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Lawnet: The Case of the Missing (Tenth) Amendment

Philip P. Frickey*

April 10, 1990. It was a windy day in Minneapolis. The blond haired, blue eyed natives were sunbathing in forty-five degree weather, a sure sign of trouble ahead. I was working the day watch out of Public Law Division. My boss is Bob Stein. My sometime partner is Dan Farber. My name's Frickey. I'm a law professor.

I was investigating the mysterious disappearance of the tenth amendment. It was there — in the Constitution, I mean — almost from the start. But nobody was ever really sure whether it said anything important, and what happened to it. I decided to take to the stairs and ask my first-year Constitutional Law class whether they had seen it lately, or at all.

So I asked my class when we had last seen the tenth amendment. Nobody answered. I called on a student. She started talking about representation reinforcement, and non-originalism, and normativism, and evolving values, and making the Constitution the best Constitution it could be, and about the New Deal as a transformative substitute for a second (or maybe even a third) Constitutional Convention. Her discussion of constitutional moments was taking too many minutes.

"Just the facts, ma'am," I said. She didn't have any, just a lot of law, or what passes for it nowadays.

So I reminded the class that we had seen the tenth amendment, in name or in substance, influence the outcome in *The Civil Rights Cases*¹ during the fall semester. They looked at me as if I were speaking Babylonian. So I reminded them about what that case had held, that under principles of federalism, the Civil Rights Act of 1875² was an unconstitutional at-

* Professor of Law and Julius E. Davis Professor of Law for 1990-91, University of Minnesota. To their embarrassment, I thank Dan Farber, Geoff Hathaway, Roger Park, and Gerald Torres for comments on an earlier version of this . . . whatever it is.

1. 109 U.S. 3 (1883).

2. 18 Stat. 336 (current version at 42 U.S.C. § 2000a (1988)).

tempt by Congress to assume the state's general police power.³ That Justice Harlan — the first one — had written a strong dissent.⁴ They stared at me as if I had switched from modern to ancient Babylonian.

So I changed the subject. I asked them whether the tenth amendment appeared in today's assignment. Somebody mumbled that it was involved in *National League of Cities v. Usery*.⁵ I asked whether the words "tenth amendment" could be found in the majority opinion in that case. The silence was deafening. Somebody said that the photocopied materials we were using were so poorly copied that you couldn't be certain how to answer the question. The fact that he was right — the copies were so blurry that they could have provided a rational basis in *Lee Optical*⁶ — didn't make me any less irritated with him. In the good old days, before people complained about law professor brutality, I would have known what to do to that student.

Today, law professors lack the old, effective weapons of humiliation and ridicule. The only weapon I still pack underneath my coat is my bicentennial pocket copy of the Constitution, Warren Burger's greatest gift to constitutional law. Some of these young hotshot law professors carry around those natural-law, repeating-automatic constitutions imported from overseas, the ones that hold fifteen implied rights in the clip and one in the penumbra. I still stick to the tried and true Constitution my dad used to carry on his beat. I figure if it was good enough for Hugo Black, it's good enough for me. If you can't nail your target with the Constitution as written, you belong on some other detail anyway.⁷

My mind drifted back to the case at hand. I wish it hadn't. I asked a fellow what the rationale of *National League of Cities* was. He said he didn't much like being roused by law professors. I told him that if he didn't answer, he'd have to come upstairs to the office and talk to the boss. Another student volunteered that she respected law professors very much and would be glad to answer the question. I almost got sick.

I was about ready to drag them all in for questioning when

3. 109 U.S. at 13-15.

4. *Id.* at 26 (Harlan, J., dissenting).

5. 426 U.S. 833 (1976).

6. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

7. Originally this phrase said "trusts and estates detail," but because that is the boss's detail (to the extent that deans have a detail anymore), I figured I had to change it to something else. Any substitution will offend somebody, so just fill in the blank as you see fit.

somebody pointed out that all Rehnquist said in *National League of Cities* was that our “federal system of government” prevented Congress from regulating integral operations of traditional state functions.⁸ Now we were getting somewhere. Another student pointed out that the tenth amendment, positively identified for the last time in the 1930s,⁹ had reappeared only briefly as a bugaboo in Brennan’s *National League of Cities* dissent.¹⁰ Excellent. I like it when people find bugaboos in dissents.

So I asked them what the source of intergovernmental immunity was in *National League of Cities* if it wasn’t the tenth amendment. A student made a comment about implicit structural protections in the original, pre-Bill of Rights Constitution. She said that maybe the tenth amendment is a truism, but a truism that merely reflects the structure of the original Constitution, and so Rehnquist has a legitimate basis for *National League of Cities*. Good student. Thorough, careful, smart, diligent, friendly. Make a fine bond lawyer someday.¹¹ I live for such rewards from teaching.

The student continued to say some other intelligent things about *National League of Cities*, but I cut her off. She was starting to anticipate the rest of the class, and I still had thirty minutes to fill. So I asked a different student about *Garcia*.¹² Where did the tenth amendment go there?

The student responded that, just like all the other protections of states’ rights, it got flushed down the toilet by the liberal majority of the Supreme Court. I had forgotten that he was the president of the Federalist Society. I thought about suggesting that his sense of who had a majority on the Court was a little out of date. But why pick a fight with one of the few students who will state a position and defend it? You need them around when everybody else is looking walleyed at you and there is lots of class time left to fill.

So I asked a student to respond to the last comment. She said that Justice Blackmun had been a very weak fifth vote in

8. 426 U.S. at 852 (Rehnquist, J., joined by Burger, C.J., Stewart, and Powell, JJ.).

9. See *United States v. Butler*, 297 U.S. 1, 68 n.18 (1936).

10. 426 U.S. at 861-62 (Brennan, J., dissenting, joined by White, and Marshall, JJ.).

11. Again, if bond lawyering is your detail, just substitute something else you find funnier. If you can’t think of anything that strikes you as funny, you have lawyered too long.

12. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

National League of Cities, had undermined Rehnquist's opinion by joining it only on the assumption that it announced a balancing test, and had simply changed his mind by the time *Garcia* came along.¹³ So Blackmun killed the tenth amendment, I asked? She said that the tenth amendment was already brain-dead, Harry had just pulled the plug, and maybe pulling the plug was especially appropriate because of Harry's Mayo Clinic days. Another student started to complain that in *Roe*,¹⁴ Blackmun had done more than just kill an amendment. The first student cut her off and continued on, saying that constitutional euthanasia was called for in this instance, because the lower court cases attempting to follow *National League of Cities* had shown that its test was unworkable in practice, even if fine in theory. That Justice Blackmun was a good guy to admit that he had been wrong. That the Powell dissent in *Garcia*¹⁵ was so overblown and nasty that it read like a book review in *Constitutional Commentary*.

I was again getting nervous, because this student had made enough intelligent comments to wipe out all the rest of my class preparation. In the old days, a law professor could rough up a student who did that, but we're all wimps today, what with citizen commissions set up to hear complaints about law professor brutality and all. I thought about calling on the president of the Federalist Society to respond to the student, for I was sure that her crack about Powell's dissent must have infuriated him. But all this talk wasn't getting us anywhere.

So I told the class to consider three possibilities: the tenth amendment was dead; it was just on a short vacation, pending another Republican appointment to the Court; or it was traveling incognito and performing minor acts of sabotage against congressional hegemony. I had no idea what the last thing meant, but it sounded good at the time, and might suggest that I had read some dead European authors. Anyway, I asked the class to go to the library and see whether they could find anything left of the tenth amendment after *Garcia*.

At lunch the day watch went over the morning's reports. We noted the recurrence of obnoxious behavior by two colleagues and three omnipresent students. We agreed to be on the lookout for whoever ripped the ACLU bumper sticker off a

13. 426 U.S. at 856 (Blackmun, J., concurring).

14. Everybody knows.

15. 469 U.S. at 557 (Powell, J., dissenting, joined by Rehnquist, and O'Connor, JJ.).

colleague's door. And we agreed to roust students to buy tickets to the professors' ball. It was a rewarding, collegial lunch.

I figured that because I had 100 people looking for the tenth amendment, I could take the rest of the day off from the case and spend my time instead on the obscure scholarship in which the Public Law Division specializes. The next day in class I was happy to see that many of the students had taken the assignment seriously. Essentially, they had three different theories about what had happened to the tenth amendment.

The first one was that the poor sucker had been snuffed out and buried under some big union-made construction project, like a football stadium in New Jersey. Now, I'm no states' rights guy, but it gave me pause to think that a contract hit had been made on a constitutional amendment. According to these students, the last reported sighting of the tenth amendment occurred in a restaurant in Detroit, where it was having lunch with some people from the Center for State and Local Government. Or at least with some people who said they were from the Center for State and Local Government. Speculation is that they were really from the Trilateral Commission.

The second theory was the tenth amendment hadn't really died at all. A student produced a copy of the *National Lawyer* to support this theory. That rag had a story reporting that a states' rights believer had seen the tenth amendment while shopping in a K-Mart in Pass Christian, Mississippi. I had trouble believing that, but my eye did catch the headline of another story — "*Harvard Law Review* Invaded by Body Snatchers" — that I wanted to read, so I set the tabloid aside. When I read it later at lunch, it confirmed my worst suspicions about the alien criteria used by elite law reviews in article selection. But, hey, I'm not bitter.

Getting back to the class, the third theory was that the tenth amendment was still there, only kinder and gentler than before. A couple of students had found that, after *Garcia*, the lower federal courts had used a canon of statutory interpretation to buffer core state functions from congressional power grabbing. Seems that both the First¹⁶ and the Eighth¹⁷ Circuits have held that the federal Age Discrimination in Employment Act does not protect appointed state judges against state mandatory retirement rules, even though the statute can be

16. See *EEOC v. Massachusetts*, 858 F.2d 52, 58 (1st Cir. 1988).

17. See *Gregory v. Ashcroft*, 898 F.2d 598, 604 (8th Cir.), cert. granted, 59 U.S.L.W. 3390 (U.S. Nov. 27, 1990) (No. 90-50).

read to do that. Both courts seemed moved by the absence of any clear statement that Congress wished to intrude upon core state functions. Federalism lives on, only now as an under-enforced constitutional norm dressed up as a canon of statutory interpretation. In other words, the tenth amendment got a new name, fake papers, and diluted authority under the witness protection program.

The third theory carried the day. The students liked the canon, even considering *Garcia*, and thought that it probably reflected a reasonable respect for constitutional structure (not to mention Blackmun's initial desire to find some middle ground initially in *National League of Cities*).¹⁸

I reported this finding to the boss, and we closed the file on the missing amendment, changing the names to protect the innocent.

* * *

November 20, 1990. As always, I was working the day watch out of Public Law Division. It was a beautiful fall day in Minneapolis, and the leaves on the trees were so brilliant I felt insecure. My name's still Frickey, and I'm still a law professor.

I didn't have any classes today, so I was digging into a backlog of public law work. I had pulled the Missing Tenth Amendment file because of new developments. The amendment may be in for a comeback, with a vengeance.

As noted in the original file, two circuits had construed the Age Discrimination in Employment Act (ADEA) to allow states to continue mandatory retirement policies for appointed judges. Now another circuit had crossed them up. On the surface, it looked like routine statutory interpretation, everyday stuff for anybody working the Public Law Beat. But I smelled a rat. The climate surrounding the ADEA problem had changed, and not for the better. What had once just been an interesting question of statutory interpretation had become ripe for infiltration by organized public law subversives. So I picked up the statute with some tweezers (you just don't touch one of those suckers if you can help it), put it in a bag, and sent it to the Public Law Lab for an analysis.

* * *

December 1, 1990. The lab report is back, right on time. "*Lab Report: Tenth Amendment Homicide Investigation*

"In response to Frickey (Badge 4062) request of 12 Oct. 90.

18. 426 U.S. 833, 856 (Blackmun, J., concurring).

Problem analyzed through regular research channels. Statute, a/k/a ADEA, protects state and local government 'employees' against being forced to retire at certain age.¹⁹ Definition of 'employee' contains exception for

any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.²⁰

"Does not take high LSAT score, much less street sense, to figure out that exception was drafted without thinking about state judges. Sure, general language of first clause operates to exclude elected state judges from ADEA.²¹ But appointed judges don't fit second clause, and hard to see them as appointees 'on the policymaking level,' which sounds like executive or legislative branch stuff."

I stopped reading for a moment to clear my head of the writing style, which reads the way a recent Russian emigre talks. I had a laugh at the last sentence I had read. If you're some kind of legal-realist-going-on-critical-legal-scholar the conclusion that judges are not policymakers is laughable, but laughable or not it would be hard to attribute that kind of perspective to Congress. In fact, most of the time it's hard to attribute any perspective to Congress.

To summarize, the report told me, in ever more irritatingly terse language, that the forensics yield no clear answers. Two district courts had gotten out their dictionaries and taken the literal approach to this ADEA exemption, concluding that the statute does cover appointed judges.²² Along with the First and Eighth Circuit decisions mentioned earlier in the file, the lab discovered that two state supreme courts²³ and one federal dis-

19. 29 U.S.C. § 623(a) (1988). The states are employers as defined by the ADEA, 29 U.S.C. § 630(b) (1988), and application of the ADEA to the states was held constitutional in *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983).

20. 29 U.S.C. § 630(f) (1988).

21. The federal Equal Employment Opportunity Commission has interpreted the first clause as also exempting state judges who are appointed by the governor or legislature and then must stand before the voters for retention or rejection. See *Ashcroft*, 898 F.2d at 600 n.3; *Diamond v. Cuomo*, 70 N.Y.2d 338, 342, 514 N.E.2d 1356, 1358, 520 N.Y.S.2d 732, 734 (1987), *appeal dismissed*, 486 U.S. 1028 (1988).

22. See *EEOC v. Vermont*, 717 F. Supp. 261, 266 (D. Vt. 1989); *Schlitz v. Virginia*, 681 F. Supp. 330, 334 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

23. See *Apkin v. Treasurer & Receiver Gen.*, 401 Mass. 427, 436, 517 N.E.2d 141, 146 (1988); *In re Stout*, 521 Pa. 571, 583, 559 A.2d 489, 495 (1989).

strict court²⁴ had held that appointed judges were not protected against mandatory retirement by the statute. The canon that intrusions into core state functions require clear evidence of congressional intent²⁵ will get you to this nonliteral result pretty well, and does account for the otherwise missing tenth amendment. You can also fire two other canons in support of this result — the ones that say courts should interpret statutes, where plausible to do so, to avoid absurd results and to avoid serious doubts about constitutionality.²⁶

The lab report stressed that if there is anything left of state sovereignty as a buffer against federal intrusion — and *Garcia* may suggest there is²⁷ — it certainly ought to raise serious doubts about Congress's ability to mandate personnel policies for appointed state judges. I mean, appointed judges aren't exactly a *Carolene*²⁸ group or anything. Of high state officials, they have both the most job protection and the least restrictions on their exercises of power. Besides, if the states aren't allowed to retire their judges, the next generation in the legal community might not have a chance to make mistakes, too. Getting there by the canons is extra fun, because it adds a jocular thrust-and-parry to the analysis.²⁹ Moreover, the canons have made sort of a scholarly comeback. Some modern writers contend that the canons perform useful roles in statutory interpretation,³⁰ particularly in tying the interpretive process into our overall public law traditions.³¹

In sum, the lab report and my own instincts added up to

24. See *EEOC v. Illinois*, 721 F. Supp. 156, 160 (N.D. Ill. 1989).

25. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

26. On these canons, see generally W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 577-81, 676-89 (1988).

27. The Court in *Garcia* did not categorically rule out some federalism-based limit on congressional power in this context. It stressed that "[t]hese cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 469 U.S. at 556, and then quoted a passage from an earlier decision concluding that the Court ought not speculate on how to handle a hypothetical parade of horrible possibilities, *id.* (quoting *New York v. United States*, 326 U.S. 572, 583 (1946)).

28. Everybody knows.

29. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

30. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1017-61 (1989); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 451-62 (1989).

31. See Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV.

pretty much the same thing. Maybe Congress should be able to snuff out state autonomy, but our tradition of federalism suggests that courts should not assume extreme federal intervention without a clear congressional mandate. Anyway, it's silly to think that Congress really wants state appointed judges to have federally mandated life tenure, especially when a literal interpretation of the statute does not give similar tenure to elected judges.

The distinction that a literal interpretation of the ADEA draws between appointed and elected judges is a dog that just won't hunt. Judges who stand for retention elections are considered elected judges for this purpose.³² At least these elected judges have almost the same job security as judges appointed with life tenure, because judges rarely lose retention elections. But if election is to be a critical distinction, the statute has everything backwards. From the standpoint of democratic values, voters ought to be allowed to re-enlist the superannuated judge if they wish. So I come out wondering if there is even a rational basis to support the distinction apparently drawn on the face of the ADEA. All my years on the beat were telling me that Congress had drafted the statute without considering state judges at all.

Principles of federalism and common sense suggest, then, that we ought to resist literalism here unless no plausible interpretation to the contrary can be constructed. Accordingly, although "on the policymaking level" in the statute seems on its face to contemplate executive branch or legislative branch activity, it isn't much of a stretch to apply it to the judiciary, too. After all, judges make policy not just in judicial decisions, but frequently in other ways as well (in administering the courts, adopting rules of procedure, and so on).

But the lab uncovered a recent circuit opinion adopting the literal approach,³³ setting up a split in the circuits on the issue. The Supreme Court has now granted certiorari on the issue.³⁴ Call it a hunch, but my instincts were telling me that the combination of state sovereignty and the various interpretive canons could create a truly explosive opinion, with state

609, 632-66 (1990); Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1139, 1129 (1990).

32. See *supra* note 15.

33. *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990).

34. See *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 59 U.S.L.W. 3053 (U.S. Nov. 27, 1990) (No. 90-50).

sovereignty winning in a back-alley shootout that destroys much of utility and interest in statutory interpretation.

I thought I'd better try out my instincts on another experienced officer, so I called up my sometime partner and asked him to meet me at the diner where they give us free food. When Dan arrived, we ordered cups of the mud that passes for java at that dive, and then I laid out the scenario. I told him it was just a guess, because I had no stoolie at the Court to lean on, but that my gut told me the worst could happen.

Led by Justice Scalia, the Supreme Court is increasingly bowing down before the god of literalism in statutory interpretation.³⁵ With the zeal of a convert, Justice Kennedy recently suggested that literalism ought to trump well-established and (at least often) sensible canons of interpretation. In *Public Citizen v. United States Department of Justice*,³⁶ a majority of the Court applied the absurd-result and constitutional-doubts canons³⁷ to avoid interpreting the Federal Advisory Committee Act³⁸ to require public disclosure of the proceedings of the American Bar Association committee that advises the President on the qualifications of potential federal judicial nominees. Justice Kennedy (joined by Chief Justice Rehnquist and Justice O'Connor) concurred only in the judgment and presented a literalist attack on the majority opinion.³⁹

Kennedy contended that the absurd-result canon should be applied only when "the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . , and where the alleged absurdity is so clear as to be obvious to most anyone."⁴⁰ Similarly, Kennedy argued that the constitutional-doubts canon

should not be given too broad a scope lest a whole new range of government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute.⁴¹

35. See, e.g., Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

36. 109 S. Ct. 2558 (1989).

37. See *supra* note 20.

38. 5 U.S.C. app. §§ 1-15 (1988).

39. Justice Scalia did not participate in the decision.

40. 109 S. Ct. at 2575 (Kennedy, J., concurring in the judgment).

41. *Id.* at 2580.

Kennedy interpreted the advisory committee statute as applying to the ABA committee, and then concluded that this application of the statute violated the separation of powers, by unduly interfering with the President's authority to appoint justices.⁴²

The question whether the ADEA covers appointed state judges seems to fit the Kennedy approach. Read literally, the ADEA exception for appointees "on the policymaking level" does not seem to reach judicial decisionmaking. It is not absurd, in the lay sense, to suppose that Congress would apply the ADEA to appointed (but not elected) state judges. What Kennedy seems to mean by "absurd" is "absurdist," like something that Woody Allen would come up with, given some time — such as a federal requirement that state judges wear party hats while hearing eminent domain cases. Nor does the potentially unconstitutional application of a federal statute suggest to Kennedy that some canon should be used to avoid considering the question of constitutionality.

Because two Justices joined Kennedy in *Public Citizen*, he would need only two more allies to take the same approach in the ADEA case. Justice Scalia, as the fountainhead of the new literalist approach,⁴³ almost certainly agrees with this analysis. Of these four Justices, two (Rehnquist and O'Connor) dissented in *Garcia* on the ground that principles of federalism do provide substantial constitutional barriers to congressional regulation of state functions.⁴⁴ The other two (Scalia and Kennedy) may well share that view. Thus, if Kennedy could find one more vote, he could write a most remarkable opinion in the ADEA case that would (1) cut back the absurd-result rule to situations where the person on the street would find the interpretation "Monty Python ludicrous"; (2) cut back the constitutional-doubts canon so that it applied only where there was substantial statutory textual ambiguity; (3) conclude that the ADEA therefore did cover appointed state judges; and (4) hold that this application of the federal statute was an unconstitutional intrusion into core state functions, repudiating any inconsistent language in *Garcia* along the way. If Kennedy felt especially ambitious, he could try to overrule *Garcia* (a 5-4

42. *Id.* at 2580-84.

43. See *supra* note 29 and sources cited therein.

44. 469 U.S. at 580 (O'Connor, J., dissenting, joined by Powell, and Rehnquist, JJ.).

case) entirely.⁴⁵

A cold wind off the Mississippi River made me shudder. Could there be one more vote for this approach? Four Justices — White, Marshall, Blackmun, and Stevens — have not shown much affection for the new literalism. Moreover, all four were in the majority in *Garcia* and thus might not see a serious constitutional problem even in the ADEA situation. That leaves new Justice Souter.

"That's the scenario," I told Dan. He sat silently for a minute, staring out the window at the broken urban landscape that is Cleveland. This was puzzling because we were in Minneapolis, but we had no time for other questions just then. Dan's mind turned over the possibilities as he muttered some thoughts to himself. "A piano wire job on the throat to the canons. A two-fer on literalism and the tenth amendment. And the professionals in place to do it right." He turned silent again and slowly turned over the coffee mud with his spoon a few times. I swallowed some undissolved coffee creamer to cool my stomach. My mind drifted to other apocalyptic events in public law: the gutting of the fourteenth amendment between 1883 and 1896; the switch in time that saved nine; the demise of the public-interest theory of regulation; the last time somebody cited something I wrote. Finally, Dan looked me in the eye. "Go with it," he said. "Try for a collar, if somebody can print it before the Court gets the opinion out."

My thoughts drifted. It's about forty minutes into next year's hit movie, "Mr. Souter Goes to Washington." I played out the scene. The once-obscure rustic has been nominated and confirmed to the High Court, and he has moved (ramshackle house and all) to Georgetown, much to the displeasure of the neighborhood. His law clerk, who looks like Jean Arthur, has been trying to convince him to avoid the allure of the new literalism. Souter, who seems to have grown in height and taken on a resemblance to Jimmy Stewart, is standing behind the bench amidst piles of mail from New Hampshire Boy Scouts interested in the ADEA case. He is talking in kind of a nasally voice that sounds like Stewart, too:

45. In fairness, Kennedy had a legitimate beef in *Public Citizen*. The majority's construction of the statute at issue there is neither clear in itself nor easily derived from statutory language. It is a good deal easier to construe "on the policymaking level" to apply to state appointed judges. Thus, even Kennedy might not apply his *Public Citizen* approach in the ADEA case, and even if he did, he may find it hard to gain allies. Nonetheless, for the reasons explained above, the ADEA case is a tempting target for this method.

I just can't see how anybody can be so gol-darned sure that words mean in context what they might mean in the dictionary. Why, if I tried that one out on the folks down the road back in New Hampshire, they would a' thought I had spent too much time cooped up with my books and not enough time with sensible people. You know, this literalism stuff pretends to be mechanical and passive, but just seems to free you up to do about anything you want. In New Hampshire, we have a name for this kind of stuff; we call it "snake oil."

The law clerk cheers.

I look back down at the open file on the Missing Tenth Amendment. Will Justice Souter first be underestimated by some of his colleagues, then persecuted, and then finally emerge a heroic figure like Senator Smith? Whatever happens, in this case, it's impossible to change the names to protect the innocent.

