US v. Morrison (2000)

http://www.oyez.org/cases/1990-1999/1999/1999_99_5/
Decided By: Rehnquist Court (1994-2005)
Argued: Tuesday, January 11, 2000
Decided: Monday, May 15, 2000

Issues: Civil Rights, Liability, Civil Rights Acts; Federalism, Natural Resources, Miscellaneous
Categories: conlaw, gender, federalism, commerce clause, police power, jurisdiction, sex discrimination, fourteenth amendment

Facts of the Case:
In 1994, while enrolled at Virginia Polytechnic Institute (Virginia Tech), Christy Brzonkala alleged that Antonio Morrison and James Crawford, both students and varsity football players at Virginia Tech, raped her. In 1995, Brzonkala filed a complaint against Morrison and Crawford under Virginia Tech's Sexual Assault Policy. After a hearing, Morrison was found guilty of sexual assault and sentenced to immediate suspension for two semesters. Crawford was not punished. A second hearing again found Morrison guilty. After an appeal through the university's administrative system, Morrison's punishment was set aside, as it was found to be "excessive." Ultimately, Brzonkala dropped out of the university. Brzonkala then sued Morrison, Crawford, and Virginia Tech in Federal District Court, alleging that Morrison's and Crawford's attack violated 42 USC section 13981, part of the Violence Against Women Act of 1994 (VAWA), which provides a federal civil remedy for the victims of gender-motivated violence. Morrison and Crawford moved to dismiss Brzonkala's suit on the ground that section 13981's civil remedy was unconstitutional. In dismissing the complaint, the District Court found that that Congress lacked authority to enact section 13981 under either the Commerce Clause or the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for it. Ultimately, the Court of Appeals affirmed.

Question:
Does Congress have the authority to enact the Violence Against Women Act of 1994 under either the Commerce Clause or Fourteenth Amendment?

Conclusion:
No. In a 5-4 opinion delivered by Chief Justice William H. Rehnquist, the Court held that Congress lacked the authority to enact a statute under the Commerce Clause or the Fourteenth Amendment since the statute did not regulate an activity that substantially affected interstate commerce nor did it redress harm caused by the state. Chief Justice Rehnquist wrote for the Court that [i]f the allegations here are true, no civilized system of justice could fail to provide [Brzonkala] a remedy for the conduct of...Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States." Dissenting, Justice Stephen G. Breyer argued that the majority opinion "illustrates the difficulty of finding a workable judicial Commerce Clause touchstone." Additionally, Justice David H. Souter, dissenting, noted that VAWA contained a "mountain of data assembled by Congress...showing the effects of violence against women on interstate commerce."

Decision: 5 votes for Morrison, 4 vote(s) against

US v. Lopez (1995)

http://www.oyez.org/cases/1990-1999/1994/1994_93_1260/
Decided By: Rehnquist Court (1994-2005)
Opinion: 514 U.S. 549 (1995)
Argued: Tuesday, November 8, 1994
Decided: Wednesday, April 26, 1995

Issues: Economic Activity, Miscellaneous; Federalism, Natural Resources, Miscellaneous

Facts of the Case:
Alfonzo Lopez, a 12th grade high school student, carried a concealed weapon into his San Antonio, Texas high school. He was charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged Lopez with violating a federal criminal statute, the Gun-Free School Zones Act of 1990. The act forbids "any individual knowingly to possess a firearm at a place that [he] knows...is a school zone." Lopez was found guilty following a bench trial and sentenced to six months' imprisonment and two years' supervised release.

Question:
Is the 1990 Gun-Free School Zones Act, forbidding individuals from knowingly carrying a gun in a school zone, unconstitutional because it exceeds the power of Congress to legislate under the Commerce Clause?

Conclusion:
Yes. The possession of a gun in a local school zone is not an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. The law is a criminal statute that has nothing to do with "commerce" or any sort of economic activity.

Decision: 5 votes for Lopez, 4 vote(s) against

The Virginia and Kentucky Resolutions

http://www.answers.com/topic/virginia-and-kentucky-resolutions

The Virginia and Kentucky Resolutions of 1798 and 1799 raised the question of states rights' and nullification. They were drafted in response to the passage of the Alien and Sedition Acts of 1798 but were concerned with a larger and more deep-rooted problem. How was power to be divided between the federal government and the states, and who was to settle disputes between the two?

The first Kentucky Resolution, passed by the state legislature on November 16, 1798, stated that when the federal government exercised power not specifically delegated to it by the Constitution, each state could judge the validity of that action for itself. The Virginia Resolution of December 24, 1798, claimed that the states "have the right and are in duty bound to interpose for arresting the progress of the evil." Several northern states objected that the judiciary, not the states, should be the arbiter of constitutionality. The Kentucky legislature passed a second Resolution on November 22, 1799, arguing that a single state had the power to nullify a federal action it deemed unconstitutional.

Unknown to contemporaries, the Virginia and Kentucky Resolutions were drafted, respectively, by James Madison and Thomas Jefferson. The doctrines they enunciated were later cited by southern slaveholders in support of their right to secede from the Union. Yet it would be a mistake to conclude that either Jefferson or Madison truly wanted to dismantle the Union. The Resolutions are best understood in the context of the fierce political battles between Federalists and Jeffersonians in the 1790s and the prevailing theory of divided sovereignty. When John C. Calhoun evoked the Resolutions in the 1820s to support his own doctrine of nullification, he was solidly opposed by James Madison.

See also Calhoun, John C.; Jefferson, Thomas; Madison, James; Nullification Controversy; Secession.

Alien and Sedition Acts

http://www.answers.com/topic/alien-and-sedition-laws

Designed to impede opposition to the Federalists, the four bills known as the Alien and Sedition Acts were passed in the summer of 1798, amid fears of French invasion. Skepticism of aliens and of their ability to be loyal to the nation permeated three of the laws. The Naturalization Act (18 June 1798) lengthened the residency requirement for naturalization from five years to fourteen, required the applicant to file a declaration of intent five years before the ultimate application, and made it mandatory for all aliens to register with the clerk of their district court. Congress repealed this law in 1802. The Alien Friends Act (25 June 1798) gave the president the power to deport aliens "dangerous to the peace and safety of the United States." Its terms were sweeping but limited to two years, and it was never enforced. The Alien Enemies Act (6 July 1798) was the only one of the four to gather strong Republican support as a clearly defensive measure in time of declared war. It gave the president the power to restrain, arrest, and deport male citizens or subjects of a hostile nation.

The most controversial of the four laws was the Act for the Punishment of Certain Crimes (14 July 1798), the nation's first sedition act. This law made it a crime "unlawfully to combine and

conspire" in order to oppose legal measures of the government, or to "write, print, utter, or publish ... any false, scandalous and malicious writing" with intent to bring the government, Congress, or the president "into contempt or disrepute, or to excite against them ... the hatred of the good people of the United States." The vice president, who at the time was a Republican, was not protected against seditious writings, and the act provided for its own expiration at the end of President Adams's term. Federalists in Congress argued that they were only spelling out the details of the proper restraints on free speech and press implied by common law. In fact, the act did liberalize the common law, because it specified that truth might be admitted as a defense, that malicious intent had to be proved, and that the jury had the right to judge whether the matter was libelous.

Federalist secretary of state Timothy Pickering directed enforcement of the Act for the Punishment of Certain Crimes against critics of the administration. Ten Republicans were convicted, including Congressman Matthew Lyon, the political writer James T. Callender, the lawyer Thomas Cooper, and several newspaper editors. Because Federalist judges frequently conducted the trials in a partisan manner, and because the trials demonstrated that the act had failed to distinguish between malicious libel and the expression of political opinion, this law was the catalyst in prompting a broader definition of freedom of the press. This experience also taught that the power to suppress criticism of public officials or public policy must be narrowly confined if democracy is to flourish.

The protest against these laws received its most significant formulation in the Kentucky and Virginia resolutions, drafted by Vice President Thomas Jefferson and James Madison. The resolutions claimed for the states the right to nullify obnoxious federal legislation, but they did not seriously question the concept of seditious libel. Rather, they merely demanded that such prosecutions be undertaken in state courts, as indeed they were during Jefferson's own presidency.

John C. Calhoun's Theory of Nullification: A Response to Increasing Tariffs in South Carolina

http://americanhistory.suite101.com/article.cfm/john_c_calhouns_theory_of_nullification

A threat of secession that galvanized the country and helped to set the stage for the coming Civil War

In 1828 Congress passed a new tariff that dramatically increased the rates on raw goods. The "tariff of abominations," as it was labeled in the South, provoked an outcry demanding the repeal of the new rates. One of the most powerful responses to the congressional action was penned by John C Calhoun of South Carolina. When he wrote his Southern Exposition Calhoun was serving as the Vice-President of the country but had little affection for Andrew Jackson the President.

Ordinance of Nullification

In his anonymous Exposition Calhoun laid out an argument for action to be taken by the state. He argued that the Union was a compact between sates. The states had the power to nullify a federal law that exceeded powers given to Congress in the constitution. The law could then be declared null and void in that state. Congress could repeal the law or could pass a constitutional amendment giving it the powers in question. If the amendment passed the state could accept the law or secede from the Union. The state legislature adopted the Ordinance of Nullification in

1833 and declared both tariffs null and void. In the text of the ordinance they also made clear "that we are determined to maintain this, our ordinance and Declaration, at every hazard..."

Historical Precedent
There was little new in the arguments presented by Calhoun. The same concepts of nullification, states rights, and secession were presented to the nation for the first time in the Virginia and Kentucky Resolutions in 1789. In both James Madison and Thomas Jefferson put forth much the same argument Calhoun drafted but there was little action taken at the time. In the case of South Carolina nullification of laws were declared and secession was a very real possibility.

Arguments Against South Carolina
The Ordinance was a dangerous declaration in response Daniel Webster of Massachusetts argued that the Union was not a compact but rather a contract between the states entered into when the constitution was ratified. It could not be cast aside when one wished. The Supreme Court, he held, was the arbiter of such issues not the states which had been the case since Marbury v Madison (1803).

Jackson's Response
A much stronger reply was from Andrew Jackson himself. Jackson was intent on preserving the Union and putting an end to the crisis. In his Proclamation on Nullification he argued that the Union was perpetual, there was no right to secession, adding that "disunion by armed force is treason." Aware of the burden that the tariffs carried in the southern states he also urged Congress to act in reducing the rates. At the same time he was granted the power to collect the revenue in South Carolina by force if necessary when congress passed the Force Act in 1833.

Peaceful Resolution
The nation teetered on the brink of war but with the swift action of Congress and the reduction of rates South Carolina repealed its Ordinance of Nullification. There was a temporary restoration of peaceful interaction between the states but under the surface there burbled the tension that erupted into the Civil War. The question of perpetual Union and the right of secession would be decided in those dark days of the 1860s.

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Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy

William J. Watkins, Jr.
http://www.independent.org/publications/books/book_summary.asp?bookID=18

The Kentucky and Virginia Resolutions, penned by Thomas Jefferson and James Madison, are a peerless study of First Principles. Written more than two decades after the colonies declared independence from Great Britain, the Resolutions remain intrepid statements of self-government and limited central authority. Recognizing that power can only be checked by power, the Resolutions call for the states to interpose against unconstitutional acts of the national government.

A Check on Federal Power

The Resolutions were responses to the Alien and Sedition Acts. Passed in the summer of 1798, the Acts were the most illiberal legislation enacted during the early national period. Ostensibly aimed at securing the home front as the Federalist Party braced for war with France, the Acts served the broader purpose of consolidating political power for the Federalists. Through this legislation, the Federalists sought to restrain democratic-minded foreigners and to silence all criticism of the national government.

Early on, Jefferson and Madison saw the Acts as an attack on civil liberties and state sovereignty. During this "reign of witches," the national government brought lawsuits for seditious libel against leading newspapers in Philadelphia, Boston, New York, and Richmond. To Republicans, these suits presented a great danger because the right to freely examine public characters and measures has often been deemed as the guardian of every other right.

During the Sedition Act controversy, Republicans adopted a modern libertarian theory of freedom of the press. Republicans such as St. George Tucker, the preeminent legal theorist of the era, postulated that an individual has the freedom to publish his sentiments without restraint, control, or fear of punishment for doing so. Until then, most Americans adhered to the rule of "no prior restraints." Under this doctrine, the government could not prohibit an individual from publishing but could impose severe sanctions against the individual afterward. The threat of punishment after publication served as a great deterrent to free expression.

Federalism, Sovereignty and Self-Government

While the protection of individual rights such as free speech is key to understanding the Kentucky and Virginia Resolutions, federalism and sovereignty are also important. Federalism (the division of legislative sovereignty between the national and state governments) is a cardinal principle of the Constitution, while the question of who has sovereignty (the supreme power of the citizenry) was at the heart of the American Revolution. Colonists argued that sovereignty resided in each colonial legislature. The British, on the other hand, believed that sovereignty resided in Parliament and therefore Parliament could make laws binding on all subjects of the crown.

After achieving independence, the theory of sovereignty further developed and Americans rejected the idea that an artificial body such as a legislature could possess supreme power. Rather than each state legislature possessing supreme power, Americans believed that the people of each state were the sovereign authority and had delegated to their elected representatives certain powers. Thus, we often say that the people of the several states possess ultimate sovereignty and their representatives possess governmental or legislative sovereignty.

Legislative sovereignty, as it relates to federalism, goes to the heart of self-government. To the Framers of the Constitution and the Revolutionaries before them, self-government meant much more than representation and voting rights. They understood that true self-government must be carried on in bodies close to the people. Small units of government permit the people to know their representatives and the representatives to know the facts and circumstances of the people. In these bodies the community's voice is heard and laws are crafted to conform to the character of the citizenry.

Alien and Sedition Acts Undermined Self-Government

In passing the Alien and Sedition Acts, according to Republicans, Congress greatly exceeded its delegated powers and thus infringed upon the powers remaining with the state legislatures as governmental sovereigns or the people as ultimate sovereigns. This usurpation thus threatened the right to self-government because the people had delegated, for example, no power to Congress to legislate regarding speech. In fact, the First Amendment specifically prohibits Congress from legislating on that subject.

As for the remedy, Jefferson and Madison pointed to nullification and interposition, whereby they declared the Acts void and of no force. Although neither Kentucky nor Virginia actually nullified a federal law and both took pains to emphasize that the Resolutions were protests, the legacy of the Resolutions is much more than that. Fortunately, Kentucky and Virginia were not forced to take more drastic measures because Jefferson was elected to the presidency in the Revolution of 1800, and the hated Sedition Act expired at midnight just before he took office.

The Legacy of the Resolutions

In the early national period, the Principles of the Resolutions gained acceptance throughout the United States. During conflicts between state and national authority, reports and resolutions adopted by state legislatures, messages from state executives, opinions of state courts, and speeches of leading citizens all ring with the words of the Kentucky and Virginia Resolutions.

Against the wishes of James Madison, South Carolina in 1832 added flesh to the skeletons of nullification and interposition. South Carolina called a special convention capable of wielding sovereign power and nullified the Tariffs of 1828 and 1832. As implemented, nullification did not rely on bayonets and brigands. Eschewing force, South Carolina sought to use the state court system to carry out nullification. South Carolina's actions, however, almost caused a war between the states as President Andrew Jackson prepared to march on South Carolina. Fortunately, a compromise was reached and war was avoided.

Lessons for Today

While the modern world is much different from that of the late 1700s, the march of years has in no way rendered federalism obsolete. If anything, the diversity that is modern America highlights the need for local self-governance and decentralized decision-making. The more diverse a society, the more it needs a pure federalist system. Only in a federalist system can a citizenry continue to work together toward great national objectives while we govern ourselves in the context of our myriad differences.

Unfortunately, our modern federal system is in disarray and functioning nothing like the system designed by the Framers. In the words of noted constitutional scholar Edward S. Corwin, "our system has lost its resiliency and what was once vaunted as a Constitution of Rights, both state and private, has been replaced by a Constitution of powers."

If we are to reform our system of government, the first step must be the rediscovery of the American Revolutionary tradition and its lessons about self-government. Integral parts of this understanding are the Kentucky and Virginia Resolutions. The Resolutions articulate the basics of self- government in an eloquent, yet logical, manner; they are second only to the Constitution in the pantheon of American charters. Only if Americans embrace the Resolutions' lessons about divided legislative sovereignty and ultimate sovereignty will a restoration of our written Constitution be possible.

State and Local Governments: Laboratories of Democracy
Within federal framework, each state has considerable autonomy

US. Dept. of State: http://www.america.gov/st/usg-english/2007/December/20071216153045esnamfuak0.6855432.html

The 50 U.S. states are divided into 3,141 counties with about 30,000 cities and 85,000 townships. The 10th Amendment to the U.S. Constitution grants state and local governments all powers not specifically reserved for the federal government. Consequently, states and communities adopt laws and forms of government that suit their needs, resulting in a diverse patchwork of governmental practices.

Nevada
The state of Nevada's renowned liberal laws grew partly from the desert state's desire to retain its population after silver prospecting went into decline. It legalized many practices that were illegal in neighboring states, such as casino gambling and some forms of prostitution. It also has the most permissive laws in the country concerning marriage and divorce.

Texas
One of the most powerful entities in the state of Texas is the Texas Railroad Commission, whose three elected members derive their power not from authority over the railroads, which they have not regulated since 2005, but from their mandate to regulate Texas' historically important oil and gas industry.

Oklahoma
Oklahoma hosts 39 American Indian tribal governments. The tribal governments, unlike the fully sovereign Indian reservations, are subject to U.S. congressional authority, but still are recognized as having authority over their tribes and tribal members through their own executive, legislative and judicial systems.

Nebraska
The unicameral legislature in the state of Nebraska is the sole exception to the bicameral system existing in all other states. It is also the nation's only nonpartisan state legislature, since the senators are elected on a ballot that does not list their party affiliations. Unlike most states that require a two-thirds majority to override a governor's veto, the Nebraska Legislature requires a three-fifths majority.

Louisiana
The state of Louisiana's political and legal structure has retained elements from its past as a French colony, basing its legal system on European continental and Roman law as opposed to English common law. It also was influenced strongly by the Napoleonic Code. As a result, judicial decisions depend more on principles set by legislation than on prior court precedents. Also, as in France, general elections typically include multiple candidates and runoff elections are held if no candidate wins more than 50 percent of the vote.

Alabama
Alabama's 1901 state Constitution is the world's longest. With more than 770 amendments and 310,000 words, the document is about 40 times the length of the U.S. federal Constitution.

West Virginia
West Virginia has a citizen legislature, as opposed to a full-time legislature, which means the delegates maintain full-time jobs in their home communities and convene in the state capital for

only 60 days between January and early April. However, the governor also can call special sessions, and monthly interim sessions often are held to prepare for the regular session.

Maryland
The city of Takoma Park, Maryland, declared itself a "nuclear-free zone" in 1983, prohibiting official contact with companies associated with nuclear weapons. The city council also voted in 2007 to impeach the current president and vice-president of the United States in a symbolic resolution.

The District of Columbia
The city of Washington, created as a federal district to host the national capital, is governed like other American cities by a mayor and city council. However, District residents' only representation in the U.S. Congress is a House representative who does not have voting privileges.

New York
The five boroughs that constitute New York City originally were separate counties and villages that were absorbed into the city as it expanded beyond Manhattan Island. The counties still retain a small amount of self-governance, but are under the authority of the New York City mayor and the city council.

Sean Wilentz: America's Long, Sordid Affair with Nullification

The New Republic (3-30-10)
http://hnn.us/roundup/comments/124991.html

[Sean Wilentz is a contributing editor to The New Republic, and the author of The Rise of American Democracy: Jefferson to Lincoln (Norton).]

Historical amnesia is as dangerously disorienting for a nation as for an individual. So it is with the current wave of enthusiasm for "states' rights," "interposition," and "nullification"—the claim that state legislatures or special state conventions or referendums have the legitimate power to declare federal laws null and void within their own state borders. The idea was broached most vociferously in defense of the slave South by John C. Calhoun in the 1820s and 1830s, extended by the Confederate secessionists in the 1850s and 1860s, then forcefully reclaimed by militant segregationists in the 1950s and 1960s. Each time it reared its head, it was crushed as an assault on democratic government and the nation itself—in Abraham Lincoln's words, "the essence of anarchy." The issue has been decided time and again—not least by the deaths of more than 618,000 Americans on Civil War battlefields. Yet there are those who now seek to reopen this wound in the name of resisting federal legislation on issues ranging from gun control to health care reform. Proclaiming themselves heralds of liberty and freedom, the new nullifiers would have us repudiate the sacrifices of American history—and subvert the constitutional pillars of American nationhood.

The origins of nullification date back to the stormy early decades of the republic. In 1798, a conservative Federalist Congress, fearing the rise of a political opposition headed by Thomas Jefferson, passed the Alien and Sedition Acts outlawing criticism of the federal government. Coming before the Supreme Court had assumed powers of judicial review, the laws, signed by President John Adams, were steps toward eradicating political dissent. In a panic, Jefferson and his ally James Madison wrote sets of resolutions duly passed by the legislatures of Virginia and Kentucky, which called upon the state governments to resist and, as Madison put it, "interpose" themselves between the federal government and the citizenry. But the other state legislatures either ignored or repudiated the resolutions as affronts to the Constitution, and the crisis was ended by the democratic means of an election when Jefferson won the presidency two years later—the wholly peaceable and constitutional "revolution of 1800."

The concept was revived by John C. Calhoun, who expanded it into a theory of nullification and Southern states' rights in 1828. The specific issue at stake was a protective tariff that Southerners believed unfair to their section, but behind it lay a growing fear that the federal government might interfere with the institution of slavery. Calhoun declared that as "irresponsible power is inconsistent with liberty," individual states had the right to nullify laws they deemed unconstitutional. He asserted further that should the federal government try to suppress nullification, individual states had the right to secede from the Union. In 1832, the South Carolina legislature passed a formal ordinance nullifying the tariff. But President Andrew Jackson proclaimed nullification pernicious nonsense. The nation, Jackson proclaimed, was not created by sovereign state governments—then, as now, a basic misunderstanding propagated by pro-nullifiers. Ratified in order "to form a more perfect union," the Constitution was a new framework for a nation that already existed under the Articles of Confederation. "The Constitution of the United States," Jackson declared, created "a government, not a league."...

After four years of Civil War, in a "new birth of freedom" that resurrected the Union, Calhoun's states' rights doctrines were utterly disgraced—but they did not disappear forever. Nearly a

century later they were exhumed to justify the so-called "massive resistance" of the segregationist South against civil rights and, in particular, the Supreme Court's ruling in Brown v. Board of Education in 1954. The current rage for nullification is nothing less than another restatement, in a different context, of musty neo-Confederate dogma....

That these ideas resurfaced 50 years ago, amid the turmoil of civil rights, was as harebrained as it was hateful. But it was comprehensible if only because interposition and nullification lay at the roots of the Civil War. Today, by contrast, the dismal history of these discredited ideas resides within the memories of all Americans who came of age in the 1950s and 1960s—and ought, on that account, to be part of the living legacy of the rest of the country. Only an astonishing historical amnesia can lend credence to such mendacity.

Abolitionists and Other 'Racists' Who Have Advocated Nullification

Posted by Ryan W. McMaken on April 6, 2010
http://www.lewrockwell.com/blog/lewrw/archives/55208.html

I rather enjoyed reading Thomas Woods's dismantling of Sean Wilentz's imaginary history of nullification in the United States. To further illustrate the Everest-like heights of Wilentz's ignorance, leftist Katrina Vanden Heuvel spoke up to note that, no, nullification can be and has been employed by notable defenders of human rights in American history. Like Woods, Vanden Heuvel mentions resistance to the fugitive slave laws, which is, of course, an excellent example of the virtues of nullification. If we consider secession to be an extreme (in a good way) sub-class of nullification, we might also note New England's threatened secession in the face of the pointless and aggressive War of 1812. We might also note the abolitionists' argument that in order to free the United States from the slave drivers, the North should secede from the South and found an actually free nation, which, unlike the United States, did not live under a bloated cloud of hypocrisy that had existed ever since the Southern states insisted on writing slavery into the Constitution of 1787.

If only the secessionists and nullifiers of the abolitionist movement had been successful! There is no doubt that some of the most heroic people in antebellum America were the operators of the Underground Railroad (like this fellow) who were branded traitors and criminals by the slave drivers, but who, in their lawbreaking and personal nullification of federal laws, brought many fellow members of the human race to freedom. Had the Northern states jailed and driven off the federal agents who had attempted to enforce federal fugitive slave laws, the Underground Railroad in the North would not have been necessary at all. In real life, however, the local obedience of most Americans to federal law meant most runaway slaves had to be spirited away to Canada, where they could be actually free of American laws written by slave whippers and obeyed by the mass of the Northern population which lacked the courage to nullify.

It is interesting to think what might have been. Had the North seceded from the South in either law or just in practice, would the South have become a garrisoned slave state? Perhaps roads and rivers and crossings might have become closely watched checkpoints to keep "property" from escaping to a foreign country. The South may have become like an enormous East Berlin with an underclass of millions imprisoned within a state with closed borders. Of course, most northerners were far too racist to allow large numbers of runaway slaves swim the Ohio to freedom, but the situation would have still been a vast improvement over a North that had been effectively rendered slavery-friendly by federal law.

Vanden Heuvel makes the point that the slave drivers were hypocrites about nullification and decentralization. That is certainly true, and the history of secession, nullification, and limiting federal power is drenched in hypocrisy on all sides. Ol' Abe Lincoln was fine with secession when the Texans seceded from Mexico. But it was verboten when the Southerners did it. John C. Calhoun had no qualms about vastly expanding the scope of federal power when it meant annexing the northern half of Mexico. Jefferson blatantly

violated the Constitution and his own decentralist principles with his embargo and his Louisiana Purchase. Many of the same abolitionists who supported nullification and secession before the war opposed it after 1861.

Yet none of these hypocrisies proves nullification and secession wrong. The hypocrisies of Calhoun and Jefferson reflect poorly on the men, but they have no bearing at all on their arguments against centralized and oppressive states. Their arguments were sound then, and they're sound now.

Which Side of History?

By LINDA GREENHOUSE
New York Times, March 25, 2010, 9:20 PM
http://opinionator.blogs.nytimes.com/2010/03/25/which-side-of-history/

Which of these assertions is the less plausible?

1. Representative Randy Neugebauer of Texas wasn't aiming at Representative Bart Stupak when he interrupted Mr. Stupak's floor speech during the closing hours of the health care debate by yelling "baby killer." (Mr. Neugebauer said his target was the bill, not his colleague from Michigan, who had accepted a fig leaf of a compromise on the bill's anti-abortion stance.)

2. The Supreme Court will find the new health care legislation unconstitutional.

In my book, these two propositions are running neck and neck into the realm of fantasy.

Fourteen state attorneys general — 13 in a coalition led by Bill McCollum of Florida and one, Kenneth T. Cuccinelli II of Virginia, going it alone — filed lawsuits this week asking federal judges to declare the new Patient Protection and Affordable Health Care Act unconstitutional. The plaintiffs do not exactly mince words. The new law violates "the core constitutional principle of federalism upon which this nation was founded," the Florida complaint declares. It is "contrary to the foundational assumptions of the constitutional compact," Virginia claims.

The Web is filled with commentary and debate over the merits of the states' arguments that the new law exceeds Congress's authority to regulate interstate commerce and violates the 10th Amendment's protection for state sovereignty.

Interesting theoretical questions, to be sure. But the only real question is whether any of these arguments will find a warm reception from at least five Supreme Court justices. The answer, almost certainly, is no.

The challengers invoke and seek to build upon the Rehnquist court's "federalism revolution" that flowered briefly during the 1990's. In a series of 5-to-4 rulings, the court took a view of Congressional authority that was narrower than at any time since the early New Deal. The court struck down a federal law that barred guns near schools, on the ground that possession of a gun near a school was not the type of activity that the Constitution's Commerce Clause authorized Congress to regulate. It ruled that Congress could not require states to give their employees the protections of the federal laws against discrimination on the basis of age or disability. It ruled that the federal government couldn't "commandeer" state officials to perform federal functions like federally mandated background checks of gun purchasers.

So isn't it reasonable to suppose that the constitutional attack on the health-insurance mandate, which states must facilitate by setting up insurance exchanges, will resonate with today's majority?

It's a fair question — to which my answer is, "That was then, this is now."

The architects of the Rehnquist federalism revolution were Chief Justice William H. Rehnquist and his fellow Arizonan, Justice Sandra Day O'Connor (Chief Justice Rehnquist was actually

from Milwaukee, but he decided during his Army service in North Africa that he liked the air of the desert rather than the cold and damp of the Great Lakes.) They were Westerners to whom the notion of states' rights came naturally.

But Chief Justice John G. Roberts Jr. is not William Rehnquist, and Justice Samuel A. Alito Jr. is not Sandra Day O'Connor. John Roberts has made his career inside the Beltway ever since coming to Washington to clerk for Rehnquist. As for Sam Alito, I don't believe that apart from a brief part-time gig as an adjunct law professor, this former federal prosecutor, Justice Department lawyer and federal judge has cashed a paycheck in his adult life that wasn't issued by the federal government. Nothing in their backgrounds or in their jurisprudence so far indicates that they are about to sign up with either the Sagebrush Rebellion or the Tea Party.

Chief Justice Roberts appears particularly in tune with the exercise of national power. One of his handful of major dissenting opinions came in the 2007 case of Massachusetts v. Environmental Protection Agency, in which the court ordered the federal agency to regulate global warming or give a science-based explanation for its refusal to do so. That case was brought by a group of coastal states, which argued that climate change was lapping at their borders. Chief Justice Roberts objected that the states should not have been accorded standing to pursue their lawsuit. He denounced the "special solicitude" that the court's majority showed the state plaintiffs. An early Roberts dissenting vote, just months into his first term, came in Gonzales v. Oregon, a 6-to-3 decision rejecting the United States attorney general's effort to prevent doctors in Oregon from cooperating with that state's assisted-suicide law.

Students of Rehnquist-style federalism will recall that the master himself blinked when his revolution got too close to the core of issues that people really care about. After all, hardly anyone had ever heard of the Gun-Free School Zones Act, the law the court invalidated in United States v. Lopez as beyond Congress's commerce power. But plenty of people cared about the Family and Medical Leave Act, the law at issue in a 2003 case, Nevada Department of Human Resources v. Hibbs. Chief Justice Rehnquist surprised almost everyone in that case, not only voting to uphold the law's application to state employees, but also writing a majority opinion displaying so much sympathy for the aims of the law it could have been ghost-written for him by Justice Ruth Bader Ginsburg. And with that decision seven years ago, the federalism revolution sputtered to an end.

John Roberts is an acutely image-conscious chief justice, as watchful and protective of the Supreme Court's image as he is of his own. I find it almost impossible to believe that this careful student of history would place his court in the same position as the court that has been rewarded with history's negative judgment for thwarting the early New Deal.

Midweek polls showed the public already rallying around the new health care law. That trend is likely to accelerate as people realize that the law's benefits belie the scare stories — just around that time that the state challenges are likely to reach the Supreme Court. It won't require a summa cum laude in history from Harvard to be able to tell history's wrong side from its right.

No Child Left Behind Act is stifling state innovations in education

By New York state Sen. Steve Saland, Special to Stateline.org
Wednesday, March 16, 2005

http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=18855

The seeds of the No Child Left Behind Act -- President George Bush's sprawling education reform initiative -- were planted decades ago, and not by the federal government. They were carefully sown by the states, cultivators in search of the best way to measure and improve student performance.

Many of the law's components took root in the early 1980s when states stopped tracking the "seat time" each student spent in school and started measuring what that student was learning. By the time NCLB deliberations began in 2001, nearly every state had developed its own method for gauging student achievement. They did so through research and experimentation. But the innovation stopped when No Child Left Behind came along. It had to stop. It was no longer allowed. Like a weed, NCLB has stifled the blossoming of states' ideas.

K-12 education historically has been a state responsibility and has been funded by state and local revenues. In this classic example of the tail wagging the dog, the federal government contributes less than 8 percent of the cost of K-12 education, less than $40 billion of the $500 billion expended nationwide. States that were once pioneers are now hostages of a one-size-fits-all education accountability system that brings the federal government into the day-to-day operations of public classrooms.

It doesn't have to be this way. Through the National Conference of State Legislatures (NCSL), a bipartisan task force of state lawmakers just finished an exhaustive review of the law. They recommend 43 ways Congress and the administration can adjust it so that it makes sense for states, and, in turn, students. Many, if not most, of these recommendations propose more flexibility for states, because state legislators believe that the freedom to respond to their area's unique needs is the freedom to innovate.

The rigid and inaccurate yardstick that No Child Left Behind uses to measure student improvement was itself left behind by many states as they fine-tuned their accountability efforts. The federal measurement compares, for example, this year's fifth-graders to next year's fifth-graders. Many educators complain that it is not a valid way to evaluate student progress.

Some states, in the pre-NCLB days, developed better models. California, Kentucky, North Carolina and Virginia were using more sophisticated and accurate systems that gauged the growth of individual students, not just groups of students and entire schools. NCLB allows states to draft their own plans for meeting the goals of the law, and those plans are subject to federal approval. None of those states was allowed to continue using its own system under NCLB. The federal law undermined innovative approaches like these.

NCSL's Task Force on No Child Left Behind recommends that the federal government show true flexibility by approving state accountability plans that meet the spirit of the law, not just the letter. Washington, D.C., should not meddle in state processes but should focus instead on monitoring states' results in narrowing the achievement gap. All agree on the need to eliminate the achievement gap. The solution will not be found by abandoning the system of vibrant federalism that has served us so well.

More specific recommendations call on the federal government to give states leeway to: focus on the schools and students most in need; measure more than just standardized test scores; set their own proficiency goals and determine the sequence of consequences for schools that don't make adequate yearly progress. Currently schools that don't achieve their improvement targets must let students attend a different school before they receive tutoring at their current school. Often, that sequence doesn't make sense.

Other consequences for schools that fail to make adequate yearly progress can be harsh. For schools that fail several times, think of a federally mandated state takeover and staff replacement. It's no wonder states

such as Michigan lowered academic standards and softened accountability systems that were in place before No Child Left Behind, rather than risk falling short of absolute federal benchmarks. States have learned to use accountability to diagnose problems and address them; the federal law uses accountability to punish. This is counterintuitive.

NCSL's task force recommends that Congress and the Bush administration reconsider the law's 100 percent proficiency goal. While that's certainly a laudable aim, under the current student proficiency measurement scheme, it is not statistically achievable. Not when disabled students who are permitted individualized education plans under civil rights law are expected to perform at grade level. Not when English learners in their third year in the country are expected to perform at grade level, regardless of their language and academic skills when they came into the United States. Not when the law expects perfection, but fails to acknowledge differences in schools and students.

And certainly not when there are consequences that actually divert money and energy from teaching. Principals and superintendents told NCSL's task force some schools that missed reading proficiency targets ended up losing reading specialists They had to use the money that paid those specialists' salaries to fund transportation to implement school choice.

The administrative costs of implementing the act are more than the federal government provides. And the true cost of the program is actually much more because complying with the law doesn't even begin to address the remediation costs of meeting proficiency targets. NCSL's task force also asks Congress and the administration to direct the Government Accountability Office to determine both the costs of compliance with NCLB and the costs of meeting proficiency targets.

States can elect not to participate in No Child Left Behind. They could forgo the federal funding and free themselves from the strings. But it's not that simple. Officials in Utah found that by not participating, they wouldn't just lose the $43 million in NCLB money, but also nearly twice that amount in other federal funding. No Child Left Behind dollars, also known as "Title 1 funds," are the basis for an important state funding formula. Not participating means a state has no related formula for Washington to figure funding levels for a host of other programs, including technology, safe and drug-free schools, literacy for parents and after-school programs. States have little choice in whether to participate in NCLB.

It's time to prune the law. State legislators have handed Congress and the administration the hedge clippers. We believe we know what education methods work best within our borders, and we look forward to serving, again, as test gardens of democracy.

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Can Federalism Solve America's Culture War?
April 26, 2006
Richard Samuelson

http://www.realclearpolitics.com/articles/2006/04/states_rights_and_wrongs.html

Can states' rights end the culture war? Commentators from David Brooks to Andrew Sullivan to David Gelernter believe that it can. According to Sullivan, in an essay in The New Republic, "The whole point of federalism is that different states can have different public policies on matters of burning controversy--and that this is okay."

Similarly, David Brooks argued in his New York Times column that each state should regulate abortion as it sees fit. According to him, Roe v. Wade was political poison. By taking the issue away from state legislatures, the Court "set off a cycle of political viciousness and counter-viciousness that has poisoned public life." Overturning Roe, he thinks, would end that cycle. Writing in the Weekly Standard, Gelernter adds: "An era where deep and fundamental moral questions divide the nation is in need of a revival of federalism. Federalism supplies the expansion joints that make America supple rather than brittle; make it a bridge that can ride out hurricanes without falling to pieces, that can sustain enormous twisting, turning, and tearing forces without cracking."

Gelernter, Brooks, and Sullivan are right in theory. Our federal system can allow for a certain degree of legal and cultural diversity in the Union. What we need to keep in mind, however, is that since the Progressive era, and particularly since the New Deal, Americans have forgotten the not just the virtues of federalism, but also the practice of federalism. A workable federal system requires forbearance on the part of the political class. It might take us a while to re-learn that virtue. Until then, I'm okay, you're okay might not be a workable political program.

A federal approach to cultural issues might worsen things, at least in the near term. As we saw in the Terry Schiavo case, separating state from national issues won't be easy. Federalism works when jurisdiction is clear, but cultural issues create murky and contentious jurisdictional controversies. That has allowed our advocacy groups to make federal cases of them.

Consider abortion. If Roe v Wade were overturned, the states could pass a rainbow of regulations, reflecting the different shades of opinion. Abortion might be legal for nine months in New York, two months in Michigan, and not at all in South Dakota. States might adopt various informed consent laws, parental consent laws, and waiting periods. That might release a certain amount of cultural steam. It could also make the cultural pot boil over. State choice might bring local troops to the culture war by forcing us all to pick sides.

Whatever happens in the states, Washington will still weigh in. Last year, the House of Representatives passed a law making it illegal to take a minor across state lines to have an abortion without her parents' consent. The more variation there is from state to state, the more opportunities Congress will have to intervene. Suppose Utah declares that life begins at conception, and Nevada declares that it begins at birth. May a resident of Utah have an abortion in Nevada? According to Utah, she has crossed state lines to commit murder. According to Nevada she has done nothing wrong. National law will have to be biased in one way or the other. It might energize more citizens, rather than less, about the issues.

Settling gay marriage state by state raises similar problems. If a gay couple marries in Massachusetts and moves to Ohio, will Ohio recognize the marriage? If so, then gay marriage in

one state effectively nationalizes the institution. If it does not, then the marriage is terribly flimsy. Congress has tried to tackle that problem with the "Defense of Marriage Act." Will the courts let it stand?

Gay couples with children will complicate things further. Would "deadbeat dad" laws apply when a spouse flees to a state that in does not recognize gay marriage? Washington state now recognizes the parental rights of a lesbian partner who is not the biological mother of the child. Not long ago, they had what might very well become a federal case.

Two women, one lesbian and one bisexual, were married and started to raise a child together. The biological mother changed her mind and decided that she would rather marry the biological father. What would happen if the biological parents moved to a state that did not recognize same-sex unions? Could the jilted lover sue for divorce on the grounds of bigamy and abandonment and demand primary custody rights of her child? In Washington she wins the case, but elsewhere her case goes nowhere. Such cases might be rare, but they are already happening. As time passes, they'll occur often enough to keep both advocacy groups and tabloid journalists busy. Tough cases make great political theater.

In short, going local will probably heat up our culture war, at least in the near term. Civic peace requires self-restraint, and even a bit of self-denial. For it to work, we must be willing not to litigate certain cases. Compromise cannot always mean splitting the difference. Sometimes it means letting the other side win, and even ignoring injustice in the name of peace. After so many years of shouting, it will take a while to learn the virtues of self-restraint.

It might be healthy for our body politic to return these issues to the states, for principled contention and compromise are essential parts of citizenship. If we go that way, the transition will not be easy. We should not pretend it will be otherwise.

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No Federalism on the Right

David Boaz. May 19, 2005
http://www.foxnews.com/story/0,2933,156260,00.html

If conservatives don't want federalism any more, will liberals pick up the banner?

Federalism has always been a key element of American conservatism. In his 1960 manifesto, The Conscience of a Conservative, Barry Goldwater called for the federal government to "withdraw promptly and totally from every jurisdiction which the Constitution reserves to the states."

Ronald Reagan ran for president promising to send 25 percent of federal taxes and spending back to the states. As Republicans took control of Congress in 1995, Newt Gingrich stressed that "we are committed to getting power back to the states."

Lately, though, conservatives -- at last in control of both the White House and both houses of Congress -- have forgotten their longstanding commitment to reduce federal power and intrusiveness and return many governmental functions to the states. Instead, they have taken to using their newfound power to impose their own ideas on the whole country.

Conservatives once opposed the creation of a federal Education Department. Congressional Republicans warned, "Decisions which are now made in the local school or school district will slowly but surely be transferred to Washington.... The Department of Education will end up being the Nation's super schoolboard. That is something we can all do without."

But President Bush's No Child Left Behind Act establishes national education testing standards and makes every local school district accountable to federal bureaucrats in Washington.

President Bush and conservative Republicans have been trying to restrain lawsuit abuse by allowing class-action suits to be moved from state to federal courts. The 2002 election law imposed national standards on the states in such areas as registration and provisional balloting. A 2004 law established federal standards for state-issued driver's licenses and personal identification cards.

President Bush's "Project Safe Neighborhoods" transfers the prosecution of gun crimes from states to the federal government. The administration is trying to persuade federal courts to block implementation of state initiatives on medical marijuana in California and assisted suicide in Oregon.

Perhaps most notoriously, President Bush and conservatives are pushing for a constitutional amendment to ban gay marriage in all 50 states. They talk about runaway judges and democratic decision-making, but their amendment would forbid the people of New York, Massachusetts, Connecticut, California or any other state from deciding to allow same-sex marriage. Marriage law has always been a matter for the states. We should not impose one uniform marriage law on what conservatives used to call "the sovereign states."

Most recently, we have the specter of the Republican Congress seeking to override six Florida court decisions in the tragic case of Terri Schiavo, intruding the federal government into yet another place it doesn't belong. Asked on Fox News about the oddity of conservatives seeking to

over-ride states' rights, Weekly Standard editor Fred Barnes responded: "Please! States' rights? Look, this is a moral issue."

Which is what liberal Democrats always said, of course, as they spent 50 years eroding federalism and expanding the power of the federal government at every turn. They had a point when it came to the civil rights laws; Southern states were violating the constitutional rights of black citizens. But that was no excuse for federalizing everything from the minimum wage to the speed limit to environmental regulations.

For decades, liberals scoffed at federalist arguments that the people of Wisconsin or Wyoming understood their own needs better than a distant Congress. They brought more and more power to Washington, over-riding state legislatures and imposing mandates on every nook and cranny of governance.

Now those chickens have come home to roost. Republicans run Washington, and they're using the federal power that liberals built in ways that liberals never envisioned.

Some liberals are rediscovering the virtues of federalism. They dimly recall that Justice Louis Brandeis called the states "laboratories of democracy" and are seeking to pursue their own policies at the state level when they fail in Washington. The prospect of a constitutional amendment banning gay marriage has made many liberals appreciate the virtues of having 50 states, each free to make its own marriage law.

Some have even come to appreciate the value of diversity: Virginia and Vermont may have different marriage laws, and that's OK. Maybe it would even be OK for Los Angeles and Louisiana to have different environmental regulations.

But most liberals can't give up their addiction to centralization. Even as they rail against federal intervention in the Schiavo case -- arch-liberal Eleanor Holmes Norton, the District of Columbia's delegate in Congress, discovers for the first time in her life that "the bedrock of who we are" is the "Founders' limited vision of the federal government" -- they push for stricter regulations on pesticides and painkillers, a higher national minimum wage, and federal gun control laws.

Only one modern political party has a history of taking federalism seriously, but Republicans have decided to abandon this principle to pander to small but vocal constituencies. The nation will be poorer for it.

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The Federalism Debate: Why Doesn't Washington Trust the States?

Cato Inst. Congressional Testimony ^
July 20, 1995
Roger Pilon, Ph.D., J.D.
Posted on **February 17, 2002**

Roger Pilon, Ph.D., J.D. Senior Fellow and Director Center for Constitutional Studies Cato Institute Washington, D.C. before the Subcommittee on Human Resources and Intergovernmental Relations Committee on Government Reform and Oversight United States House of Representatives July 20, 1995

I want to thank Congressman Shays for inviting me to testify on the subject of these hearings, **"The Federalism Debate: Why Doesn't Washington Trust the States?"** I want also to commend the subcommittee for holding these hearings, for the federalism debate is, without doubt, the most important political, legal, and constitutional debate taking place in America today, going to our very roots as a nation.

At the same time, I would have thought, especially following last November's elections, that the proper question was not **"Why doesn't Washington trust the states?" but "Why don't the people and the states trust Washington?" For surely, it is distrust of Washington that drives the debate today.**

And the answer to that question, I submit, has rather less to do, in the final analysis, with the policy concerns that infuse the subcommittee's statements to date on the subject than with a much more basic concern about political and constitutional legitimacy. **In a word, the people and the states no longer trust Washington not simply because Washington has been doing a less than satisfactory job but, more deeply, because Washington has assumed a vast array of regulatory and redistributive powers that were never its to assume--not, that is, if we take the Constitution seriously.**

Thus, the question the people and the states are increasingly putting to Washington is simply this: **By what authority do you rule us as you do?** That is a question that takes us to First Principles of a kind the Supreme Court itself revisited less than three months ago when it found, for the first time in nearly 60 years, that the power of Congress to regulate interstate commerce is not the power to regulate anything and everything.

The Court's opinion in United States v. Lopez sent shock waves through official Washington, not least because Washington had simply assumed, since the era of the New Deal, that its regulatory powers were plenary. Indeed, with the statute in question, The Gun-Free School Zones Act of 1990, Congress had not even bothered to cite the source of its authority under the Constitution. One can hardly fault the average American for finding in that a certain indifference, if not contempt, for constitutional limits.

Yet it is just such limits that federalism, in the end, is all about. To appreciate the point, however, it is necessary to go beyond the federal-state and states' rights debates that have dominated the federalism discussion. For the issues, at bottom, are not so much jurisdictional as substantive. And nowhere is that more clear than in the Tenth Amendment, properly understood.(1)

I. The Tenth Amendment and Enumerated Powers

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

By its terms the amendment tells us nothing about which powers are delegated to the federal government, which are prohibited to the states, or which are reserved to the states or to the people. To determine that, we have to look to the centerpiece of the Constitution, the doctrine of enumerated powers.

That doctrine is discussed at length in the Federalist Papers. But it is explicit as well in the very first sentence of Article 1, section 1, of the Constitution ("All legislative Powers herein granted . . .") and in the Tenth Amendment's reference to powers "not delegated," "prohibited", and "reserved."

Plainly, power resides in the first instance in the people, who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally--**through the Constitution. The importance of that starting point cannot be overstated, for it is the foundation of whatever legitimacy our system of government can claim. What the Tenth Amendment says, in a nutshell, is this: if a power has not been delegated to the federal government, that government simply does not have it.** In that case it becomes a question of state law whether the power is held by a state or, failing that, by the people, having never been granted to either government.(2)

At bottom, then, the Tenth Amendment is not about federal vs. state, much less about federal-state **"partnerships," block grants, "swapping," "turnbacks," or any of the other modern concepts of intergovernmental governance. It is about legitimacy.** As the final member of the Bill of Rights, and the culmination of the founding period, the Tenth Amendment recapitulates the philosophy of government first set forth in the Declaration of Independence, that governments are instituted to secure our rights, "deriving their just powers from the consent of the governed."(3) Without that consent, as manifest in the Constitution, power is simply not there.

It is the doctrine of enumerated powers, then, that gives content to the Tenth Amendment, informs its theory of legitimacy, and limits the federal government. Power is granted or delegated by the people, enumerated in the Constitution, and thus limited by virtue of that delegation and enumeration. **The Framers could hardly have enumerated all of our rights--a problem the Ninth Amendment was meant to address.(4) They could enumerate the federal government's powers, which they did to restrain that government.** The doctrine of enumerated powers was meant to be the principal line of defense against overweening government. The Bill of Rights, added two years after the Constitution was ratified, was meant as a secondary defense.

Yet today the federal government exercises powers not remotely found in the Constitution, leading lawyers and laymen alike to say, increasingly, that those powers are illegitimate.(5) How then did we get to this point, where the federalism debate is increasingly a debate about the very foundations of our system of government? I have discussed that question at length elsewhere.(6) Let me simply summarize the answer here, then turn to an issue that seems to concern the subcommittee, and not without reason--the connection, historically and prospectively, between

federalism and "states' rights."

II. The Demise of the Doctrine of Enumerated Powers

Our modern regulatory and redistributive state--the state the Framers sought explicitly to prohibit--has arisen largely since 1937, and primarily through just two clauses in the Constitution, the Commerce Clause and the General Welfare Clause respectively. It is striking that this is so, for if the Framers had meant forCongress to be able to do virtually anything it wanted through those two simple clauses, why would they have bothered to enumerate Congress' other powers, much less defend the doctrine of enumerated powers throughout the Federalist Papers? That is the question that cries out for explanation.

The explanation, of course, is that the Framers intended no such thing. The modern state arose through judicial legerdemain, following Franklin Roosevelt's notorious 1937 Court-packing scheme.

In a nutshell, the **Commerce Clause,** which gives Congress the power to regulate commerce among the states, **arose out of concern that the free flow of commerce among the states might break down if states, as under the Articles of Confederation, had the power to erect protectionist measures on behalf of indigenous enterprises.** Thus, its principal aim was to ensure the free flow of commerce by giving Congress the power to regulate, or make regular, such interstate commerce. Not remotely did the Framers intend that the clause would be converted from a shield against state abuse--its use in the first great Commerce Clause case, Gibbons v. Ogden(7)-- into a sword, enabling Congress, through regulation, to try to bring about all manner of social and economic ends. Yet today, following the Supreme Court's reversal in 1937,(8) **that is just what has happened as Congress claims power to regulate anything that even "affects" interstate commerce, which in principle is everything.**

The General Welfare Clause of Article 1, section 8, was also intended as a shield, to ensure that Congress, in the exercise of any of its enumerated powers, would act for the general rather than for any particular welfare. Here, however, Hamilton stood opposite Madison, Jefferson, and others in thinking that the clause amounted to an independent, enumerated power--albeit limited to serving the general welfare. But as Congressman William Drayton noted in 1828, if Hamilton were right, then whatever Congress is barred from doing because there is no power with which to do it, it could accomplish by simply appropriating the money with which to do it.(9) That, of course, is precisely what happened, which the Court sanctioned when it came down on Hamilton's side in 1936,(10) then a year later went Hamilton one better by saying that although the distinction between general and particular welfare must be maintained, the Court would not itself police that distinction.(11) **Congress, the very branch that was redistributing with ever-greater particularity, would be left to police itself.**

With the Court's evisceration of the doctrine of enumerated powers, the modern regulatory and redistributive state poured through the opening. One result of the subsequent explosion of federal power, of course, was the contraction of state power where the two conflicted--and the attendant federalism dilemmas. At the same time, individual liberty contracted as well--the preservation of which was supposed to be the very purpose of government. And finally, questions about constitutional legitimacy never did go away. As government grew, the idea that a Constitution designed for limited government had authorized that growth of power became increasingly difficult to sustain.

III. Federalism and "States' Rights"

But what about the sorry history of "states' rights" as a doctrine that southern states invoked by way of defending slavery and then, after the Civil War, the reign of Jim Crow? Does this not give weight to the question, "Why doesn't Washington trust the states?" Indeed it does, but here too there has been substantial misunderstanding over the years, with a seminal Supreme Court case at its core.

The tragic compromise that led the Framers to accept slavery in their midst is well known. It took a civil war to abolish that institution, and the Civil War Amendments to secure the legal rights of the freed slaves. Unfortunately, no sooner had those amendments been ratified than the principal vehicle for insuring substantive rights against state action, the Privileges and Immunities Clause of the Fourteenth Amendment, was eviscerated by a deeply divided Court in the Slaughter-House cases.(12) The clause has never been successfully revived.

On Blackstone's view, the clause referred to our "natural liberties." The Civil Rights Act of 1866, which Congress reenacted in 1870, just after the Fourteenth Amendment was ratified, made it clear that the clause was meant to protect the very rights Jim Crow went on to deny.

The demise, then, of the Privileges and Immunities Clause had nothing to do really with the Tenth Amendment or the doctrine of enumerated powers. It was a blatant case of judicial abdication that eviscerated the clause, thereby leaving the freed slaves in the South to the mercies of state legislatures.

Nor is there anything in current efforts to revive the Tenth Amendment and the doctrine of enumerated powers that should give pause--provided only that we are clear, and the judiciary is clear, that the Fourteenth Amendment gives the courts, through section 1, and the Congress, through section 5, the power to negate state actions that deny their citizens the privileges and immunities of citizens of the United States. Were the Congress to move to do that, the promise of the Civil War Amendments would at last be realized, not in opposition to federalism, but in harmony with it as perfected through those amendments.

http://www.cato.org/testimony/ct-fd720.html

FIFTY WAYS TO KILL RECOVERY

by James Surowiecki
The New Yorker, JULY 27, 2009
http://www.newyorker.com/talk/financial/2009/07/27/090727ta_talk_surowiecki

If you came up with a list of obstacles to economic recovery in this country, it would include all the usual suspects—our still weak banking system, falling house prices, overindebted consumers, cautious companies. But here are fifty culprits you might not have thought of: the states. Federalism, often described as one of the great strengths of the American system, has become a serious impediment to reversing the downturn.

It's easy enough, of course, to mock state governments nowadays, what with California issuing I.O.U.s to pay its bills and New York's statehouse becoming the site of palace coups and senatorial sit-ins. But the real problem isn't the fecklessness of local politicians. It's the ordinary way in which state governments go about their business. Think about the $787-billion federal stimulus package. It's built on the idea that during serious economic downturns the government can use spending increases and tax cuts to counteract the effects of consumers who are cutting back on spending and businesses that are cutting back on investment. So fiscal policy at the national level is countercyclical: as the economy shrinks, government expands. At the state level, though, the opposite is happening. Nearly every state government is required to balance its budget. When times are bad, jobs vanish, sales plummet, investment declines, and tax revenues fall precipitously—in New York, for instance, state revenues in April and May were down thirty-six per cent from a year earlier. So states have to raise taxes or cut spending, or both, and that's precisely what they're doing: states from New Jersey to Oregon have raised taxes in the past year, while significant budget cuts have become routine and are likely to get only deeper in the year ahead. The states' fiscal policy, then, is procyclical: it's amplifying the effects of the downturn, instead of mitigating them. Even as the federal government is pouring money into the economy, state governments are effectively taking it out. It's a push-me, pull-you approach to fighting the recession.

Now, state cutbacks have not been as severe as they might have been, thanks to the stimulus plan, which includes roughly $140 billion in aid to local governments. That aid, according to a recent study by the Center on Budget and Policy Priorities, has covered thirty to forty per cent of the states' budget shortfalls. Money for the states translates directly into jobs not lost and services not cut—which is why you can make a good case that more of the stimulus should have gone to state aid. Yet there's no sign that those budget gaps are getting smaller, and, as the federal money runs out, state tax increases and spending cutbacks are only going to become more common. In the midst of this downturn, some of the biggest players in the economy—state and local governments together account for about thirteen per cent of G.D.P.—will be doing precisely the wrong thing.

Fiscal federalism also makes it harder to spend the stimulus money efficiently. Much of the tens of billions of dollars that will be spent on roads, for instance, will be funnelled through the states. As a result, a disproportionate amount of the money will be spent in rural areas (which exert disproportionate influence on state governments), leaving cities—which happen to have most of the people and most of the traffic—shortchanged. The top eighty-five metropolitan areas in the country are responsible for about three-quarters of the country's G.D.P. Yet less than half of the road money will be invested there. The billions in stimulus money that's going to high-speed rail will likely be spent more sensibly, since the Obama Administration has placed a premium on interstate coöperation in building the network. Still, whether we end up with true regional, let alone national, rapid-transit networks will depend largely on decisions made at the state, rather

than the national, level. In other words, you may be able to get from Miami to Orlando quickly, but it could be a slow train (at best) to the rest of the country.

Even more important, federalism is getting in the way of the creation of a "smart" American power grid. This would involve turning the current hodgepodge of regional and state grids into a genuinely national grid, which would detect and respond to problems as they happen, giving users more information about and control over their electricity use, and so on. It could also dramatically reduce our dependence on oil. Wind power could eventually produce as much as twenty per cent of the energy that America consumes. The problem is that the places where most of that wind power can be generated tend to be a long way from the places where most of that power would be consumed. A new grid would enable us to get the power to where it's needed. But since nobody likes power lines running through his property, building the grid would require overriding or placating the states—and the prospects of that aren't great.

The tension between state and national interests isn't new: it dates back to clashes in the early Republic over programs for "internal improvements." Of course, the federal government is far bigger than it once was, and yet in the past two decades we've delegated more authority, not less, to the states. The logic of this was clear: people who are closer to a problem often know better how to deal with it. But matters of a truly interstate nature, like the power grid, can't be dealt with on a state-by-state basis. And fiscal policy is undermined if the federal government is doing one thing and the states are doing another. It's a global economy. It would be helpful to have a genuinely national government. ♦

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Laboratories of Democracy: Anatomy of a Metaphor

By Michael S. Greve

Justice Louis D. Brandeis's metaphor of the states as "laboratories" for policy experiments is perhaps the most familiar and clichéd image of federalism. Contrary to common belief, however, Brandeis's famous dictum had almost nothing to do with federalism and everything to do with his commitment to scientific socialism. That substantive view proved even more influential, in political thought and constitutional jurisprudence, than the metaphor that flowed from it. To this day, it continues to inhibit a truly experimental, federalist politics.

"It is one of the happy incidents of the federal system," Justice Louis D. Brandeis wrote in 1932, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Conservative and liberal justices have quoted Brandeis's dictum in some three dozen cases. The metaphor invariably surfaces in any scholarly or public discussion of federalism and is accompanied by emphatic nods of approval. It conveys a pragmatic spirit that naturally appeals to a nation of compulsive tinkerers, and it connotes equally popular sentiments in favor of localism and decentralization.

Popular appeal aside, one can make a powerful *theoretical* case for the experimental, decentralized politics that the laboratory metaphor suggests. Political institutions should be capable of adapting to changing economic circumstances and social values. Much can be said for the piecemeal diffusion of new policies: when we do not know what we are doing, it is best not to do it everywhere, all at once. A state-based process facilitates gradualism and, therefore, feedback and institutional learning. Successful state and local experiments with airline deregulation, welfare reform, and school choice taught valuable lessons, built public confidence in innovative policies, and provided a testing ground for social scientists' models and policy recommendations that might well have gone unheeded in a centralized political environment. State-based policy innovation also facilitates adaptation to local needs, circumstances, and preferences.

Political experimentation, however, does not operate with the efficiency of a disinterested, scientific process of trial and error. Such experimentation carries political risks, which arise principally from the fact that the governmental experimenters, and the interest groups that hang around them, have huge stakes in exploiting the test population of citizens. Legislative experimentation must therefore be constrained. To that end, we have a Constitution that allocates specified and limited powers to competing institutions and levels of government. The point of the constitutional arrangement is to limit what government may do to citizens in the way of experimentation; to inhibit rash, indiscriminate lawmaking; and to guard against the risk of factious, "partial" legislation, or what we now call rent seeking.

At some level, tension between constitutional constraint and political experimentation is inevitable. A prompt call for "balance" among those considerations, however, is a case of preemptive

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intellectual surrender. It is possible to harmonize constitutionalism and federalist experimentation while taking account of political risks. Also possible, however, is a view of experimentation that is inimical to constitutional purposes and oblivious to political risks.

Louis D. Brandeis's view, unfortunately, was of the latter kind. His idea of experimentation was all trial—and never an error. Far from celebrating a genuinely diversified, experimental politics, Brandeis viewed state governments as a vanguard for the national administrative state.

New State Ice and Interests

The "laboratory" dictum appears in Brandeis's dissent in *New State Ice Co. v. Liebmann* (1932), a case arising over an Oklahoma statute prohibiting the manufacture, distribution, and sale of ice without a certificate of public convenience and necessity. Then-extant constitutional doctrine permitted such conversions of private enterprises into public utilities vis-à-vis industries that were viewed as being affected with a public interest—for example, by virtue of a monopolistic market position. With respect to competitive industries, however, such measures were viewed as violating the Fourteenth Amendment—specifically, the liberty to apply one's labor in an ordinary occupation, subject to reasonable regulation. Writing for the majority in *New State Ice,* Justice George Sutherland determined that selling ice was an ordinary private business and effectively enjoined the operation of the Oklahoma licensing statute.

Brandeis objected that intense public concern over the ice industry, "destructive competition," and the industry's necessity to consumers and to Oklahoma's economy might well warrant the licensing scheme. To reverse the state legislature's judgment, Brandeis insisted, would "involve the exercise not of the function of judicial review, but the function of a super-legislature." The dissent culminates, and terminates, in the "laboratory" passage:

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the 14th Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have the power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[1]

The Supreme Court's last decision to invalidate a state economic regulation as a violation of substantive due process, *New State Ice* represents an exceedingly deferential application of that doctrine. Oklahoma, like many other states, regulated prices and practices in the ice industry before turning it into a public utility. Justice Sutherland explicitly acknowledged the constitutionality of those regulations. He would have permitted even the licensing scheme had it rested on anything resembling a plausible rationale.

Brandeis's dissent recites, at characteristic length, "facts" that could have justified Oklahoma's experiment. (The "facts" were neither relied on by the Oklahoma legislature nor in the record before the Court; Brandeis cobbled them together from squawkings in the trade press and articles by protosocialist academics such as Charles A. Beard.) The low cost of entry into the ice market, Brandeis maintained, leads to "wasteful," "destructive," and "ruinous" competition. For the duration, consumers "suffer" [*sic*] because producers "go to extremes in cutting prices." Unable to recoup their fixed costs, Brandeis continued, some producers are forced out of business. Thus, "the business of ice . . . lends itself peculiarly to monopoly" and, presumably, monopoly pricing. That risk, though, apart from being unlikely in an industry with low entry costs and government price regulation, has nothing to do with the licensing scheme. As Justice Sutherland observed, and Justice Brandeis conceded,

Oklahoma's statute aimed to "*create and foster*," rather than to abate, "monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public."

Pace Brandeis, Oklahoma was not a "single courageous state" whose "citizens chose" to stage a "novel experiment." It was rather the first state where beleaguered industry participants, threatened by intense competition and by a newfangled invention called the "refrigerator," managed to enact the oldest game in town—market entry and output restrictions in conspiracy against consumers and potential competitors. Justice Brandeis himself noted the industry's "unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character." "The ice industry in Oklahoma has acquiesced in and accepted the Act and the status which it creates," he added—somewhat superfluously, since a member of that industry was the plaintiff in *New State Ice* and the defendant, a prospective competitor.

Neither those actual facts nor the plain absurdity of curtailing a threat of monopoly through monopolization gave Brandeis pause. That suggests not a "bold" mind but an unalterably closed one; not a healthy regard for facts but obtuseness to the political dynamics and dangers of state regulation.

The wholesale rejection of economic substantive due process in the wake of the New Deal earned the "*Lochner Court*" its notoriety and its contemporary opponents on the bench, Louis D. Brandeis and Oliver Wendell Holmes, their inflated reputations. The *New State Ice* dissent assumed the rank of a canonical statement of federalism's innovative, experimental virtues. That interpretation, however—testimony to the lasting dominance of Brandeis's progressivist ideology—is unsustainable. The *New State Ice* majority employed judicial review as a coarse screen to filter permissible, public-regarding experimentation from naked interest group dealing. What the dissent stands for is judicial abdication in the face of that spectacle.[2]

Federalism?

A credible commitment to state experimentation carries two necessary federalism implications. First, states must be limited to experimenting with citizens inside their own borders, rather than with out-of-state parties. Otherwise, the "laboratories" will routinely exploit outsiders for the benefit of their own constituents. Such mutual regulatory aggression will, *ex ante*, induce excessive experimentation and, *ex post*, obviate politically effective comparisons of costs and benefits.

Second, a plausible model of state experimentation requires limitations on national power. Without such limitations, states that are conducting costly social experiments will seek to prevent a deterioration of their competitive position and the flight of productive citizens to more hospitable jurisdictions by insisting that Congress induce all states to conduct the same experiment. Once that happens, we shall never know whether regulation or forbearance produces better results. Moreover, citizens and corporations lose the ability to move from one state to another in search of a regulatory package to their liking. The most reliable mechanism of institutional feedback and learning is lost.

By way of a current example, Texas, Pennsylvania, and Virginia, among other states, are conducting successful—if piecemeal—experiments with electricity deregulation. California, obviously, is not. Its citizens believe, and its politicians proclaim, that the state's energy crisis stems from a corporate conspiracy, as opposed to the Golden State's experiment with price controls and environmental restrictions on power plant construction. Those people deserve to sit in the dark. They will learn, though—perhaps when all the high-tech jobs and factories have moved to Nevada; probably sooner.

Learning from a failed experiment is the *only* benefit of the California fiasco and the most potent argument for sustaining state experimentation—even, in this instance, in the face of inevitable spillover effects on shareholders and energy users outside California. That benefit would be lost, and little could be said for federalism, if the state were permitted to impose the costs of its experiment on its neighbors or to engineer a federal bailout—to say nothing of contriving to prevent its citizens and companies from leaving the state. Effective experimentation and learning require institutional constraints that make the costs and benefits of political experiments hit home. Justice Brandeis did not believe in such constraints.

Across the Borders. Brandeis's most fateful decision and opinion, *Erie Railroad v. Tompkins* (1938), wiped out the federal common law that governed private disputes among parties from different states and provided that such disputes must instead be governed by *state* common law. Three years later, in *Klaxon Co. v. Stentor Electric* (1941), the Supreme Court extended *Erie's*

"state-law-governs" rule to choice of law—that is, the question of which state law governs disputes among parties from different states.

While *Erie* looks like a profederalism decision, its effect is the opposite. To the *Erie-Klaxon* regime, we owe the fabulous "experiment" of systematic exploitation of out-of-state corporations in franchise disputes and, most egregiously, in products liability litigation. Plaintiffs' attorneys shop for a hospitable court and jury, which proceed to apply their home state law and sock it to out-of-state defendants. That is not experimentation—quite the opposite: states lose their ability to experiment with varying liability regimes, since the most plaintiff-friendly jury in the country will determine product safety and liability standards for the entire country—provisionally, until plaintiffs' lawyers find a still crazier jury.

Brandeis had left the bench before *Klaxon* and, in fairness, might not have joined that decision. For most of his career, he insisted on federal, constitutional limitations to prevent states from applying their own law to out-of-state parties and legal relations.[3] But he would have approved of *Klaxon's* spirit.

Brandeis burbled incessantly about the increasing complexity of the industrial age, which in his estimation necessitated a bigger government and "administrative machinery." "With the increasing complexity of society," he intoned in a 1918 dissent, "the public interest tends to become omnipresent."[4] (In the ice industry, for example.) A serious consideration of complexity, however, should have produced the opposite result in *Erie*. One facet of complexity, the explosive growth of sales of products manufactured in another state, greatly increased the risk that parochial state courts might exploit out-of-state producers. For that reason, corporations liked federal courts and diversity jurisdiction. For precisely the same reason, Brandeis wanted to abolish federal diversity jurisdiction and, in *Erie,* committed corporate defendants to the tender care of state courts. His devotion was not to experimentation as a functional response to social complexity. What drove him was his animus against corporate capitalism.[5]

The States and the Nation. An early test of Brandeis's commitment to state experimentation came in *Hammer v. Dagenhart,* a 1918 decision invalidating, as exceeding congressional powers under the commerce clause, the federal regulation of child labor. The purpose of the commerce clause, the Court explained, is to enable Congress to regulate interstate commerce, as distinct from flattening the diverse, experimental state world. None of the rationales that might warrant national intervention—say, a national emergency or an inability on the part of the states to tackle a social problem—was present. Every single state had at the time enacted prohibitions against child labor; the only question in the case was whether the federal minimum age (fourteen) should be permitted to trump North Carolina's (twelve). Despite the evidence of competent, successful state experimentation, however, Louis "Laboratory" Brandeis joined Justice Oliver Wendell Holmes's dissent in *Hammer.*

Almost two decades later, in *Steward Machine Co. v. Davis* (1936), the Supreme Court sustained a federal statute that enticed the states, through a "cooperative" system of taxation and funding, to adopt a uniform, federal unemployment insurance regime. The statute short-circuited an experimental dynamic that should have appealed to Brandeis. Wisconsin, on the initiative of Brandeis's daughter, had adopted an unemployment insurance law shortly before the federal enactment, and other states were contemplating similar legislation. "We ought to get the full benefit of experiments in individual states before attempting anything in the way of Federal action," Brandeis had written in 1912.[6] Heedless of that sensible exhortation, he joined Justice Benjamin N. Cardozo's majority opinion in *Steward Machine,* which legitimated the federal statute on the grounds that state experimentation was not proceeding with sufficient speed.

State experiments, it turns out, are of no constitutional significance or consequence. Both experimentation, as in *Hammer,* and the lack (or lack of speed) thereof, as in *Steward Machine,* are a prelude and predicate for federal intervention.

While Brandeis mobilized federalism and state experimentation in opposition to the exercise of federal *judicial* power, what he actually believed in was social control and legislative supremacy at every level. Brandeis resolutely opposed Tenth Amendment limitations on the national government as well as judicially recognizable commerce clause or other enumerated powers limits to congressional authority. He generously read federal law to "preempt" state law, even when the two were not actually in conflict and, moreover, Congress had expressed no intent to override the states' policies.[7] If the states "wish to protect their police power," Brandeis argued, "they should, through the 'state block' in Congress, see to it in every class of Congressional legislation that the state rights which they desire to preserve be expressly provided for in the

acts."[8] His remark foreshadows the post–New Deal Supreme Court's commitment to "process federalism," which holds that federalism's only protection lies in the political process itself. That doctrine of judicial abdication, to which the Supreme Court adhered as late as 1985, is the credo of the centralized administrative state. It is the opposite of an experimental politics.

Speech, Trials, and Errors

Louis Brandeis's enthusiasm for state experimentation was not only lukewarm; it was also selective. It was limited to "economic and social" matters, as his *New State Ice* dissent put it, and did not extend to speech, education, and "privacy." In *Meyer v. Nebraska* (1923), Brandeis voted to strike down, over a dissent by his soul mate Holmes, a statute that prohibited, to the untold relief of cornhusker kids, the teaching of German in public and private schools. In *Pierce v. Society of Sisters* (1925), Brandeis joined in striking down a state statute mandating public school attendance. In *Near v. Minnesota* (1931), he voted to invalidate a state statute prohibiting the publication of scandalous and defamatory materials.

Meyer and *Pierce* were substantive due process cases, just as *New State Ice*. *Near* incorporated the First Amendment into the due process clause. In each case the state invoked police power justifications that, however debatable, had greater plausibility than Oklahoma's *New State Ice* scheme. Justice Sutherland, for one, saw the connection: his majority opinion in *New State Ice* cited *Pierce* and *Near* as precedents and wrapped them around Brandeis's neck. The only reason for enjoining state experimentation in those cases while celebrating the Oklahoma racket, Sutherland suggested, was the contention that constitutional and common law rights count only when they are not economic.

Just so. Far from merely opposing substantive due process, Brandeis refused to recognize "economic" rights, even when they had a clear-cut textual basis—and, for that matter, when they ran against the federal government rather than against experimenting states.[9] Meanwhile he detected, somewhere in the Fourth or Fifth Amendment, a constitutional aspiration "to protect Americans in their beliefs, their thoughts, their emotions and their sensations." (That blow of hot air appears in Brandeis's celebrated dissent in *Olmstead v. United States* (1928), the perceived basis of a "right to privacy.") Such jurisprudence rested on Brandeis's belief that free inquiry and "personal sanctities," in contrast to stultifying economic rights, were central to scientific management, social trial and error, and political and economic progress and must therefore be placed beyond the reach of experimenting governments.

Brandeis's functionalism has the dynamics of rights and social change precisely backward.

Freeze! Brandeis rejected the judicial review of economic regulation as invariably premature. Regulatory experiments, he argued, should be allowed to prove their success or failure before being declared "arbitrary" or "unreasonable." The intended result of interest group politics, however, is often stasis rather than social experimentation. Oklahoma's ice licensing scheme, for a perfect example, attempted to arrest the existing structures in a fiercely competitive, rapidly changing industry.

The conservative bias of political "experimentation" is systemic and utterly predictable: the emerging forces of change and progress are unorganized and underrepresented, whereas the dinosaurs have trade associations and friends in high places. Once a regulatory regime is in place, moreover, the beneficiaries will manage to sustain it regardless of its merits. The interest group detritus of the New Deal is with us to this day, from agricultural marketing orders to minimum wage laws. The price of uninhibited government experimentation is political and social ossification.

Toward Progress, March! Under the First Amendment banner planted in *Near v. Minnesota*, the Supreme Court later mowed down state libel laws, loyalty oaths, Pledge of Allegiance rituals in public schools, and state and local pornography regulations. The substantive due process of *Pierce* and the "privacy" right of *Olmstead* eventually became the substantive due process and privacy rights of *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973). Whatever one makes of the state regulation of birth control devices (as in *Griswold*) or abortion, though, it is most certainly experimental. If trucking and ice regulation present a case for diversification, gradualism, and institutional learning, so too do school choice, drug policy, and pornography regulation.

Social experiments enshrined in state legislation, moreover, are typically more easily reversed by political means than are economic experiments. Economic legislation is dominated by lobbyists and their well-heeled clients, who can easily defend their special interest schemes against a mass of rationally ignorant voters. In the social arena, political entrepreneurs can usually mobilize constituencies

on both sides of issues that voters readily understand and, moreover, care about.[10]

Regardless of their merits in one case or another, then, universal rights to speech and privacy tend to reduce experimentation and diversity. That tendency is particularly pronounced when the commitment to universal noneconomic rights is instrumental and wedded, as it was for Brandeis, to an ideological notion of "progress." The judicial account of experimentation will then follow not the silly distinction between economic and noneconomic affairs but the more basic political commitments. Brandeis waxed about the right to "privacy" and suggested that the constitutional right to "life" must mean a *meaningful* life, including leisure time and a minimum wage. Having done so, he assented to state experiments with the forced sterilization of "imbeciles."

Beyond Progressivism?

Louis D. Brandeis favored federalist "experimentation in things social and economic" as a means to progressive, statist ends. Even his hagiographers concede that Brandeis would have held a very different view of state economic experimentation and its judicial review had those experiments run against, say, trade unions.[11]

Modern justices have tended to overlook, or perhaps ignore, the instrumental and ultimately half-hearted nature of Brandeis's federalist commitment. For example, they have quoted the "laboratory" dictum in the course of celebrating federalism's virtues of diversity and attentiveness to local circumstances. Brandeis's view of state experimentation, however, was entirely disconnected from those notions and instead emphasized its value as a step toward federal legislation. Similarly, profederalist justices have quoted the *New State Ice* dissent in opinions that reject, on Tenth Amendment grounds, federal impositions on state governments.[12] Brandeis, as seen, did not believe in Tenth Amendment or any other constitutional federalism constraints.

One could easily live with an occasional out-of-context quotation. What distresses is the modern Supreme Court's sustained Brandeisian tendency of subordinating federalism to progressive dictates and statist presumptions. The Court has empowered and protected state governments through creative interpretations of the Tenth and Eleventh Amendments. It has, however, refrained from resurrecting constitutional doctrines—foremost, a robust enumerated powers doctrine—that would *discipline* state governments by forcing them to compete for productive citizens. On the rare occasions that the Court has limited enumerated powers, it first reassured itself that the states can and will in fact regulate the problem at hand—gun possession on school grounds or sexual violence.[13]

On issues that we now call "social," the Court acts as a superintendent of experimentation. Untoward experiments, such as operating an all-male college, are *verboten.* Experiments of the right kind are not; in a way they are affirmatively required. If states fail to liberalize, with sufficient speed, laws governing sexual and life-and-death matters, the Supreme Court will move them along; witness *Roe v. Wade.*

Disagreements between the liberal and moderate justices chiefly concern the desirable rate of social progress, not the Court's custodial role. If forty-nine states have abolished obstacles to terminating the lives of the permanently comatose, the speed-loving Justice John Paul Stevens views that as an excellent reason to seize the all-purpose due process club and to beat the last laggard—Missouri—into compliance. On the other hand (or perhaps the same hand), the First Amendment should not bar New Jersey from doing to the Boy Scouts what Oklahoma did to ice merchants—that is, turn them into a public enterprise. The Supreme Court, Stevens opined in a Brandeis-quoting dissent, should set aside constitutional concerns over an experiment so much in line with prevailing state efforts to overcome the "atavistic" sentiments that sustain private discrimination against homosexuals. The more patient Justice Sandra Day O'Connor explained in a Brandeis-quoting concurrence in a pair of "assisted suicide" cases that she would stay the Court's hand in life-or-death matters—provided that the evidence shows sustained, conscientious state experimentation of the right kind.[14]

One cannot simultaneously believe in an open, experimental, federalist politics *and* in a comforting, social-democratic notion of progress; in institutional trial-and-error *and* in legislative supremacy and unconstrained interest group politics; in state experimentation *and* in the judicial enforcement of progressive moral sentiments. Real federalism requires confidence in the creative energies of a free society; a healthy suspicion of interest group schemes; and a willingness to tolerate indeterminacy and variegated results. The real Constitution allows for and in fact enshrines those premises. The Constitution according to Brandeis does not.

If ever we get a Supreme Court that trusts an experimental, federalist politics, that Court is unlikely to cite the *New State Ice* dissent. It is much more likely to

cite George Sutherland's majority opinion—and perhaps, that underrated justice's *cri de coeur* about his progressive foe and brother: "My, how I detest that man's ideas."

Notes

1. 285 U.S. 262, 311.

2. Funny that this should be true of many other decisions that form the foundation of the post–New Deal Court's jurisprudence—for instance, the famous 1938 decision in *United States v. Carolene Products,* 304 U.S. 144 (1938), which established the Supreme Court's "dual standard" of judicial review (none for economic rights, plenty for a few other rights and especially those of "discrete and insular minorities"). See Geoffrey P. Miller, "The True Story of *Carolene Products,*" 1987 *Supreme Court Review* (1987), p. 397.

3. See Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* (New Haven: Yale University Press, 2000), pp. 151–53. Similarly, Brandeis was prepared to use the "dormant" commerce clause as a means of invalidating state interferences with interstate commerce.

4. *International News Service v. Associated Press,* 248 U.S. 215, 262 (1918).

5. For an excellent account of anticorporate sentiments as the basis of Brandeis's *Erie Railroad* opinion, see Purcell, *Brandeis and the Progressive Constitution,* pp. 141–64.

6. Melvin I. Urofsky and David W. Levy, eds., *Letters of Louis D. Brandeis,* vol. 2 (Albany: State University of New York Press, 1972), p. 640 (July 8, 1912, letter to Mary McDowell).

7. Modern constitutional law requires a "clear statement" of congressional intent before the Supreme Court will infer federal preemption. Justice Brandeis, who seems to have coined the term *preemption,* held a far more expansive view. In *Gilbert v. Minnesota,* 254 U.S. 325, 334 (1920), for example, Brandeis dissented when the Court sustained a conviction for antiwar propaganda under a state statute. While the *Gilbert* dissent is widely read as a paean to the First Amendment, it actually rests on the proposition that Congress, in the exercise of its powers to raise armies and to declare war, had opted for a volunteer army—and that state injunctions against pacifist propaganda would interfere with the recruitment of fully informed volunteers. While Congress was free to bar state interferences with antiwar pamphleteering, it had not actually done so. To Brandeis, the deafening silence indicated comprehensive federal field preemption.

8. Urofsky and Levy, eds., *Letters of Louis D. Brandeis,* vol. 5 (Albany: State University of New York Press, 1978), p. 247 (January 6, 1926, letter to Felix Frankfurter).

9. For a good example of Brandeis's restrictive view of textual constitutional guarantees of "economic rights," see his lone dissent in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922). For a Brandeisian endorsement of federal expropriation, see the so-called *Gold Bond Cases,* 294 U.S. 330 (1935), where five justices, including Brandeis, sustained the federal government's scheme to repay the holders of gold-backed bonds in devalued dollars. The secretary of the Treasury proudly proclaimed that the U.S. government had managed to relieve the investor class of $2.8 billion, which—little is new under the political sun—would be deposited in a lockbox for future payment of the national debt. To Brandeis, it was just another good day at the federal lab.

10. To be sure, the dichotomy between interest group–driven economic policies and entrepreneurial social policies exists on a continuum. Notably, coalitions of "bootleggers and Baptists" may be able to enact policies with redistributive and "moral" aspects (blue laws, in the classic case) that neither constituency, acting alone, could obtain. See Bruce Yandle, "Bootleggers and Baptists—The Education of a Regulatory Economist," *Regulation,* vol. 7 (May/June 1983), p. 12. Those mixed and intermediate cases, however, do not invalidate the general observation in the text.

11. See, for example, Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence: University Press of Kansas, 1993), p. 89.

12. For miscites of the *New State Ice* dissent in support of diversity and local variation, see, for example, *Roth v. United States,* 354 U.S. 476, 505 (1957) (Justice John M. Harlan dissenting), *EEOC v. Wyoming,* 460 U.S. 226, 264 (1983) (Chief Justice Warren E. Burger dissenting), and *Chandler v. Miller,* 520 U.S. 305, 324 (1997) (Chief Justice William H. Rehnquist dissenting). For misciting Brandeis in support of Tenth Amendment limitations on national power, see, for example, *FERC v. Mississippi,* 456 U.S. 742, 789 n. 20 (1982) (Justice Sandra Day O'Connor concurring and dissenting in part) and *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 567 n. 13 (1985) (Justice Lewis F. Powell, Jr., dissenting). The charming misunderstanding evident in those passages is more readily explained than the winning entry in the misquote-Brandeis sweepstakes—Justice Harry A. Blackmun's curious suggestion that federal impositions on the states somehow promote experimentation. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546.

13. See, respectively, *United States v. Lopez,* 514 U.S. 549, 581 (1995) (Justice Anthony M. Kennedy concurring) and *United States v. Morrison,* 529 U.S. 598, 618 (2000).

14. The cases and opinions mentioned in this paragraph are *Cruzan v. Director, Missouri Department of Public Health,* 497 U.S. 261, 330 (Justice John Paul Stevens, dissenting) (but see Justice Sandra Day O'Connor's concurrence, which cites the *New State Ice* dissent, 497 U.S. 261, 292); *Boy Scouts of America v. Dale,* 120 S. Ct. 2446, 2459 (2000) (Justice John Paul

Stevens dissenting); and *Vacco v. Quill* and *Glucksman v. Washington*, 521 U.S. 702, 737 (1997) (Justice Sandra Day O'Connor concurring). In *Dale*, Chief Justice Rehnquist responded to Justice Stevens's venomous dissent that "Justice Brandeis was never a champion of state experimentation in the suppression of free speech." 120 S. Ct. 2446, 2457. While that is technically true, the Stevens dissent is true to the spirit of Brandeis's jurisprudence.