

TOWARD A FEDERALIST MIDDLE GROUND

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ABSTRACT: “Federalism” is a loose term which may be used in various ways, but it had a particular meaning to the framers and a peculiar place in American constitutional history. This paper argues a twofold thesis: first, that the founders envisioned American federalism as a middle-ground between the extremes of a supreme national government and a weak league of states. This system would grant the federal government legal supremacy but provide states the means with which to resist it. Second, this system has been consistently misunderstood and misapplied throughout American history by both proponents and opponents of federal power. The paper has three parts: first, it analyzes the Constitution and related texts to discern the founders’ intent relative to federalism. Second, it explores several misapplications of federalism from the founding to the Progressive era. Finally, it briefly reviews Chisholm v. Georgia, one early case that displays a properly functioning federalism.

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The founders designed a system of federalism wherein the federal government would have only certain powers. Some of these powers were to exist exclusively in the federal government, some were to be shared with the states, and other unenumerated powers were to be reserved for the states. Several ultimately unsuccessful constitutional mechanisms and institutions were put into place to ensure that neither the states nor the federal government could encroach upon one another. The first Congress designed the Tenth Amendment to clarify this system of enumerated powers, not to fundamentally alter it. This balanced system of federalism has been consistently misinterpreted and misapplied throughout American history. Both those forces which have sought to expand the federal government and those forces which have favored a restrained federal government are guilty of this. Since shortly after the founding of the Republic, politicians have adopted policies and perspectives inconsistent with the framers' understanding of federalism. Strict constructionists and proponents of compact theory placed too great an emphasis on the sovereignty of the states. After the Civil War, the

opposite problem occurred. Economic conservatives and progressives alike expanded the federal government beyond the bounds of federalism and encroached upon state powers.¹ Neither extreme is in line with the system of federalism established in the Constitution. The founding fathers envisioned American federalism as a middle ground between the extremes of a supreme national government and a weak league of sovereign states in which the federal government, though legally supreme, would be limited in its powers and balanced by the states. Given how frequently this system has been misapplied, however, the mechanisms established to enforce federalism have clearly been insufficient.

The Constitution created a system in which the federal government would be powerful and sovereign, but limited. There were several clear changes in language from the Articles of Confederation to the Constitution which serve as evidence for the intent of the framers with regard to federalism. The Articles of Confederation First, the

¹ The four examples discussed in this paper are in no way exhaustive; numerous examples of misunderstanding federalism exist.

preamble of the Articles refers to “We the delegates of the undersigned states...,”² while the Constitutional parallel is “We the People of the United States...”³ Considering that the Constitution credits the unified people rather than representatives of the states, the latter clearly signifies a more powerful national government with less emphasis placed on the role of the individual states.

Furthermore, the second of the Articles declares that, “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation, expressly delegated to the United States...”⁴ The closest Constitutional parallel to this passage is the Tenth Amendment, which makes no reference to sovereignty, freedom, or independence, and omits the word “expressly.”⁵ The Tenth Amendment mentions only powers. By the omission of “expressly,” moreover, it opens the door to implied powers. As John Marshall argued, the authors of the amendment realized the

2 ARTICLES OF CONFEDERATION OF 1781, pmbl.

3 U.S. CONST. pmbl.

4 ARTICLES OF CONFEDERATION OF 1781, art. II.

5 U.S. CONST. amend. X.

“embarrassments” of including the modifier “expressly” in the Articles.⁶ This distinction indicates that the framers intended to create a stronger national government with broad, limited powers. The language which protects the states is much weaker than in the Articles, but it still affirms the idea that the federal government would only have enumerated powers, and that the states would retain many of their traditional powers. This system of enumerated powers lies at the core of the federalist middle ground established by the Constitution.

It is also noteworthy that the founders did not originally include the Tenth Amendment or any other clause analogous to the second Article. The original framers did not perceive a need to specify that the federal government only had enumerated powers. Similarly, James Madison, the author of the Bill of Rights, believed the Tenth to be unnecessary but harmless. As he said in Congress,

...several are particularly anxious that it should be declared in the Constitution, that

6 John Marshall, *McCulloch v. Maryland*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 129, 131.

the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration...⁷

As Madison argued, the words of the Tenth are unnecessary because the Constitution as a whole already implies them. The Tenth Amendment, then, was intended to clarify, not to fundamentally alter the system which the Constitution created. It granted no greater power to the states than they already had under the Constitution.

While the Tenth Amendment did not fundamentally alter the relationship between the federal government and the states, several other features of the Constitution provided mechanisms by which the states could resist an overbearing federal government. First, the Constitution created institutions of state representation. One of these institutions is the Senate. The Constitution originally provided for two Senators to be elected by the legislatures

⁷ James Madison, *House of Representatives, Amendments to the Constitution*, in 5 THE FOUNDERS CONSTITUTION (Univ. of Chicago Press 1987).

of each state.⁸ This provided each of the states with a representative who could help to assure that his or her state was not abused. In addition to the Senate, the Constitution also provided the states with some representation in the election of the President. The Constitution gave the states the ability to appoint Presidential electors through a process of their choosing. As Article II states, “Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors...”⁹ Though the Senate and electoral college are today driven by popular votes, they still provide the states with some nominal representation today.¹⁰

In addition to representation, the Constitution also provided the states with a significant role in constitutional change. Article V specifies two ways in which the nation can change the Constitution. Two-thirds of the legislature can propose a Constitutional Amendment, and two-thirds of the states can call for a Constitutional Convention. In either

8 U.S. CONST. art. I, §3.

9 U.S. CONST. art. II, §2.

10 The extent to which the popular vote for the election of Senators and electors has altered the representation of the states is beyond the scope of this article.

case, three-fourths of the states must vote to ratify in order for the changes to become part of the Constitution.¹¹ The states, then, were given a powerful role in Constitutional change. In theory, this could prevent the federal government from using the amendment process to usurp the long-held powers of the states. The states, moreover, have the sole authority over the convention process. Though they have never exercised this power, the states could potentially use this authority to curb a federal government that has gotten out of hand. By providing the states power to alter the supreme law of the land, the Constitution implies that states were not intended to be wholly subservient to federal power.

While the Constitution provides these means to the states, it also provides sweeping authority to the federal government over the states. The framers created a system in which the federal government would have legal supremacy. Article VI of the Constitution clearly establishes the supremacy of federal law and the Constitution. As it declares, “This Constitution, and the Laws of the United

¹¹ U.S. CONST. art. V.

States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...”¹² This measure precludes the states from nullifying or otherwise violating federal laws. While there have been some attempts to violate this (discussed below), these were few and they largely failed. The supremacy clause is the principal federal limit on state power. It has much broader, more sweeping power than those means provided to the states. This indicates that, while the states do have some means to resist the federal government, the power relationship clearly favors the latter.

The Fourteenth Amendment, ratified during Reconstruction, provides the federal government with further power over the states. The amendment made several changes to the Constitution, and the most important for the purposes of this paper are those associated with the equal protection clause. As the amendment states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

12 U.S. CONST. art. VI, §2.

any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹³ Many have interpreted this broadly and have argued that it created new Constitutionally-protected rights.¹⁴ The most sober and logical approach to understanding the equal protection clause, however, is to view it in light of its historical context. It was adopted during Reconstruction at a time when the nation was seeking to move beyond slavery. As Justice Bradley argued in the Civil Rights cases, African slavery was a distinct entity which included, “disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person.”¹⁵ The Fourteenth was, thus, a measure to ensure that every African American would enjoy the legal rights denied to them during slavery. This may, perhaps, be reasonably interpreted to apply to other groups relegated to second-

13 U.S. CONST. amend. XIV, §1.

14 See *Lochner v. New York* for an example. *Lochner* and the right to free contract is discussed below.

15 Joseph Bradley, *Civil Rights Cases*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 347, 349.

class status. A new, extremely broad set of constitutional rights, other than the right to freedom from involuntary servitude guaranteed in the Thirteenth Amendment, is not really related to the institution of slavery. The federal government was given new powers over the states to extend the rights of citizenship to African Americans, but not a new set of rights to protect.

The founders, then, envisioned a system in which the federal government and the states would have different powers and the means to balance one another. Despite this, it is clear to the modern observer that the federal government has become the dominant level of government. Since the Civil War and reconstruction era, the federal government has exercised much greater power over the states. For example, the post-Civil War Supreme Court struck down far more state laws than its predecessors. At its height in the late 1920's, for instance, it struck down fifteen state laws, compared to one or two in the 1850's and 60's.¹⁶

It is, thus, clear that the means which the founders

16 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 330-331.

provided to the states have been insufficient to the task of preserving the crucial role of the states in federalism. While representation of the states in the Senate and the Electoral College is important, there are clear limits to the amount of change that Senators and electors can effect. Senators are limited by the popularly elected house and the (effectively) popularly elected President. As members of the federal government, furthermore, they have an inherent interest in expanding the power of that government. The Electoral College functions far differently than the founders envisioned. Electors still represent their states and are chosen through state processes. However, electors almost always respect the result of the popular vote in their states, and do not functionally serve as a barrier to the Presidency as the founders thought they might. Constitutional change, moreover, is a near political impossibility. The convention power is a forgotten relic which the states have never exercised. While the amendment process has been more frequently used, only the Eleventh Amendment (discussed in depth below) has done anything to practically limit the federal usurpation of power. Perhaps the requirement of

state approval has discouraged the proposal of amendments that would usurp state powers, but if true, this is a limited success. It is reasonable to argue that the founders should have included a more practical way for the states to check federal power. Nonetheless, the mechanisms and institutions that were included demonstrate that the founders intended to create a system in which the federal government would be balanced by the states.

Throughout American history, this original view of federalism has been misunderstood and misapplied. Though they were instrumental in the revolution and the founding, strict constructionists such as Thomas Jefferson and James Madison were among the first to misunderstand constitutional federalism. At the Constitutional Convention, Madison was worried about the tendency of overbearing states to “encroach upon federal authority.”¹⁷ Later, however, he seemed to reverse himself on federalism and counted himself among the strict constructionists. Both he

17 James Madison, *Debate in the Constitutional Convention*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 80.

and Jefferson opposed the creation of a national bank on the grounds that it violated the strictly interpreted letter of the Constitution. They particularly cited the necessary and proper clause, and favored a strict interpretation of necessity. As Madison argued, "...the proposed Bank could not even be called necessary to the Government; at most it could be put convenient."¹⁸ Jefferson, likewise, argued that the government could exercise its powers to lay taxes and pay debts without the bank, and, therefore, the bank is not necessary.¹⁹

It is not, at first glance, obvious how strict construction relates to federalism. Indeed, the Tenth Amendment and federalism did not explicitly affect debates at this time.²⁰ In fact, however, federalism played a great part. St. George Tucker, a major proponent of

18 James Madison, *House Debate on the Bank*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 126.

19 Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 127.

20 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 119.

strict construction, argued that the Tenth and the Ninth Amendments were created to guard against encroachments on the states and people, and thus, concluded that “the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear...”²¹ Strict construction, then, was a perspective about the place of the states in the Constitution, not only a view about constitutional interpretation. This view misunderstands the intent of the Tenth Amendment. As noted above, the Tenth Amendment was not created to change the system of the Constitution, but to clarify and affirm the system of limited government and federalism. As discussed, Madison did not even believe it to be necessary, let alone a fundamental safeguard. It also used much weaker language than its counterpart in the Articles of Confederation, and, with the removal of “expressly,” opened the door to broad implied powers.

The obvious dilemma for an originalist critique of strict construction like the one offered here is that

21 St. George Tucker, *in* 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 120.

Madison, one of the Constitution's key authors, was a proponent of strict construction.²² This dilemma can be resolved by analyzing Madison's own thoughts on the necessary and proper clause. Madison himself agreed that positive enumeration of all federal powers would be nearly impossible. In the Federalist papers, he wrote, "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates..."²³ As this passage demonstrates, Madison believed that there were parts of the Constitution that must be unwritten. The founders could have written a "complete digest of laws," but they did not. The Constitution is not a detailed code of laws, but a concise core of fundamental laws from which the statutes and codes of the nation could be derived. Because the Constitution would be at the center of innumerable national debates and issues, it would require a

22 That the framers did not agree on everything is one of the core problems with originalism as a school of constitutional interpretation. A detailed treatment of this problem is beyond the scope of this paper.

23 THE FEDERALIST No. 44 (James Madison).

broad interpretation. Strict construction, which argues that every word must be read as narrowly as possible, is out of step with this principle, and it is out of step with Madison's own logic in the *Federalist*.

Like the strict constructionists, proponents of compact theory emphasized the importance of the states in the relationship of federalism. In the Virginia and Kentucky Resolutions of 1798, the Kentucky legislature summed up compact theory by declaring that "by compact, under the style and title of a Constitution for the United States... [the states] constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself the residuary mass of right to their own self-government..."²⁴ For proponents of compact theory, then, the Constitution was an agreement between the states which left the states with ultimate power. In the aforementioned resolutions, it justified the states' rights to declare a federal law unconstitutional.²⁵ Later,

24 *Virginia and Kentucky Resolutions (1798)*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 165.

25 *Id.*

compact theory would be used to justify the nullification of federal laws²⁶ as well as the secession movement which resulted in the Civil War.²⁷

The proponents of compact theory were out of step with federalism as intended by the founders for two main reasons. First of all, it assumes that the states are the more powerful partner in the relationship of federalism. Given the supremacy clause, however, it is quite clear that the federal government holds the reins of power over the states. While the Constitution provides some mechanisms by which the states can defend themselves against an overbearing federal government, the supremacy clause provides the federal government with sweeping authority. Secondly, the means which the Constitution provides states to push back against the federal government are not the means which the proponents of compact theory sought to use. The founders could have provided the states with

26 See John C. Calhoun, *Fort Hill Address*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 228.

27 *South Carolina Ordinance of Secession*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277.

the authority to somehow challenge federal laws, or even secede, but they did not for various reasons.

After the Civil War, a general shift in the understanding of federalism occurred. Unfortunately, however, the shift was not to a correct understanding, but to an equally poor understanding. *Lochner v. New York* was among the first examples to demonstrate this shift. In this case, Joseph Lochner was charged with violating New York's Bakeshop Act, which set hour requirements for bakery employees.²⁸ When the Supreme Court took up the case, the majority ruled that the law was unconstitutional on the basis that "the general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power."²⁹

The notion that the federal government has the authority to strike down such state actions based on a freedom of contract fundamentally undermines the

28 *Lochner v. New York*, 198 U.S. 45 (1905).

29 *Id.*

powers of the states. While *Lochner* was troubling for several reasons, the most troubling in relation to the issue of federalism is its assumptions about free contract. For Peckham, the author of the opinion, state governments could not violate the right to a free contract except through a “legitimate” police power that involves a benefit to the public health.³⁰ This is an extreme limitation of traditional police powers. Judges generally recognized police powers, which are broad state actions to protect the safety, order and morals of the people, as essential powers of state and local governments.³¹ While the Fourteenth Amendment was, in some respects, a break with federalism in that it granted the federal government new powers over the states, its specific intent, as discussed above, was not to create new rights, but to extend old rights. As Holmes argued in his dissent, moreover, the idea that liberty of contract is implied by the Fourteenth Amendment is out of step with the way many laws, such as Sunday closings and limits

30 *Id.*

31 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 392.

on usury, operate.³² The idea that the Fourteenth justifies the undermining of one of the most important traditional powers of the states is a stretch to say the least.

On the other side of Peckham and like-minded economic conservatives who sought to keep government out of private enterprise was the rising Progressive movement. Progressives generally sought to modernize and democratize government. They worked for ballot reform, women's suffrage, an income tax, and direct election of Senators, among other things.³³ Along with this, they generally attempted to increase the size and scope of the federal government. This often encroached upon spheres of authority that traditionally belonged to the states. Woodrow Wilson, a Progressive president, championed such an approach. In the case of *Missouri v. Holland*, the Court mulled the legality of a treaty which Wilson made with Canada. This treaty effectively regulated hunting, which is pretty clearly outside the scope of federal powers.³⁴

32 *Lochner v. New York*, 198 U.S. 45, 75 (1905).

33 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 326.

34 A regulation of hunting is probably best viewed as a police power.

Despite this, Justice Holmes, in the opinion of the court, defended this measure because treaties are Constitutional “when made under the authority of the United States,”³⁵ and because a national interest of such magnitude requires “national action.”³⁶ While *Lochner* conservatives attempted to limit state powers, Wilson and Holmes attempted to usurp them.

In *Missouri v. Holland*, Holmes and the Progressives misunderstood federalism in two basic ways. First, “national interest” is not a sound justification for the federal government to exercise powers that were legitimately left to the states. The Constitution created a system of limited government in which some powers were left to the states. While the federal government may have some interest in the regulation of hunting, it cannot exercise powers that are reserved to the states. If something

While an argument could be made that it is a regulation of commerce, no such argument was made in *Missouri v. Holland*.

35 Oliver Wendell Holmes, *Missouri v. Holland*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 378.

36 Oliver Wendell Holmes, *Missouri v. Holland*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 378.

as mundane as controlling bird populations is the standard for usurping powers, moreover, it is difficult to imagine what state powers the federal government cannot exercise for the “national interest.” A national interest standard, then, would erode all sense of limited government and would dangerously encroach upon state powers. Secondly, it does not matter if the mechanisms used to exercise that power (in this case, treaty power) are constitutional. This, too, will result in the erosion of state powers. Treaties have great authority, but if the United States can exercise any power reserved to the states by simply signing a treaty, the Constitution and the system of federalism which it created are meaningless. The powers which Wilson attempted to usurp, then, were a clear violation of the system of federalism as intended by the founders.

While federalism has been consistently misunderstood throughout American history and continues to be misunderstood today, there have been times when federalism has operated as the founders imagined.

Chisholm v. Georgia and its aftermath (also known as the sovereign immunity case), for instance, provides a strong

example. Alexander Chisholm, a South Carolina resident, attempted to sue the state of Georgia because he believed they owed money to his client's estate. This violated the traditional understanding of sovereign immunity, the idea that a state cannot be sued without its consent.³⁷ The court ruled that, in fact, the text of the Constitution clearly does not provide for the sovereign immunity of the states.³⁸

The public reaction to this was swift. The nation was extremely anxious about the ruling. Georgia refused to enforce it, and threatened to execute anyone who tried. A day after the decision, the Eleventh Amendment, which provides for the sovereign immunity of the states, was proposed.³⁹ Georgia's violent reaction notwithstanding, the aftermath of *Chisholm* generally provides a good example of how the system of federalism was intended to work.

The federal government made a ruling that the states felt

37 *Chisholm v. Georgia*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 159, 159.

38 Randolph, *Chisholm v. Georgia*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 159, 159.

39 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 162-163.

was over the line. Rather than attempt to nullify the ruling, the states ultimately used the path which the Constitution provides and participated in the amendment process in order to protect themselves.

Federalism as the founders intended it has been misapplied throughout history. Before the Civil War, many held an extreme view in which the states held the dominant role in the Constitution. After the Civil War, the federal government began to limit and usurp state powers to protect rights and promote the national interest. The truth is that the intent of the founders was a middle ground between these extremes. The Constitution set up a system of federalism in which the federal government was legally supreme, but limited. The states retained many crucial powers such as police powers. The Tenth Amendment served to clarify and reinforce this system. Though they were ultimately insufficient, the states were provided with some protections against federal power. This displays that the founders intended a system in which the federal government and the states both complemented one another through their powers and balanced one another through these provisions.

