</sup> No more than this, I suggest: Congress must show a reasonable connection between what it regards as expedient and an enumerated power. To use the language of civil procedure, the initial burden of production is on Congress, but after that is met, a substantial burden of persuasion must be borne by anyone challenging the action's constitutionality. That is my understanding of what a liberal construction of Congress's powers means. In support of this interpretation, the framers were aware of an alternative restrictive formulation. Had Roger Sherman's proposal been accepted, the final clause would have read, "in carrying into execution the foregoing powers, and all others, no laws shall be passed but such as are necessary and proper and which do not interfere with the internal policy of the several states, unless it is absolutely necessary."

Two of the Convention's decisions bear on the commerce clause. First, and most important, as part of an important sectional compromise, the southern states agreed to give up a virtual sectional veto on navigation acts in exchange for a twenty-year period for slave importation.<sup>38</sup> Second, on the last full business day of the Convention, a proposal to add an enumerated power to cut canals,

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36. 1 FARRAND, *supra* note 34, at 357.

37. In his essay, Charles F. Hobson discusses the importance that Madison attached to the proposed national negative as a means of preventing the ordinary tendency of power to revert to the parts in a federal system. While Madison was not sure that after-the-fact judicial enforcement of the "supremacy clause" would suffice, he did, as Hobson points out, make the best of the proposed Constitution during ratification. Hobson's argument, as he presents it in his conclusion, is that Madison only "retreat[ed] from his high nationalism of 1787" in response to Hamilton's economic plans. Only then did he come "to appreciate the balance between the federal and national features of the government, a balance that he had celebrated in *The Federalist*, but without inner conviction." Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. AND MARY Q. 215, 235 (1979). Michael Zuckert discusses Hobson's essay but he regards Madison's federalism, even in the Convention, as less national than Hamilton's. He does not discuss the speech of Madison's which I have quoted in the text above. Zuckert, *Federalism and the Founding*, 48 REV. POL. 166, 197-98 (1987).

38. Cf. 2 FARRAND, *supra* note 34, at 25.

which was then enlarged by Madison, to a power "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," was briefly considered and voted down 8-3, after being limited to canals.<sup>39</sup> In the course of consideration, Rufus King (Massachusetts) suggested that the power was unnecessary and then said that "the States will be prejudiced and divided into parties by it," because "in [Philada.] & New York it will be referred to the establishment of a Bank."<sup>40</sup>

Madison made brief reference to this decision in the House, in February 1791, when he opposed the national bank on constitutional as well as political grounds, as did Secretary of State Jefferson in his opinion on the subject, which President Washington solicited.<sup>41</sup> Neither placed great weight on this argument. I mention it because it raises an important question for original intention jurisprudence: how does one assess speeches and/or votes, as a means of understanding a document or a part of it? In this particular case, Raoul Berger, a prominent scholar of the "original intent" school, regards the evidence as conclusive against the bank's constitutionality.<sup>42</sup> I find the result inconclusive because it was not an "up or down" vote on a bank, and moreover, even if it had been, the question would have remained whether a bank was reasonably related to the commerce power, or the power to tax and spend, or the power to borrow money.

On the other hand, H. Jefferson Powell has argued that the framers themselves expected that subsequent interpretation would be entirely textual and structural, on the model of common law interpretation.<sup>43</sup> This proscription on the "extra-textual" seems to me to go too far, since much can be learned from a careful study of

39. See *id.* at 364-65, 369-75, 400, 449-53. The navigation act in question concerned special protection or the nascent American shipbuilding industry. A two-thirds vote of both houses would have given the South a veto over any commercial regulation favoring, or requiring, use of American ships for exports.

40. 2 FARRAND, *supra* note 34, at 615-16.

41. In his speech to the House on February 2, 1791, Madison said "he recollected that a power to grant charters of incorporation had been proposed in the General Government and rejected." 2 ANNALS OF CONG. 1896 (1791).

The argument that followed was based on the enumeration of powers, the necessary and proper clause, and the power of incorporation. His conclusion did not refer to the brief discussion in the Federal Convention. See *id.* at 1896-1901. For Jefferson's argument, which is similar, see his *Opinion on the Constitutionality of the National Bank*, in PETERSON, *supra* note 31, at 261-67 (dated February 15, 1791).

42. See R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (forthcoming). I am grateful to Mr. Berger for letting me study his manuscript and for the time he gave me during my leave of absence as a Liberal Arts Fellow at Harvard Law School.

43. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

legislative history. And, if that information is excluded, historically incorrect arguments about the structure of the government may be drawn, as Powell acknowledges in his discussion of states' rights. As for the framers' intention on the interpretation question, it is hard to say. The Federal Convention was, after all, held in secret. Madison kept his Notes confidential, and they were only published after his death in 1836. It is true that Madison himself, in letters later in his life, played down the Federal Convention for the understanding of the people during ratification. But his argument—which sharply distinguished the Convention's proposed constitution from a ratification—seems to confuse what validates with what might instruct. That is, I think we can learn a good deal from Madison's Notes of the Federal Convention, along with the votes taken, and on some issues we can learn more from these sources than from the ratification debates.

The ratification struggle, which began after the Federal Convention adjourned on September 17, 1787, and was effectively complete by the summer of 1788 when Virginia and New York became the tenth and eleventh states to vote for the Constitution, focused on the substantial powers given the new federal government. As the Federalists framed the debate, it was the importance of union for the common defense and the blessings of liberty which led to a discussion of the powers necessary to secure those objects. To the Anti-Federalists, who conceded the need for some revisions in the Articles, the federal powers were so extensive in the proposed Constitution and the representation was so inadequate, that the result was bound in time to be a consolidation of power in the national government and the consequent loss of liberty. The Anti-Federalists held a traditional conception of republican liberty; this included a small territory, a homogeneous population, substantial representation, and a simple, mild government. To defend the proposed Constitution as consistent with republican government, the Federalists offered a less restricted definition of that form—one that required nothing more than direct or indirect popular election to office—and argued that the larger, more diversified sphere was more suitable to republican government because majority tyranny was more effectively restrained.

A related debate and revision of definitions took place in connection with federalism. The Anti-Federalists claimed that they were the true Federalists, since federalism, or especially federal republics, gave primary consideration to the parts, where true republican government was sustained. Many admitted the need for effective national supremacy, but they emphasized the essential role

of the states. Without severe restrictions on federal power, federalism would be lost and with it, republican liberty. The few would rule, rather than the substantial middle classes, and government by persuasion would be replaced with government by coercion.

In response, Madison constructed an entirely new definition of federalism. In place of state primacy, or even a clear preservation of a nation-state balance, he emphasized the ways in which the states were recognized in the structure of the new federal government. On the basis of the mode of ratification in the states, the mode of election and representation, the operation and extent of the powers, and the mode of amendment, Madison was able to argue that the Constitution was "in strictness neither a national nor a federal constitution; but a composition of both."<sup>44</sup>

I think this shows that in its focus, the Federalists' view of federalism corresponds to that of the *Garcia* majority—national supremacy, with the states' presence and importance guaranteed in the constitutional structure itself, while in its focus the Anti-Federalists' view of federalism corresponds to that of the *Usery* majority and *Garcia* minority—concern over a loss of republican liberty as a result of big government.

Turning to the enumeration of powers, I think the evidence supports a liberal construction over a strict construction, notwithstanding *The Federalist's* reassurances about the powers remaining in the states. By that I mean, and here I draw on the debate over the national bank, that reading "necessary" (in the "necessary and proper clause") as convenient or useful, and hence granting Congress a choice of means, is sounder than reading it to include no more than what would be essential to effectuate an enumerated power. But, to paraphrase Jefferson's most telling argument against implied powers, we need to consider how liberal a construction can be read into the necessary and proper clause without doing violence to the enumeration of powers clause altogether. If the enumeration becomes effectively a general grant of power, is that still a legitimate construction? After discussing the evidence for liberal construction, I will take up that question in my conclusion.

The characteristic argument of *The Federalist* on this question is that the means, the enumerated powers, must be proportional to the ends, the objects of union. Those objects include the common

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44. See THE FEDERALIST NO. 39, at 257 (J. Madison) (J. Cooke, ed. 1961). For Madison's earlier views on federalism, see his July 14, 1787 speech in the Federal Convention, 2 FARRAND, *supra* note 34, at 8-9. For a further account of Anti-Federal Constitutionalism, see my essay *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in THE CONSTITUTION: A HISTORY OF ITS RATIFICATION AND FRAMING (L. Levy & D. Mahoney eds. 1987). See also H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

defense, the preservation of public peace against internal and external attacks, and the regulation of commerce with other nations and between the states. Publius charges the Anti-Federalists with wanting all the benefits of union without being willing to pay the price, in terms of effective government. And they can't have it both ways:

For the absurdity must continually stare us in the face of confiding to a government, the direction of the most essential national interests, without daring to trust it with [sic] the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but embrace a rational alternative.<sup>45</sup>

This is only the most striking of many such arguments in *The Federalist*.

In addition, Publius presents full and candid arguments for unconditional powers to raise armies and taxes.<sup>46</sup> The discussion of the commerce power, however, does comport with Justice O'Connor's description; the examples include the removal of interstate tariffs and foreign commercial treaties. As for the necessary and proper clause, Governor Edmund Randolph provided a good discussion of it in the Virginia Ratification Convention, and Publius discussed it in two places. Randolph argued that since "a constitution differs from a law," a liberal construction was necessary, although he did not agree with the Anti-Federalists who argued that under this clause, the general welfare clause or the supremacy clause, the new government would be able to do anything.<sup>47</sup> *The Federalist* passages support a similar position. *The Federalist* No. 33 argues that "it is *expressly* to execute these powers, that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws."<sup>48</sup> And *The Federalist* No. 44 explains that in the absence of the clause "all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication."<sup>49</sup>

Turning to *The Federalist* passages relied on by Justices Powell and O'Connor for the proposition that most of the powers remained in the states, I do not think a fair reading supports strict construction. In *The Federalist* No. 17 it is said that since the administration of civil and criminal justice remains in the states, the people's affections will remain there.

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45. THE FEDERALIST NO. 23, at 151 (A. Hamilton) (J. Cooke ed. 1961).

46. THE FEDERALIST NOS. 24-36 (A. Hamilton).

47. 3 DEBATES, *supra* note 28, at 8-9.

48. THE FEDERALIST NO. 33, at 205 (A. Hamilton) (J. Cooke, ed. 1961) (emphasis in original).

49. THE FEDERALIST NO. 44, at 304 (J. Madison) (J. Cooke, ed. 1961).

That essay replied to the objection that the federal government would swallow up the states. The subject is continued in *The Federalist* No. 27, which replied to the contention that the federal government would need military force to make it operate on an intransigent people. Publius's intention in each essay was to reassure the people, and what he emphasized in *The Federalist* No. 17, concerning the people's affections, was called into question in *The Federalist* No. 27, where it was said that the people's affections are won over by a good administration. On this score *The Federalist* clearly looked to the federal government. As for the references to few and limited federal powers in *The Federalist* Nos. 45 and 46, from other discussions, some of which were cited above, it is clear that they may be few but they cannot be called limited. As Publius put it in *The Federalist* No. 30, "in the usual progress of things, the necessities of a nation in every stage of its existence will be found at least equal to its resources."<sup>50</sup> And there is no indication that the commerce clause was intended to have a permanently limited reach.

### III

I have just completed an argument that the tenth amendment does not support special protection for the states, beyond what is implicit in the enumeration of powers itself, and that the enumeration of powers was understood by the Constitution's framers and by both sides in the ratification debates to contain a liberal grant of legislative powers. The evidence points emphatically toward the cooperative federalism approach taken by the *Garcia* majority. That means the enumerated powers, especially the power to tax and spend for the general welfare, the power to regulate commerce among the states, and the necessary and proper clause, were viewed as giving Congress a choice among all convenient means that are reasonably related to an enumerated power.<sup>51</sup> For this reason, I think the Attorney General's conception of original intention jurisprudence is too restrictive on the federalism question. How can strict construction, or a states' rights interpretation of the tenth amendment, be called interpretivism when the Federalists were liberal constructionists and they were responsible for the language of the Bill of Rights?

I think that Congress still must make the case for its exercise of

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50. THE FEDERALIST NO. 30, at 190 (A. Hamilton) (J. Cooke, ed. 1961) (emphasis omitted).

51. In a recent confirmation of this principle, the Supreme Court voted 7-2 to uphold the federal law providing for the withholding of part of Federal highway funds otherwise due to states that allow people under twenty-one to drink. *South Dakota v. Dole*, 55 U.S.L.W. 4971 (U.S. June 23, 1987) (No. 86-260).

legislative power. In our cases, as long as there is a clear constitutional justification for passing a minimum wage law, it can clearly be applied to state employees, especially since the line between the public and the private sector is so elusive. For example, it seems to me that withholding federal highway money from states that do not raise their drinking ages to twenty-one, in light of the evidence concerning drinking and automobile accidents and the ages of the drinking drivers, is clearly constitutional. The cases I focused on both involved the regulation of the states as employers. Many others involve the regulation of local activity either because it affects interstate commerce or as a means of prohibiting shipment or movement in interstate commerce. Both arguments were made in the case upholding the minimum wage law in 1941. Professor Gerald Gunther has been critical of the latter approach, on the grounds that under it Congress never has to show the connection between the local activity and the national economic problem.<sup>52</sup> I would agree that such a connection must be shown, but it seems to me that in most cases, including racial discrimination in public accommodations, loan sharking, and gambling,<sup>53</sup> it can be done.

I think there are three justifications for an outcome that transforms an enumeration into a virtual general grant of power. First, the development of federal power under the commerce and taxing and spending clauses follows the Federalists' emphasis on liberal grants of power and their expectation that if the Constitution worked the federal government would gain in authority and power. Second, when the Supreme Court intervenes to maintain some form of dual federalism, it has short-circuited the political process. And there does seem to be something to the argument, made by Justice Blackmun, with support from *The Federalist* and modern scholars,<sup>54</sup> that federalism is preserved in that political process. Here I

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52. G. GUNTHER, *CONSTITUTIONAL LAW* 144 (11th ed. 1985).

53. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953). The results in these cases are more straightforward than the rationales. That is because constitutional law remains burdened with terminology from the "dual federalism era." The constitutional language, after all, is "commerce among the states," not "interstate commerce."

54. See CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL POWERS* (1980); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selecting of the National Government*, 54 COLUM. L. REV. 543 (1954). Scholars critical of *Garcia* include Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985) and Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985). Both argue that judicial review plus the tenth amendment justify the *Usery* court's approach to the conflict between the state's police power and Congress' power over commerce, see Howard, *supra*, at 789; Van Alstyne, *supra*, at 1719-20. Neither argues for a return to "dual federalism," and yet neither acknowledges the novelty of judicial enforcement of tenth amendment federalism despite a broad view of

would take note of Madison's shift on federalism by saying that the Constitution surely permits one to make the argument for either strict construction or for some special tenth amendment support for the states. That does not mean that such a position is necessitated by the Constitution, and hence that the Court should adopt it. Even Jefferson was aware that an argument could be made for liberal construction and the bank's constitutionality. He therefore urged President Washington to sign the bill, out of deference to Congress, if the President was not certain of its unconstitutionality.<sup>55</sup> This restricted view of the presidential veto has been discarded, but the point applies to the courts, which should not be invalidating laws that are merely plausibly unconstitutional.

Finally, speaking about interpretivism generally, if the Constitution's language is restricted to what the framers clearly had in mind, and nothing else, if even general language is construed in the narrowest possible terms, then it may have to be amended as frequently as laws, and there is good reason to doubt that this would be a good thing for constitutional government.

Even in the *Garcia* approach to federalism, the states remain active if subordinate partners in American government. While the position of cooperative federalism reflects the Federalist view, the Anti-Federalist concern about the importance of states as a buffer against centralization is also present. One example of the states' vitality in the political process concerns their effectiveness in retain-

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the commerce clause. Robert F. Nagel took a similar position in his defense of *Usery*, written before *Garcia*. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81.

The only supporter of an *Usery* approach to federalism who focuses not on the tenth amendment by itself but the enumeration of powers is Sotirious A. Barber. Arguing that "[r]eal damage came to the Tenth Amendment when Congress was permitted to develop a national police power under its powers over commerce and taxation," Barber suggests that the state governments are entrusted with government ends, such as "educational excellence," which are even more important than the ends entrusted to the national government, which include "economic prosperity, national defense, fundamental civil liberties, and racial justice." S. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 171, 179. This is a more consistent position than the one taken by the *Garcia* minority and the other critics of *Garcia*, but it is even more emphatically the federalism of the Anti-Federalists. The Supreme Court should not be imposing it on the nation where Congress has been able to make a plausible case for its action.

Lawrence H. Tribe and Frank I. Michaelman have also written separate but related articles in defense of *Usery*. Each scholar argues for a special state role for protecting individual rights, the right to have certain services provided at certain levels. These are both creative arguments but no attention is given to the framers' intent with respect to the powers of Congress and the tenth amendment. See Michaelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1182-91 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1075-78 (1977).

55. See the last paragraph of Jefferson's opinion in PETERSON, *supra* note 31, at 267.

ing federal deductions for state and local taxes.<sup>56</sup> It is important for the states with high property and income taxes that their residents receive a federal deduction for states taxes. Given the importance of federal taxes, individual mobility, and the resulting unequal distribution among the states of social welfare costs, this deduction seems to strengthen state governments and to be desirable.

Federalism is also alive and well in the courts. Neither Congress nor the federal courts have extended article III jurisdiction nearly as far as constitutionally permissible, and the Supreme Court in particular has been especially respectful of state law, as long as it does not contradict federal law. And even if it does, it is generally necessary to follow state law procedures for appeal in order to receive federal judicial relief.<sup>57</sup> To speak, as Professor Van Alstyne has, of *Garcia* as the "second death of federalism,"<sup>58</sup> is surely hyperbole.

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56. For an account of the congressional deliberations on these provisions of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986), see CONG. Q. WEEKLY REPORTS 179-81, 592, 1008, 1571-72, 1953, 2118, 2351 (1986).

57. See Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 550-52 (1985), (Shapiro describes, with approval, the federal courts' abstention from exercising jurisdiction in the name of comity and federalism).

58. See *supra* note 54.