Vanderbilt Law Review

Volume 35
Issue 1 *Issue 1 - January 1982*

Article 3

1-1982

Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism--Past and Present

Robert C. Brighton, Jr.

NOTES

Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism—Past and Present

The question of the relation of the States to the federal government . . . cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.[1]

T. Woodrow Wilson

I. INTRODUCTION

Many myths surround the American system of government.[2] One such myth promotes the view that federalism is the paragon which resolves the problem of ordering man in political society. The myth has often been woven into the rhetoric of many members of the various branches and levels of government.[3] It has been retold throughout American history by opposing sides, each of which has promoted its own interpretation of federalism as the mythical paragon of government.[4] The myth, however, is a concept without form or substance, an ill-defined goal rather than a detailed plan. The myth of federalism should not be confused with the reality of federalism, which is the ever-evolving compromise between those who argue for tilting the balance of functions and powers in favor of either national or state government based on

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1. T. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908).

2. *See, e.g.*, Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974). Ely first describes and then explodes the myth that *Erie* stated the ideal standard for the relation of the federal and state judiciaries.

3. *See, e.g.*, Inaugural Address of President Ronald Reagan, 17 WEEKLY COMP. OF PRES. DOC. No. 4, at 1, 2 (Jan. 20, 1981) ("It is my intention . . . to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.").

4. *See, e.g.*, Calhoun, *The Fort Hill Address of John C. Calhoun: On the Relation which the States and General Government Bear to Each Other*, in WE THE STATES 277 (Virginia Commission on Constitutional Government ed. 1964).

what they perceive as the advantages that flow from either form.[5] Federalism's division of powers and functions among the several levels of government[6] represents a choice of social policy because the division selected influences the general scope and focus of governmental action.[7] The Reagan Administration's call for a "New Federalism"—a major reordering of national priorities and an abrupt shift of governmental responsibilities from Washington to the states[8]—represents the most recent rhetorical confusion of the myth of federalism as a paragon of government with the reality of federalism as a process for implementing policy choices. As Morton Grodzins, a prominent political scientist, has written, in practice federalism is "a device for dividing decisions and functions of government. . . . It is a means, not an end."[9]

An issue of federalism has often been at the center of legal controversies. The Supreme Court, the ultimate interpreter of the United States Constitution, has also functioned as the ultimate interpreter of the federal system.[10] Some critics have chastised the Court for presumptuously assuming a task that interjects the judiciary into matters of policy because federalism cases often concern questions of the proper scope and focus of governmental action.[11] They argue that Congress, a democratically composed representative body, is better suited to the task of determining policy than the Court. Other commentators, however, have questioned this evaluation and have argued in favor of the Court's suitability as an arbiter of federalism on both historical[12] and practical[13] grounds.

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5. *See generally* FEDERALISM: MATURE AND EMERGENT (A. MacMahon ed. 1955).

6. *See* Grodzins, *Centralization and Decentralization in the American Federal System*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 1-23 (R. Goldwin ed. 1961).

7. *See* D. ELAZAR, AMERICAN FEDERALISM, A VIEW FROM THE STATES 1-46 (2d ed. 1972).

8. *See* N.Y. Times, June 1, 1981, at A1, col. 1.

9. Grodzins, *The Federal System*, in GOALS FOR AMERICANS: THE REPORT OF THE PRESIDENT'S COMMISSION ON NATIONAL GOALS 265 (1965).

10. *See* D. ELAZAR, *supra* note 7, at 155-58.

11. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-258 (1980). *See generally* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

12. *See, e.g.*, J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957, at 3-17 (1958); text accompanying notes 84-98 *infra*.

13. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 846 (1979).

Professor Kaden, for example, argues in favor of the judiciary as an arbiter of federalism because he finds Congress to be insufficiently sensitive to state autonomy. He feels that

The Supreme Court itself has historically vacillated between the two positions, sometimes deferring[14] and at other times dictating[15] to Congress the terms of the federal relationship.

Federalism issues extend beyond the relationship between the national and state governments. Federalism is more than the mere reconciliation of national with state sovereignty. The term encompasses a cluster of competing values, including efficiency, equity, uniformity, localism, pluralism, and diversity.[16] Some commentators have interpreted the modern Supreme Court's federalism decisions as evidence of a balance of these competing priorities.[17] The Supreme Court, however, has never formally announced its use of a balance or the particular weight assigned to any one competing value.[18] The Court has been content to allow the myth of federalism as a paragon of government to be confused with the reality of federalism as a process for implementing policy choices. This Note suggests that the separation of the myth of federalism from the reality is a *sine qua non* to a clear consideration of the Supreme Court's proper role in federalism issues. Meaningless phrases such as "state sovereignty" that have been employed with talismanic effect should be discarded[19] because they invoke the myth, adding nothing but confusion to a consideration of the reality.

The Supreme Court's confusion of the myth with the reality of federalism is pernicious to harmony in the federal system because it ignores American federalism's historic[20] and contemporary[21] na-

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the decline in the importance of national and state party organizations, the growing importance of the national media, the advantages of wealth and incumbency in congressional election campaigns, and the vested interest of many state bureaucrats in federal programs have all operated against the preservation of state sovereignty interests by the political branches. Thus, in Kaden's view, only the judiciary is both powerful and impartial enough to protect and preserve the integrity of the states. *See* text accompanying notes 82-83 *infra*.

14. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941). *See* text accompanying notes 123-27 *infra*.

15. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), discussed at text accompanying notes 174-96 *infra*, and Hammer v. Dagenhart, 247 U.S. 251 (1918), discussed at text accompanying notes 112-16 *infra*.

16. *See generally* FEDERALISM: MATURE AND EMERGENT, *supra* note 4.

17. Beaird & Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35 (1976).

18. *But cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352, 2366 n.29 (1981) (certain federal interests may justify state submission); National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (interpreting majority opinion as employing a balance of federal and state interests).

19. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 842 (1976).

20. *See* notes 32-127 *infra* and accompanying text.

21. *See* notes 128-52 *infra* and accompanying text.

ture and disrupts the system's normal outlets for accommodating interests and assigning priorities.[22] This Note reviews the history of American federalism with particular emphasis on a comparison of the reality of the birth of American federalism with the myth that shrouds that event.[23] The interplay of the several levels of American government in the federal system has been called "cooperative federalism." The Note describes cooperative federalism as a process and criticizes the use of federalism as a rationale for the implementation of policy decisions.[24] The Note next considers the Supreme Court's current analysis of federalism issues that have arisen when Congress has exercised its powers under the commerce clause[25] and identifies the contradictions and confusions that result when myth and reality are intermingled in the Court's analysis.[26] The Supreme Court's recent decisions upholding the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *Hodel v. Virginia Surface Mining & Reclamation Association*,[27] and *Hodel v. Indiana*,[28] continue to muddy the analysis of the federalism issue by refusing to distinguish between myth and reality. This Note argues that the vague test[29] articulated by Justice Marshall in *Virginia Surface Mining* obfuscates reasoned analysis because it measures the reality of federalism against the myth—a standard without form or content. The Court mixes together the several competing interests and, while invoking the mythical standard for federalism, actually makes decisions about the division of powers and functions that amount to choices of policy. Instead, the Supreme Court should carefully identify the underlying basis of its decisions. The Court should separate the competing interests and

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22. *See* notes 149-52 *infra* and accompanying text.

23. *See* notes 32-127 *infra* and accompanying text.

24. *See* notes 128-52 *infra* and accompanying text.

25. In addition to the commerce power, federalism issues may arise in relation to the exercise by the national government of many of its delegated powers. For example, exercises of the spending power by the national government may transgress the traditional boundaries in such fields as education, and public health and safety. The Court has traditionally dealt with each national power as it independently affects federal relations. Several commentators, however, have suggested a unified treatment for federalism questions. *See, e.g.*, Prygoski, *Supreme Court Review of Congressional Action in the Federalism Area*, 18 DUQ. L. REV. 197 (1980); Note, *Practical Federalism After* National League of Cities*: A Proposal*, 69 GEO. L.J. 773 (1981). This Note also proposes an analysis that can be utilized for federalism questions arising under many of the delegated national powers. *See* notes 235-45 *infra* and accompanying text.

26. *See* notes 153-234 *infra* and accompanying text.

27. 101 S. Ct. 2352 (1981).

28. 101 S. Ct. 2376 (1981).

29. 101 S. Ct. at 2366; *see* text accompanying note 212 *infra*.

measure their relative weights. This approach would provide better guidance for lower courts, minimize conflicts among the several levels of government, and better reveal the actual role of the judiciary in federalism cases.[30] The proposition that Congress rather than the Court should decide certain federalism issues can be better examined when myth is separated from reality. The final part of the Note tests this proposition within the factual context of the Supreme Court's surface mining decisions.[31]

II. American Federalism

A. *Federalism and the Founding Fathers*

From its beginning American federalism has been more the product of circumstances than a philosophical plan. The English colonists who came to America in the seventeenth century brought with them the strong sense of local autonomy that had contributed to the English Civil War and the Glorious Revolution.[32] The division of powers and functions between Court and Country[33] had accustomed Englishmen to both a feeling of local autonomy and a sense of national unity.[34] In America the working relationships that had evolved between the English Crown and Parliament and the colonies developed into a pragmatic division of power and authority. Geographical isolation from the mother country promoted colonial autonomy. The day-to-day administrative details fell to local goverumental bodies within the broad bounds set by the Crown and Parliament.[35]

An inchoate system of federalism developed among the units

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30. *See* notes 235-45 *infra* and accompanying text.

31. *See* notes 239-45 *infra* and accompanying text.

32. *See generally* H. Colbourn, The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution 3-40 (1974); C. Robbins, The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies 22-55 (1959).

33. "Country" was the name given to describe the landed lords who, as late as the eighteenth century, ruled their property almost without interference from the national government. The "Country," political descendents of those lords who supported the Stuart "Pretender" to the English Crown, was the political opponent of the "Court," the supporters of the House of Hanover's claim to rule England. During the eighteenth century the "Court," as ministers and as members of Parliament, controlled the English national government. *See generally* P. Zagorin, The Court and the Country: The Beginning of the English Revolution 1-118 (1970).

34. *Id.*

35. *See generally* J. Adams, Provincial Society, 1690-1763, at 1-54 (1927); C. Degler, Out of Our Past 1-74 (1970); C. Rossiter, Seedtime of the Republic 3-34 (1953).

of government in the colonies as well. Although the primitive state of transportation and communication hampered the development of intercolonial relationships, certain common concerns—defense against the Indians and against foreign powers, and, later, against Great Britain—required intercolonial action and resolution.[36] At the onset of the American Revolution a general division of governmental powers and functions already existed. When Parliament attempted to assert its power over the colonies in defiance of this pragmatic division of powers and functions, the colonists developed a philosophical justification for local autonomy.[37] The colonists argued that a sovereign body need not be universally supreme, but only with respect to those issues requiring a unified policy, and that lesser governmental bodies might exercise absolute and discretionary authority within their appropriate spheres.[38] This *imperium in imperio*—two concurrent sovereigns—an apparent solecism, derived from the assumption that sovereignty ultimately rested neither in the Crown nor in any individual legislative body, be it Parliament or one of its colonial counterparts, but in the people.[39] The justification given for the distribution of power among several governments, no one of which could claim paramountcy, was to keep the central government from amassing "a degree of energy, in order to sustain itself, dangerous to the liberties of the people."[40]

This theory of concurrent sovereignty, as transferred from the context of imperial relations between the colonies and the King and Parliament to domestic relations between the states and the national government, was not clearly set forth until the Constitutional Convention. Throughout the Revolutionary War years the colonial press and pamphleteers engaged in only a limited discussion of the nature of the union established under the Articles of Confederation. One contemporary commentator, however, noted that the Articles did not create "a body in which resides authoritative sovereignty; for there is no real cession of dominion, no surrender or transfer of sovereignty to the national council, as each state

36. *See generally* J. ADAMS, *supra* note 35, at 1-54; C. DEGLER, *supra* note 35, at 1-74; C. ROSSITER, *supra* note 35, at 3-34.

37. *See generally* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 3-83 (1969).

38. *See* B. BAILYN, *supra* note 37, at 198-229; G. WOOD, *supra* note 37, at 344-89.

39. *See* B. BAILYN, *supra* note 37, at 198-229; G. WOOD, *supra* note 37, at 344-89.

40. B. BAILYN, *supra* note 37, at 229 (quoting an anonymous contemporary commentator).

in the confederacy is an independent sovereignty."[41] Rather, the Articles of Confederation exalted the virtues of local government and scarcely limited the states in their exercise of independent authority. The language of the second article, that "each state retains its sovereignty, freedom and independence,"[42] typifies the general attitude of the entire document. The Articles established a deliberately weak central government, hobbled by a plural executive and emasculated by the denial of any direct power to tax the people or the states over which it presumed to rule. For advocates of local sovereignty such as Thomas Burke of North Carolina and George Clinton of New York, the Articles created the precise form of government that they had envisioned before the Revolution and for which they had gone to war. In their view, free government inhered in local control and the supremacy of the states.[43] Over time, these principles came to be associated with those statesmen known as the "Antifederalists."[44]

The retention by each state of its individual sovereign prerogatives, however, produced disputes over commerce,[45] abuse by foreign nations,[46] and a depreciating currency.[47] When the inability of the Confederation's decentralized government to solve these problems became apparent, critics called "Federalists"[48] proposed

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41. G. WOOD, *supra* note 37, at 355 (quoting Ezra Stiles, the president of Yale University during the Revolutionary War period).

42. ARTICLES OF CONFEDERATION OF 1781, art. II, *reprinted in* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1218 app. (1953).

43. *See, e.g.*, M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 25 (1950); W. MURPHY, THE TRIUMPH OF NATIONALISM: STATE SOVEREIGNTY, THE FOUNDING FATHERS, AND THE MAKING OF THE CONSTITUTION 19-25, 276-77 (1967).

44. *See generally* J.T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788 (1961).

45. *See generally* A. MCLAUOHLIN, THE CONFEDERATION AND THE CONSTITUTION, 1783-1789, at 59-69 (1962). *But cf.* M. JENSEN, *supra* note 43, at 337-42 (arguing that the Articles of Confederation provided a means for arbitrating commercial disputes among the several states).

46. *See generally* A. MCLAUGHLIN, *supra* note 45, at 70-81. *But cf.* M. JENSEN, *supra* note 43, at 175 (noting that despite some foreigu policy failures there were also successes and, at least, the new nation was not excluded from world trade).

47. *See generally* M. JENSEN, *supra* note 43, at 313-26; A. MCLAUGHLIN, *supra* note 45, at 100-09.

48. The term "Federalist" is a misnomer. In its current usage it signifies one who supported a strong national government. Prior to the Constitution's ratification, however, "Federalist" signified those who supported a system of government similar to that established by the Articles of Confederation. At the Constitutional Convention of 1787, Gouverneur Morris "explained the distinction between a *federal* and *national, supreme,* Govt.; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and *compulsive* operation." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34 (M.

a stronger national government as the solution. The Federalists envisioned a substantial consolidation of powers and functions within a reconstituted national government.[49] Chief among these critics was James Madison, often called the "Father of the Constitution." According to some scholars,[50] Madison did not intend to create a system of government in which the national and state governments would coexist as equal partners. Rather, he envisioned " 'a due supremacy of the national authority' " that granted power to "the local authorities" only in " 'so far as they can be subordinately useful.' "[51] At the Constitutional Convention both Madison and James Wilson[52] ardently promoted a proportional representation in the national legislature[53] and a congressional veto of all state laws that Congress deemed unjust and unconstitutional.[54] They believed these measures were necessary to prevent a reversion to the problems that had plagued the Confederation, problems caused by the unrestrained individual sovereignty of the states.[55]

The 1787 Constitutional Convention created an ideal opportunity for debate between those such as Edmund Randolph, who favored "a strong *consolidated* union, in which the idea of states should be nearly annihilated,"[56] and those such as George Mason, who desired a confederated union in which the states were sovereign for most purposes.[57] According to James Madison, the result-

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Farrand ed. 1937) (emphasis in original) [hereinafter cited as THE RECORDS]. Only after the Convention did the supporters of a strong national government begin, for political reasons, to be known as Federalists. *See* M. JENSEN, *supra* note 43, at xiii-xiv. *See also* A. MCLAUGHLIN, *supra* note 45, at 185-86.

49. *See* A. MCLAUGHLIN, *supra* note 45, at 129-38.

50. *See, e.g.*, G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 163 (1981) ("[I]n [Federalist Paper] No. 37, [Madison said] that it was impossible to draw precise boundaries between state and federal powers; that experience would be needed to fix them; that compromise would make men agree in a process of give and take."); G. WOOD, *supra* note 37, at 525.

51. G. WOOD, *supra* note 37, at 525 (quoting Letter from James Madison to Thomas Jefferson (Sept. 6, 1787)).

52. James Wilson was a representative from Pennsylvania who signed the Declaration of Independence and served as a member of the Continental Congress. One commentator has called Wilson's contribution to the making of the Constitution "second only to Madison's." W. MURPHY, *supra* note 43, at 82.

53. *See id.* at 82-87; G. WOOD, *supra* note 37, at 525-26.

54. G. WOOD, *supra* note 37, at 525-26.

55. *Id.*

56. 1 THE RECORDS, *supra* note 48, at 24 (emphasis in original).

57. *See* W. MURPHY, *supra* note 43, at 67-70. Mason and several other delegates favored a national government possessing only limited powers. These powers, in their view, should largely be restricted to relations with foreign governments; power over domestic affairs should remain in the states.

ing Constitution created a hybrid plan for a government " 'not completely consolidated, nor . . . entirely federal, [a government] of a mixed nature, [composed] of many coequal sovereignties.' "[58] During the battle for ratification of the Constitution, the Antifederalists criticized the Constitution as the design for an "*imperium in imperio.*" George Mason warned that two concurrent sovereigns "cannot exist long together; the one will destroy the other."[59] Moreover, Mason feared that the national government, with its sweeping authority as the "supreme law of the land," would eventually annihilate the independent sovereignties of the several states.[60]

The Federalists struggled to refute the Antifederalist doctrine of sovereignty, according to Professor Gordon Wood, "not by attempting to divide it or to deny it, but by doing what the Americans had done to the English in 1774, by turning it against its proponents."[61] The Federalists argued that the source of governing authority rested with the governed and thus, because the people themselves, rather than their representatives in the legislatures, were the final, illimitable, and continuous source of all power, both the state and federal legislatures could be concurrently and equally representative of the people.[62] Madison wrote in *The Federalist*, "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."[63] By placing the source of government's authority in the people, the Federalists changed the issue from whether the United States should have a national and unitary republic or a confederated system, to the issue considered at the Constitutional Convention: How should the powers and functions be distributed among the various branches of the proposed national government?[64]

The Virginia Plan, which served as the basis for discussion at the Convention, assumed the continued existence of the states as governmental units providing certain functions and possessing certain powers, even though it proposed an extensive enlargement of

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58. G. WOOD, *supra* note 37, at 529.

59. *Id.* at 528 (quoting 3 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 29 (J. Elliot ed. 1834)).

60. *Id.*

61. *Id.* at 530.

62. *Id.* at 543-47.

63. THE FEDERALIST No. 46, at 292 (J. Madison) (H. Lodge ed. 1888).

64. *See* A. MCLAUGHLIN, *supra* note 45, at 135-37, 151-54, 163-65, 170.

the powers of the central government.[65] Under the Virginia Plan Congress would have the power to define the extent of both its own authority and that of the states.[66] The Plan, however, did not provide any guidelines for the operation of such a multilevel system of government. The Plan's advocates purposefully made the proper division of the powers and functions among the various levels of government a political decision.[67]

The representatives of the small states feared the Virginia Plan's centralization of power in the national government. As an alternative they offered the New Jersey Plan, which called for an expansion of the powers of Congress. The Plan provided for the elevation of all the treaties and acts of Congress to the supreme law of the land in the several states, enforceable in the state courts. The New Jersey Plan, however, retained the principle of state equality in Congress and made the national government's executive directly subject to state control.[68] The Plan of the small states clearly had a theoretical premise different from that of the Virginia Plan proposed by the large states.

The Constitution that emerged from the Federalist-Antifederalist debate was a practical document. The so-called Connecticut Compromise[69] resolved the problem of representation by creating one legislative house based on size of population and another based on equal representation for the states. The Compromise temporarily appeased those who feared that the Constitution contemplated a strong central government which would eventually annihilate the independent sovereignties of the several states.[70] The supporters of both the Virginia and New Jersey Plans agreed on the need for a limited government.[71] They disagreed, however, about how best to construct a government that would possess sufficient power to perform necessary governmental functions, but that would be unable to encroach upon the people's rights and liberties.[72] The two factions realized that, beyond their agreement to limit government, their notions of how the new government should

65. A. MASON, THE STATES RIGHTS DEBATE 35 (1964).

66. *Id.* at 61.

67. *Id.* The Virginia Plan placed the power to determine both national and state law in the national legislative branch, a political body. The allocation of power between the national and state governments was therefore a decision at least partly political.

68. *Id.* at 62-64.

69. *See* C. WARREN, THE MAKING OF THE CONSTITUTION 267-312 (1937).

70. R. LEACH, AMERICAN FEDERALISM 7 (1970).

71. *See* A. MASON, *supra* note 65, at 61, 62-64.

72. G. WOOD, *supra* note 37, at 519-23, 543-46.

be structured were quite different. To avoid further divisiveness and the risk of the failure of the Convention, the Founding Fathers declined to debate the theoretical merits and disadvantages of the Compromise as a system for ordering man in political society. Instead, they concentrated on creating a compromise that would serve their primary purpose—the preservation of the Union.[73]

In the minds of the men who gathered at the Convention in Philadelphia in 1787, the Constitution's main purpose was to provide a government adequate to meet the problems facing the new nation in the late eighteenth century. With their common philosophical objective in mind—that of limited government—the Founding Fathers negotiated a pragmatic compromise rather than an ideal solution. Although they assumed the existence of a multileveled government with each level concurrently exercising power over the nation's affairs, the Framers failed to provide guidelines concerning the precise relationships among the various levels.[74] The Framers purposefully left vague the exact nature of the relationships because it was a sharp point of contention among them.

The Founding Fathers held a spectrum of political beliefs. Their views represented a variety of social policy choices. They disagreed among themselves about the nature of the history of the period and about the best kind of government for the new nation.[75] Because of this diversity of opinion, credible arguments may be developed in support of almost *any* interpretation of the Constitution one chooses. Conflicting interpretations have occupied many constitutional scholars,[76] but all their efforts have never produced any final answers because the vague phrases of the Constitution permit interpretations couched in terms of the varied hopes, interests, and beliefs of humanity rather than in terms of knowable facts.

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73. *See generally* C. WARREN, *supra* note 69, at 309-12.

74. R. LEACH, *supra* note 70, at 6-8.

75. *See* M. JENSEN, *supra* note 43, at 245-57; notes 43-68 *supra* and accompanying text.

76. *See, e.g.*, G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1893); C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1956); J. BRYCE, THE AMERICAN COMMONWEALTH (1918); A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1838); A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1935).

B. *Origins of the Federal Judiciary's Role as Arbiter of the Federal System*

Although the Constitution provides few clues about the proper division of powers and functions, the Founding Fathers were certainly aware of the necessity for some authority to arbitrate and resolve the inevitable disputes concerning the legitimate scope of federal and state power.[77] Those scholars who have advocated a theory of state sovereignty insist that only the states can perform the role of arbiter or judge in these disputes.[78] Others who have championed a broadly powerful national government give that role to Congress.[79] A third group, whose motives are complex,[80] argue that "the framers of the Constitution clearly intended that the Court should be the umpire of the federal system."[81]

The argument that the Supreme Court should be the ultimate arbiter of the federal system begins with the assumption that the Constitution contains the plan for the federal system of government. Since the Supreme Court is the ultimate interpreter of the Constitution,[82] the argument logically proceeds with the proposition that the Court should interpret the Constitution's plan for federal relations. Indeed, the Supreme Court necessarily determines the parameters of the federal system when it interprets the several sections of the Constitution that establish or limit the powers of the national and state governments.[83] This judicial arbiter concept had been discussed prior to the Constitutional Convention,[84] and at the Convention both Federalists and Antifederalists eventually supported the concept, although for different reasons. The Federalists believed that the Virginia Plan's congressional negative on state laws would provide the best safeguard against the states' divisive tendencies.[85] The Antifederalist alternative, the

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77. Both the Virginia and New Jersey plans contemplated that the national legislature would make these decisions. *See* notes 65-68 *supra* and accompanying text.

78. *See, e.g.*, Kilpatrick, *The Case for States Rights*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM, *supra* note 6, at 88.

79. *See, e.g.*, E. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1937).

80. Unlike the other two views, the motives of this third group are not based on consistent support for either national or local decisionmaking. Rather, this group assumes that the Court will adopt an impartial view and will decide on a case by case basis whether the power in question properly belongs to the national or the local authority.

81. J. SCHMIDHAUSER, *supra* note 12, at 206.

82. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

83. *See, e.g.*, U.S. CONST. art. IV; *id.* art. VI, § 2.

84. *See* J. SCHMIDHAUSER, *supra* note 12, at 4-7; G. WOOD, *supra* note 37, at 455, 459, 461-62.

85. *See* A. MASON, *supra* note 65, at 61.

New Jersey Plan, approved this provision and even provided for the use of the national military to enforce Congress' federalism decisions.[86] The suggestion of military coercion of the states, however, made the proposal too distasteful for many delegates, and it was ultimately defeated.[87] The Convention then settled on a judicial arbiter of federalism disputes.

The selection of the national judiciary as the arbiter of national-state relations represented a compromise resulting from a series of parliamentary developments beginning with the Convention's repudiation of coercion of the states by force and adoption of coercion of individuals by law.[88] This decision in favor of legal coercion, together with the general willingness to create a national judiciary, the Antifederalists' demands for a Council of Revision,[89] the Federalists' plan for a complete system of inferior national courts,[90] and the substitution of a supremacy clause for the congressional negative,[91] impliedly gave the national judiciary the role of arbiter of the federal system. While the Federalists did not oppose this pragmatic solution, they had little faith in the Supreme Court's ability to maintain the supremacy of the national government through resolution of isolated cases or controversies brought by and limited to the parties before the Court[92] within the jurisdiction set forth in the Constitution.[93] On the other hand, the Antifederalists not only approved the compromise but apparently regarded the courts as the best protectors of state prerogatives.[94] Like their adversaries the Federalists, however, the Antifederalists did not anticipate that such judicial power would be employed either aggressively or with wide effect. They trusted that the courts would impartially protect the reserved rights of both states and

86. *See id.* at 64.

87. *See* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 158-59 (1966) (reprinting J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (G. Hunt & J. Scott eds. 1920)).

88. *See id.* at 140, 158-59.

89. *See id.* at 60-62, 66-67, 596-97, 600-01. Several delegates to the convention, including both Federalists and Antifederalists, envisioned a Council of Revision, consisting of the executive and "a convenient number" of the members of the national judiciary, which, in one proposed form, would possess the power to veto legislative proposals of both the national and state legislatures. 2 W. CROSSKEY, *supra* note 42, at 979, 1013-18.

90. *See* J. MADISON, *supra* note 87, at 318-19.

91. *See* C. WARREN, *supra* note 69, at 164-71.

92. *See* U.S. CONST. art. III, § 2; J. SCHMIDHAUSER, *supra* note 12, at 11; G. WOOD, *supra* note 37, at 537-38, 552.

93. U.S. CONST. art. III, § 2.

94. *See* J. SCHMIDHAUSER, *supra* note 12, at 9-11; 2 THE RECORDS, *supra* note 48, at 28-29.

individuals,[95] as well as those of the national government, and that few cases would arise which would challenge the states within their spheres of sovereignty.

Despite the general approval of the compromise, during the campaign to ratify the Constitution, both James Madison and Alexander Hamilton[96] devoted an essay in *The Federalist* to an examination of the purposes and the impartial character of the judicial arbiter in an effort to combat criticism of the broad jurisdictional grants to the new national court system. Madison noted that although "the tribunal which is ultimately to decide" disputes relating to the boundary of powers and functions between a government of the whole and governments of the parts is an aspect of the national government, "[t]he decision is to be impartially made, according to the rules of the Constitution."[97] Although nationalists such as Madison and Hamilton wrote most frequently about judicial protection of national supremacy against state encroachments, they recognized that in a converse situation national laws that infringed state rights would also be declared unconstitutional.[98]

C. *Early Supreme Court Federalism Decisions*

Historically, Supreme Court decisions concerning the appropriate boundary lines between state and national authority have been colored by the political point of view prevalent among the Court's membership.[99] The pose of judicial impartiality and finality which assumes that the Constitution provides some definite, identifiable plan for national-state relations supports the myth of federalism as the paragon of government. In reality, however, the Constitution is an ideal without detail. In their role as arbiters of national-state relations, the Justices possess broad discretion in determining the boundary lines for the division of powers and functions in the federal system. Over time the Court has shifted these boundary lines to accord with the political philosophies of its

95. J. SCHMIDHAUSER, *supra* note 12, at 207.

96. Hamilton vigorously defended judicial review as part of the elaborate system of checks and balances in the new national government. According to Hamilton, "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST No. 78, at 485 (A. Hamilton) (H. Lodge ed. 1888).

97. THE FEDERALIST No. 39, at 238 (J. Madison) (H. Lodge ed. 1888).

98. THE FEDERALIST, *supra* note 96, at 482.

99. *See* text accompanying notes 100-27 *infra*. *See generally* J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING (2d ed. 1980).

changing membership,[100] as well as in response to changes in American society itself.

Much to the surprise of both the Federalists and the Antifederalists, under the stewardship of Chief Justice John Marshall the Supreme Court established itself as an aggressive arbiter of national-state relations. In a series of cases the Marshall Court asserted national authority by nullifying state laws[101] that conflicted with the Court's "nation-centered federalism"[102] interpretation of the Constitution. The case of *Gibbons v. Ogden*,[103] the Court's first interpretation of the commerce clause, indicated the Marshall Court's political perspective. In *Ogden* the Court examined the constitutionality of New York's steamboat monopoly law. In defense of the statute the steamboat monopoly's counsel argued that commerce did not embrace navigation, but merely comprised traffic in commodities. Writing for the Court, Marshall rejected this view and held that commerce not only embraced navigation but also included every species of commercial intercourse.[104] Marshall's broad interpretation of the scope of the commerce power has been the foundation for subsequent extensions of the power of the national government.[105] The *Ogden* decision ascribed to Congress plenary power to regulate commerce. The power to regulate commerce, wrote Marshall, is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[106] These strong statements concerning national power reflected the Marshall Court's political views that generally favored broad governmental powers when exercised for national objectives.[107]

During Roger Taney's tenure as Chief Justice, the pendulum of power swung partially back towards those with a "state-centered"[108] view of federalism. The Taney Court generally exercised

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100. For a humorous phrasing of this phenomenon, see F. DUNNE, *The Supreme Court's Decisions*, in MR. DOOLEY: NOW & FOREVER 156 (1954), in which he writes, "[N]o matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns." *Id.* at 162.

101. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

102. *See* R. LEACH, *supra* note 70, at 10-12.

103. 22 U.S. (9 Wheat.) 1 (1824).

104. *Id.*

105. *See generally* W. CROSSKEY, *supra* note 42.

106. 22 U.S. (9 Wheat.) at 196.

107. *See generally* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937).

108. *See* R. LEACH, *supra* note 70, at 12-13. The state-centered theory of federalism postulates that government generally possesses only a limited amount of power and that the

more self-restraint than the Marshall Court when confronted with a case requiring a determination of the boundaries of the federal system. As John Schmidhauser, a constitutional scholar, has observed, the Taney Court followed "a policy of leaving to the states the fullest possible freedom of control of their social and economic affairs."[109] In *Cooley v. Board of Wardens*[110] the Taney Court's examination of the validity of a Pennsylvania river pilotage law decided the question whether under any circumstances the states could regulate interstate or foreign commerce. Justice Curtis, the author of the *Cooley* opinion, upheld the state law and set forth the precedential rule that when the subjects of regulation demand diverse treatment, state regulation would be permitted in the absence of congressional action, but when the subject of regulation had a national effect or required uniform treatment, Congress possessed exclusive regulatory authority.[111]

The Taney Court approached the federalism issue with concern for the protection of the states' role in the federal system from encroachment by the national government. In contrast, the Marshall Court had accepted the Federalist view that the chief danger to a federal system was the tendency of the "parts" to encroach upon the powers of the "whole." Because the federalism decisions of both Courts affected American social and economic development, as well as the division of powers and functions in the federal system, they both undeniably had much the same effect as political choices of policy. In *Ogden* the Marshall Court defined the broad and plenary power that the national government possesses under the commerce clause. In *Cooley* the Taney Court announced the theoretical premise of concurrent jurisdiction over commerce by the states and the national governments. Using the same clause from the Constitution, the two Courts set two different policy courses.

Later Courts attempted, often successfully, to direct American economic and social development according to their own choice of policy. In practical effect, the Supreme Court usurped the powers

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power of the national government is confined to narrowly construed delegated powers. Under this theory, any expansion of national power usurps the prerogatives of the states and the people. *Cf.* U.S. CONST. amend. X ("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.").

109. J. SCHMIDHAUSER, *supra* note 12, at 79.

110. 53 U.S. (12 How.) 298 (1851).

111. *Id.*

of the national and state legislatures to determine questions of social and economic policy by its restrictive opinions concerning the constitutionality of national and state regulations. In *Hammer v. Dagenhart*[112] the Supreme Court invalidated an act of Congress intended to prevent interstate commerce in products created by child labor. Writing for the Court, Justice Day declared that "the act in a two-fold sense is repugnant to the Constitution" because it both exceeded the authority delegated to Congress over commerce and infringed on a matter properly reserved to the states.[113] Applying a doctrinaire dual federalism analysis, the Court decried "[t]he far reaching result of upholding the act."[114] In the Court's words, "[I]f Congress can thus regulate matters entrusted to local authority . . . the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."[115]

Although the *Dagenhart* majority invoked the mythical plan for the division of powers and functions between the states and national government as one ground of the decision, Justice Holmes in a powerful dissent argued that the decision to strike down the act represented an unjustifiable and inappropriate choice of social policy by the Court. Holmes observed that "the propriety of the exercise of a power admitted to exist . . . was for the consideration of Congress alone" and the Court should not "intrude its judgment upon questions of policy or morals."[116]

Although the language in the cases restricting national regulatory power frequently raised the mythical standard for national-state relations, the underlying issue before the Court was often the policy choice of national regulation versus economic *laissez faire*.[117] In *Carter v. Carter Coal Co.*[118] the Supreme Court held the Bituminous Coal Conservation Act of 1935 unconstitutional on the ground that Congress had not regulated interstate commerce, but rather had invaded the reserved powers of the states. Justice Sutherland's opinion reflected the *laissez-faire* majority's view

112. 247 U.S. 251 (1918).
113. *Id.* at 276.
114. *Id.*
115. *Id.*
116. *Id.* at 280 (Holmes, J., dissenting). Justice Holmes' dissent was a portent of the view adopted by the Court beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). His view was echoed again in Justice Brennan's dissent in National League of Cities v. Usery, 426 U.S. 833, 860 (1976) (Brennan, J., dissenting).
117. *See* E. CORWIN, *supra* note 79, at 107.
118. 298 U.S. 238 (1936).

that certain "local" matters could not be regulated by the national government under the pretext that the matters "affected" interstate commerce.[119] In *Carter* the Supreme Court's interpretation of federal relations effectually blocked congressional regulation of labor conditions, a matter that the individual states were, in a practical sense, incompetent to deal with independently. The dual federalism model was the analytical weapon wielded by the supporters of a *laissez-faire* social and economic policy against Franklin Roosevelt's national programs for social and economic reform. Dual federalism's sharp division of powers and functions between the nation and the state stifled intergovernmental cooperation in combating the social and economic problems of the Depression.[120]

In 1937, however, the Supreme Court turned its back on the dual federalism model and, in the process, altered its political and economic policy. The Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*[121] to sustain the National Labor Relations Act against the charge that it exceeded the scope of congressional commerce power signaled the Court's new willingness to permit the national government greater influence on the nation's social and economic affairs.[122] The Supreme Court completed its judicial change of faith in *United States v. Darby*[123] when it upheld the Fair Labor Standards Act against allegations that it exceeded Congress' delegated powers under the commerce clause and that it infringed on the reserved powers of the states in violation of the tenth amendment. Employing a broad constructionist formula in the tradition of the Marshall Court, the Supreme Court, in an opinion authored by Chief Justice Stone, sustained the Act as a necessary and proper implementation of the commerce power. The Court expressly rejected the restrictive dual federalism model[124] in order to facilitate New Deal social and economic programs. According to the *Darby* Court, "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[125] This conclusion,

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119. *Id.* at 307.

120. *See* E. CORWIN, *supra* note 79, at 262. Dual federalism's delineation of isolated spheres of sovereignty for national and state governments precluded an overlap of sovereignty that would permit cooperative action between the two levels of government.

121. 301 U.S. 1 (1937).

122. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

123. 312 U.S. 100 (1941).

124. *Id.* at 114-20.

125. *Id.* at 115.

noted Chief Justice Stone, "is unaffected by the Tenth Amendment" because the amendment carries no substantive weight of its own.[126] Rather, the tenth amendment "states but a truism that all is retained which has not been surrendered."[127] The *Carter* decision's promise to scrutinize congressional objectives and to reject pretexts for the regulation of commerce was shortlived. On the contrary, in *Darby* the Supreme Court announced its plan to exercise only minimal scrutiny of a statute's congressional purpose.

III. FEDERALISM TODAY

A. Cooperative Federalism: Process—Not Policy or Paragon

The premise of cooperative federalism is, simply, that the multilevel American governmental system is best described as one government serving one people.[128] The late Professor Corwin wrote, "[T]he National Government and the States are mutually complementary parts of a *single* government mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand."[129] Thus, cooperative federalism stresses a partnership among all levels of government in the promotion of policy choices. Furthermore, the partnership is a pragmatic one in which each level works with the others to accomplish goals which could not be achieved by one level alone.

Cooperative federalism theorists argue that no neat division of functions among the various levels is possible. Police protection, for example, is often considered a uniquely local function. But in practice police work requires the cooperation of national, state, and local governments beginning with the codification of a criminal code and continuing through enforcement procedures.[130] The sharing of functions has equal importance for governmental responsibilities usually thought to be restricted to the national government. Foreigu affairs,[131] national defense,[132] and the development of energy programs[133] are examples of functions often considered exclu-

126. *Id.* at 123.
127. *Id.* at 124.
128. Grodzins, *supra* note 6, at 23.
129. Corwin, *supra* note 122, at 19 (emphasis in original).
130. *See* D. ELAZAR, *supra* note 7, at 11-12, 47, 66, 211.
131. *See* U.S. CONST. art. I, §§ 8, 10; *id.* art. II, §§ 2-3.
132. *See* U.S. CONST. art. I, § 8.
133. *See* Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422 (1976 & Supp. III 1979).

sively national. States and localities, however, often directly and indirectly influence each of these areas.[134] The specific mix and character of the responsibility borne by a certain level of government in these areas will, of course, vary in accordance with policy decisions.[135] But the dominant role sometimes played by one level of government should neither obscure the underlying collaboration of the various levels in the functions of government nor serve to justify policy decisions on federalism grounds.

Perhaps Morton Grodzins best described this interplay of governments and functions that is known as federalism when he wrote,

> The federal system is not accurately symbolized by a neat layer cake of three distinct and separate planes. A far more realistic symbol is that of the marble cake. Wherever you slice through it you reveal an inseparable mixture of differently colored ingredients. There is no neat horizontal stratification. Vertical and diagonal lines almost obliterate the horizontal ones, and in some places there are unexpected whirls and an imperceptible merging of colors, so that it is difficult to tell where one ends and the other begins. So it is with federal, state, and local responsibilities in the chaotic marble cake of American government.[136]

Few will dispute that powers and functions often overlap in the American federal system. In fact, it is often the overlap that creates intergovernmental disputes about the proper allocation of powers and functions.[137] These disputes tend to be fought with

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134. The states, particularly those which serve as points of ingress and egress from the United States, affect foreign relations. Texas and California, for example, have substantial impact on our relations with Mexico. The migrant worker, welfare, and educational policy responses of these states to the flow of Mexican natives who regularly cross the border play a major role in United States-Mexico relations. *See generally* E. DVORIN & A. MISNER, GOVERNMENT IN AMERICAN SOCIETY 95-97 (1968). In wartime the states have contributed to the implementation of domestic economic and social programs designed to facilitate the war effort. The National Guard is one example of joint national and state control of the military. During peacetime state governors command National Guard units, but during wartime the President may activate these units. *See generally* J. FERGUSON & D. MCHENRY, THE AMERICAN SYSTEM OF GOVERNMENT 471-72, 484-86 (6th ed. 1961). Also, many states have individual energy programs. *See The Race to Develop State Energy Plans,* BUSINESS WEEK, March 31, 1980, at 44. *See also* Note, *Nebraska's Legislative Responses to the Energy Crisis: Solar Energy, Gasohol, and the Conservation Ethic,* 60 NEB. L. REV. 327 (1981).

135. For example, decisions about the parameters of national participation in local education or local participation in national welfare programs reflect policy decisions on hoth the national and local level about the nature of these programs. The national government, of course, may preempt state action in common fields under the supremacy clause. U.S. CONST. art. VI.

136. Grodzins, *supra* note 6, at 3-4.

137. *See, e.g.,* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352, 2356 (1981) (overlap of federal power over interstate effects of surface mining with states' power over local land-use).

sweeping generalities and conclusory statements that confuse the politically neutral, but fluid process for allocating power and function with decisions about social and economic policy. They fail to recognize that the two concepts are independent. Politicians, spokesmen for business and labor, civic leaders, and local news media are quick to champion state and local governments as the foundation of American democracy when the national government deals unfavorably with some issue that holds importance for them.[138] Social and economic conservatives predictably deplore the insidious undermining of state and local government by the expansion of the national government and its bureaucracies.[139] In contrast, liberal critics portray state and local government as the breeding ground for many of the inequities that plague American life. These critics characterize state and local government as inept and often corrupt, overwhelmed by the demands of an increasingly urbanized society, and handicapped by boundaries that have become irrelevant to changing demographic patterns.[140]

The classic concerns of federalism—governmental effectiveness and the protection of liberty through the diffusion of power[141]—are rarely the primary concern of these actors in the federalism play. Rather, the more commonly posed federalism questions concern issues of social and economic policy.[142] The debates focus on the character and propriety of governmental action. For example, President Reagan's "New Federalism" does not deal with federalism's classic concerns so much as it seeks to serve "the demands of privatism—the concern to conserve wealth and power in the private sector, with a concomitant concern to curb government *at all levels.*"[143]

The focus is on policy choices—the determination of societal goals—rather than on an accommodation of traditional federalism

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138. *See id.*

139. *See, e.g.*, Kilpatrick, *supra* note 78. *See generally* L. FREEDMAN, POWER AND POLITICS IN AMERICA 304-07 (2d ed. 1974).

140. *See, e.g.*, Jaffa, *The Case for a Stronger National Government*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM, *supra* note 6, at 106. *See generally* L. FREEDMAN, *supra* note 139, at 287-99.

141. *See* text accompanying note 40 *supra*. *See generally* FEDERALISM: MATURE AND EMERGENT, *supra* note 4.

142. *See* notes 99-127 *supra* and accompanying text; J. SCHMIDHAUSER, *supra* note 12, at 209-10.

143. Scheiber, *American Federalism and the Diffusion of Power*, 9 TOL. L. REV. 619, 676 (1978) (emphasis in original). *See also* Schlesinger, *Administration Economics: End of Illusions*, Wall St. J., Sept. 29, 1981, at 32, col. 3 ("no great growth in the federal establishment over the last 30 years").

concerns. Decisions about societal goals that affect the allocation of powers and functions among governmental units may incidentally impact on traditional federalism concerns. An allocation of powers and functions that favors state and local government may produce certain intangible benefits, including the freedom to adapt government to local conditions, the opportunity to participate in government, and the ability to make government responsive to the desires of the governed.[144] On the other hand, a tilt in favor of the national government has its own intangible advantages including equity and equality of access and opportunity.[145] The third option, a general reduction of government's powers and functions, promotes the values of individualism and self-reliance.[146] These values, however, are rarely the true issue in federalism disputes.

Cooperative federalism is neither a paragon of government nor a specific choice of policy. It is not an eternal, immutable principle. Rather, it is a process that has a fluid form well suited for the implementation of various choices about social and economic policy. A discussion of federalism's allocation of powers and functions should not confuse process with either paragon or policy. As Morton Grodzins has noted, "The rhetoric of state and national power becomes easily and falsely a rhetoric of conflict."[147] This confusion occurs because there exist real differences of opinion about policy questions. But the conflict about policy should not be carried over into discussions about the process. In a system of cooperative fed-

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144. *See* R. DAHL, A PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 172-73 (1967).

Dahl has identified four basic contributions of strong state and local governments to American democracy:

1. By reducing the workload of the national government, they make democratic government at the national level more manageable.
2. By permitting diversity, they reduce conflicts at the national level and thus make democratic government at the national level more viable.
3. By providing numerous more or less independent or autonomous centers of power throughout the system, they reinforce the principles of Balanced Authority and Political Pluralism . . . .
4. By facilitating self-government at local levels, they greatly expand the opportunities for learning and practising the ways of democratic government . . . .

Id.

145. M. DANIELSON, A. HERSHEY & J. BAYNE, ONE NATION, SO MANY GOVERNMENTS 13 (1977).

146. *See generally* Y. ARIELI, INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY 168-80, 322-47 (1964). According to Arieli, individualism is an aspect of liberty. "Self-reliance and enlightened self-interest, competition and association were the conditions of liberty and progress, to be preserved even though equality of conditions should perish." *Id.* at 326.

147. Grodzins, *supra* note 6, at 23.

eralism channels exist through which conflicts about process can be resolved. These channels are opened by the interplay of such cooperative programs as welfare, social security, and environmental protection.[148] These programs are the joint creations of a national representative government and state and local jurisdictions.[149] As Professor Wechsler has written, local participation in the political process "necessitates the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states."[150] Moreover, as a process, cooperative federalism requires that all levels of government share in the implementation of policy. In practice, this sharing of responsibility results in local governments determining how best to administer policy within the broad guidelines prescribed by state or national authorities.[151] Conflicts among the several levels of government then occur generally when policy, not process, is at issue. In such situations the conflict is no longer about federalism's allocation of powers and functions, but rather about policy choices that must be left for the political branches to resolve.[152]

B. The Modern Court's Analysis

1. Harbingers of a Judicial Role in Federalism Decisions

Following the *Darby* decision the Supreme Court practiced a "hands off" policy with regard to national legislation enacted under the commerce clause.[153] Together with the Court's deferential treatment of the exercise of national power under the war[154] and spending[155] powers and under the Civil War Amend-

148. *See* D. ELAZAR, *supra* note 7, at 29-30 (welfare), 56-57 (social security), 53-54 (environment).

149. *See id.*

150. Wechsler, *supra* note 11, at 558.

151. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

152. *See* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279-95 (1957) (Supreme Court's major policy role is to confer legitimacy on the major politics of the national ruling coalition).

153. *See* Bogen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187 (1972).

154. *See, e.g.*, United States v. Oregon, 366 U.S. 643 (1961); Woods v. Miller Co., 333 U.S. 138 (1948); Case v. Bowles, 327 U.S. 92 (1946).

155. *See, e.g.*, Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (federal program required states to limit political activities of state employees participating in federal program); Helvering v. Davis, 301 U.S. 619, 640 (1937) (unless Congress' action is clearly arbitrary, it alone determines general welfare).

ments,[156] the Supreme Court's pro forma scrutiny of Congress' exercise of the commerce power amounted to an abdication of the Court's role as arbiter of federal relations. Some signs, however, indicated that the Court had not completely abandoned the notion of federalism limits on national power. In a 1944 decision Justice Frankfurter argued that the Supreme Court should assume a balanced approach in federalism cases: "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology."[157] Scholarly studies[158] indicating the essential economic and social unity of the nation, Justice Frankfurter insisted, "cannot justify absorption of legislative power by the United States over every activity."[159] Justice Douglas later expanded on Justice Frankfurter's theme when he dissented in *United States v. Oregon*,[160] a case concerning a conflict between state and national laws regarding the estate of a decedent who died intestate in a Veterans Administration hospital. Justice Douglas noted, "The Tenth Amendment does not, of course, dilute any power delegated to the national government. . . . But when the Federal Government enters a field as historically local as the administration of decedents' estates, some clear relation of the asserted power to one of the delegated powers should be shown."[161]

In *Maryland v. Wirtz*[162] the Supreme Court groped towards some limit to congressional power under the commerce clause. *Wirtz* concerned a constitutional challenge to two amendments to the Fair Labor Standards Act of 1938 (FLSA)[163]: one extended the Act's coverage of employees in private industry to include "the fellow employees of any employee who would have been protected by the original Act"[164] and the other applied the Act to employees of state-operated schools and hospitals. In a footnote to the majority opinion upholding both amendments, Justice Harlan sought to

156. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88 (1971) (extension of the private conspiracy coverage of 42 U.S.C. § 1985(3)).

157. Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 650 (1944).

158. *See, e.g.*, D. ELAZAR, *supra* note 7; M. GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (1966).

159. Polish Nat'l Alliance v. NLRB, 322 U.S. at 650.

160. 366 U.S. 643 (1961).

161. *Id.* at 654 (Douglas, J., dissenting).

162. 392 U.S. 183 (1968).

163. 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).

164. Maryland v. Wirtz, 392 U.S. at 188.

temper the broad language of *Wickard v. Filburn*,[165] the Court's most expansive reading of Congress' powers under the commerce clause. Justice Harlan stated, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[166] Only when a statute "bears a substantial relation to commerce" will the Court uphold the provision without regard to the insubstantiality of the individual activity that the statute seeks to regulate.[167] Justice Douglas' dissent in *Wirtz* recalled the mythical federalism standard, which reserved certain powers and functions exclusively to the states. The FLSA amendments, he stated, "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."[168] Douglas suggested that accepting the majority's rationale, an "enterprise concept" that justified Congress' regulation of activities which have only a trivial impact on commerce, could enable Congress virtually to "draw up each State's budget to avoid 'disruptive effect[s] . . . on commercial intercourse.' "[169]

The growing sensitivity of the Court to federalism limitations continued in *Fry v. United States*.[170] Although the Court upheld the application of temporary national wage controls to state employees,[171] Justice Marshall emphasized the narrowness of the Court's holding, carefully noting that the statute was an emergency measure of limited scope which did not appreciably intrude on state sovereignty.[172] Justice Marshall's comments about the tenth amendment are particularly indicative of the Court's renewed regard for federalism limitations on national power. Acknowledging that the *Darby* Court had characterized the tenth amendment as a "truism," Marshall stated that the amendment has significance and that it "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States'

165. 317 U.S. 111 (1942). *Wickard* required "a substantial economic effect on interstate commerce." *Id.* at 125. This requirement, however, could be satisfied when a regulated activity "taken together with that of many others similarly situated, is far from trivial." *Id.* at 128. *Cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2389, 2391 (1981) (Rehnquist, J., concurring) (Justice Rehnquist's emphasis that a prerequisite to Congress' commerce power is a "*substantial* effect on interstate commerce").

166. Maryland v. Wirtz, 392 U.S. at 196-97 n.27.

167. *Id.*

168. *Id.* at 203 (Douglas, J., dissenting).

169. *Id.* at 204-05.

170. 421 U.S. 542 (1975).

171. *Id.* at 545.

172. *Id.* at 548.

integrity or their ability to function effectively in a federal system."[173] In the next term, Marshall's rereading of the tenth amendment served as the starting point to justify the Court's reemergence as an arbiter of federalism.

2. *National League of Cities v. Usery*

The Court's decision in *National League of Cities v. Usery*[174] marked the return of the Court to an unabashed policymaking role. *Usery* was the most dramatic and activist commerce clause decision rendered by the Court in four decades.[175] The majority[176] opinion, written by Justice Rehnquist, recalled the rationales offered by the Depression-era Court to justify its obstructionist intrusion into questions of economic and social policy. The decision vacillated somewhat, but ultimately rested on the two traditional rationales for limiting Congress' power under the commerce clause: (1) The inherent limits in the reach of Congress' delegated power over commerce, and (2) the undefined but inviolable governmental powers and functions reserved to the states.[177] The primary distinction between *Usery* and the older "dual federalism" line of cases was Justice Rehnquist's characteristic failure to admit the Burger Court's return to rationales previously rejected by the Court.[178]

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173. *Id.* at 547 n.7.

174. 426 U.S. 833 (1976).

175. The last commerce clause decision prior to *Usery* to reject congressional legislation was Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See* notes 118-20 *supra* and accompanying text.

176. The decision was decided by a 5-4 majority. Justice Blackmun wrote a concurring opinion but also joined the majority opinion. Nonetheless, several commentators have mistakenly characterized the decision as a plurality opinion that has a lesser precedential effect. *See, e.g.*, Bogen, Usery *Limits on National Interest*, 22 ARIZ. L. REV. 753, 766 (1980); Heldt, *The Tenth Amendment Iceberg*, 30 HASTINGS L. J. 1763, 1765 (1979). *See also* R. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). The authors of *The Brethren* note, "Blackmun toyed with concurring in the result [in *Usery*] only, thus denying Rehnquist his fifth vote to make it a binding precedent. He finally decided to join Rehnquist's opinion, but to limit its effect by publishing his own separate opinion." *Id.* at 410.

177. National League of Cities v. Usery, 426 U.S. at 842-43.

178. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303-04, 349-57 (1976). Two examples of Justice Rehnquist's misuse of precedent include Paul v. Davis, 424 U.S. 693 (1976) (procedural due process decision denying due process protection to interest for injury to reputation, inconsistent with prior case law), and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (restriction of state action doctrine for purposes of applying fourteenth amendment). *See also* R. WOODWARD & S. ARMSTRONG, *supra* note 176, at 408 ("When [Justice] Stevens received his copy of Rehnquist's draft [of the *Usery* opinion], he took it home and went over it carefully. Rarely, in five years on the

In *Usery* the Court invalidated the amendments to the FLSA, which set minimum wage and maximum hour requirements for all state and local employees, stating that the amendments exceeded the scope of the commerce power insofar as they "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[179] According to Justice Rehnquist, by increasing state labor costs substantially the statute could potentially force reductions in state-provided public services as well as severely restrict states' control over their own employees.[180] In short, stated Rehnquist, "[T]he federal requirement directly supplants the considered policy choices of the States' elected officials."[181] The Court seemed untroubled that these same arguments had been decisively rejected thirty-five years before[182] and again dismissed as recently as the previous term in *Fry*.[183]

With a semantic twist that evidenced an implicit balance of interests, Justice Rehnquist managed to distinguish *Fry* while simultaneously overruling *Wirtz*.[184] He found that the national interest in *Fry* was more substantial than in *Wirtz* because nationwide inflation affected "the well-being of all the component parts of our federal system" in a manner "which only collective action by the National Government might forestall."[185] The national interest in the general welfare, however, a goal promoted by the minimum wage and maximum hour legislation at issue in both *Wirtz* and *Usery*, was not as weighty. As one commentator[186] has noted, "the Court's distinction of *Fry*, in which Justice Rehnquist dissented, represents a statement about the relative propriety of federal action in the pursuit of national economic policy and in the pursuit of federal notions of fairness in employment relations."[187] Thus, although the *Usery* Court purported to base its limitation of Congress' commerce clause powers on certain inviolable "attributes of

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appeals court, had he seen such a misuse of precedents. Rehnquist 'can't do this,' he told a clerk the next morning.").

179. National League of Cities v. Usery, 426 U.S. at 852.

180. *Id.* at 846, 851.

181. *Id.* at 848.

182. *See* text accompanying notes 123-27 *supra*.

183. *See* Fry v. United States, 421 U.S. 542 (1975).

184. National League of Cities v. Usery, 426 U.S. at 852-54.

185. *Id.* at 853.

186. Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473 (1978).

187. *Id.* at 533 (footnote omitted).

state sovereignty" that the Constitution reserves to the states,[188] in reality the decision amounted to little more than the substitution of the Court's choice of social and economic policies for those of Congress. Justice Rehnquist's ability to distinguish *Wirtz* from other equally intrusive legislation enacted under the commerce power weakened his "attributes of [state] sovereignty" argument because his distinction admitted that "[t]he limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude"[189] statutes that coincide with the Court's own choice of policy.

Justice Brennan, in a dissent joined by Justices White and Marshall, vehemently objected to the majority's invocation of the mythical federalism standard.[190] The Constitution, he argued, recognizes no restraint on Congress based on state sovereignty when a delegated power admittedly exists.[191] According to Justice Brennan, the majority opinion was grounded on an "abstraction without substance."[192] Moreover, in an effort to interject the Court into a policymaking role the majority had made a "purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power."[193]

As Justice Brennan noted in his dissent, *Usery* represents the Supreme Court's groping search for some analytical formula that will allow the Court to limit Congress' power under the commerce clause and thus permit the Court to regain its role as arbiter of national-state relations. The *Usery* Court chose to return to prior doctrines that, in their previous incarnation, had stifled the ability of the national government to respond to the Depression-era crisis. The dissent feared the "pernicious consequences" that might flow from a return to a doctrine that inflexibly restricted national power.[194] Justice Brennan argned that the political process provides adequate safeguards for the federal system and noted that this position had long ago been advocated by Chief Justice Marshall when he stated,

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188. National League of Cities v. Usery, 426 U.S. at 845.

189. *Id.* at 853. Justice Rehnquist's exceptions would include "temporary enactments tailored to combat a national emergency" such as the wage-price freeze employed to combat inflation discussed in *Wirtz*. *Id. But cf.* Fry v. United States, 421 U.S. 542, 550, 558-59 (1975) (Rehnquist, J., dissenting) (rejecting this exception).

190. *Id.* at 858-60 (Brennan, J., dissenting).

191. *Id.* at 858 (Brennan, J., dissenting).

192. *Id.* at 860 (Brennan, J., dissenting).

193. *Id.* at 858 (Brennan, J., dissenting).

194. *Id.* at 860 (Brennan, J., dissenting).

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied to secure them from [commerce power] abuse. They are the restraints on which the people must often rely solely, in all representative governments.[195]

The views of the *Usery* majority and dissent concerning the proper role for the Court in federalism cases clearly conflict. The majority suggested that the Constitution contains a plan for the allocation of powers and functions between the national and state governments that should be interpreted by the Court. The dissent rejected this myth and recognized that the division of powers and functions is fluid and must remain so in order that government may best respond to a continually changing and increasingly complicated world. Starting from these two opposing premises, Justice Rehnquist quite naturally saw the Court as the proper arbiter of federalism while Justice Brennan selected the political branches for this role. In *Usery* both the dissent and the majority insisted on the exclusive right of their chosen branch of government to determine the proper federalism balance. In subsequent federalism cases, the Court has side-stepped the polemic presented by those divergent views and begun to move towards some intermediate position.[196]

3. The SMCRA Decisions

The Supreme Court's decisions in *Hodel v. Virginia Surface Mining & Reclamation Association*[197] and *Hodel v. Indiana*[198] are the most recent attempts to articulate some principled approach to federalism cases. In two separate opinions, both by Justice Marshall, the Supreme Court unanimously upheld the Surface Mining Control and Reclamation Act of 1977[199] despite several constitutional challenges, including claims premised on the inherent limits of Congress' delegated power to regulate commerce and the tenth amendment's affirmative protection of the powers reserved to the

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195. *Id.* at 857 (Brennan, J., dissenting) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (emphasis added by Justice Brennan).

196. Justice Marshall's opinions in the SMCRA decisions, *see* notes 197-234 *infra* and accompanying text, point towards a shared responsibility between the Court and the political branches about federalism questions. For further analysis, see text accompanying notes 235-45 *infra*.

197. 101 S. Ct. 2352 (1981).

198. 101 S. Ct. 2376 (1981).

199. 30 U.S.C. §§ 1201-1328 (1976 & Supp. III 1979).

states.[200]

In *Virginia Surface Mining* plaintiffs[201] urged the Court to look beyond the pretext[202] offered by Congress as SMCRA's purpose, the regulation of the interstate commerce effects of surface coal mining, for SMCRA's underlying purpose, namely the regulation of the use of private lands subject to state control. Thus, plaintiffs argued that their claim presented the ultimate issue " 'whether land *as such* is subject to regulation under the Commerce Clause, *i.e.* whether land can be regarded as being "in commerce." ' "[203] The Court rejected this framing of the issue in favor of its traditional two-step commerce clause inquiry: (1) Whether a rational basis exists for "a congressional finding that a regulated activity affects interstate commerce,"[204] and (2) "whether the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution."[205] Applying this analysis, the Court found ample rational basis for Congress' finding, supported in the legislative record,[206] that "regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity."[207] In addition, the Court found that SMCRA's challenged provisions were reasonably related to the stated congressional purpose of controlling the adverse economic and environmental interstate effects of surface coal mining.[208]

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200. Plaintiffs also alleged that certain provisions of SMCRA effected an uncompensated taking of private property in violation of the just compensation clause of the fifth amendment, and that some of SMCRA's enforcement provisions violated procedural due process requirements and equal protection guarantees. The Court held that SMCRA is not vulnerable to plaintiffs' pre-enforcement constitutional challenges. Hodel v. Indiana, 101 S. Ct. 2376, 2381 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352, 2359 (1981).

201. Plaintiffs in *Virginia Surface Mining* were an association of coal mining operations in Virginia, some of its member coal companies, individual landowners, the Commonwealth of Virginia, and a town. Plaintffs in *Hodel v. Indiana* were the State of Indiana and several of its officials, the Indiana Coal Association, several coal mine operators, and others whose property rights SMRCA would potentially affect.

202. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. at 2358-59. *Cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Court would look behind stated congressional purpose to discover underlying effect of legislation).

203. 101 S. Ct. at 2359 (quoting Brief for Appellees at 12 (emphasis in original)).

204. *Id.* at 2360 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)).

205. *Id.* (brackets in original).

206. *Id.* at 2361-62. For an analysis of SMCRA's legislative history, see *A Symposium on the Surface Mining Control and Reclamation Act of 1977*, 81 W. VA. L. REV. 553 (1979) [hereinafter cited as *Symposium*].

207. 101 S. Ct. at 2362.

208. *Id.*

In its analysis of possible tenth amendment affirmative limitations on Congress' commerce power, the Court noted the district court's heavy reliance on *Usery*'s vaguely stated rationale. Although the lower court had acknowledged that SMCRA "ultimately affects the coal mine operator," it had held that because SMCRA interferes with the states' "traditional governmental function" of regulating land use, SMCRA contravened the tenth amendment's affirmative protection of the states' reserved powers.[209] According to Justice Marshall, the lower court had misread *Usery*. In *Usery*, he explained, the Court had drawn a sharp distinction between congressional regulation of areas of private endeavor that fell within the province of both the nation and the state of their residence, and congressional regulation "directed not to private citizens, but to the States as States."[210] Although the tenth amendment did not restrict congressional power over private parties, it did operate to prohibit regulation of the states qua states when Congress' exercise of its commerce power "displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions."[211]

Justice Marshall expanded on the vague *Usery* rationale by formulating a three-pronged test that any challenger to Congress' commerce power must pass:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."[212]

Applying this test, the Court rejected the tenth amendment challenge because SMCRA operated to regulate private parties, not "States as States."[213] Moreover, as Justice Marshall observed, SMCRA does not coerce the states "to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever."[214] Consistent

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209. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 (W.D. Va. 1980), *rev'd sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

210. 101 S. Ct. at 2365 (quoting National League of Cities v. Usery, 426 U.S. 833, 845 (1976)).

211. *Id.*

212. *Id.* at 2366 (citations omitted).

213. *Id.*

214. *Id.*

with SMCRA a state may decline to shoulder any regulatory burden[215] or, if it so chooses, a state may design an enforcement program within a broad range of options provided that certain minimum standards set forth in the Act are met.[216] In short, SMCRA does not dragoon the states into forced participation in a federal program. As Justice Marshall noted, the Act merely "establishes a program of cooperative federalism" that allows the states to structure a program "to meet their own particular needs."[217]

In his concurring opinion, Justice Rehnquist reflected on "one of the greatest 'fictions' of our federal system"—the notion "that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people."[218] The Supreme Court, observed Justice Rehnquist, has broadly construed Congress' powers under the commerce clause. Nonetheless, he insisted, "there *are* constitutional limits" to this power[219] that are not exclusively based on the public-private distinction articulated in the Court's SMCRA opinions. In Rehnquist's view, "some activities may be so private or local in nature that they simply may not be *in* commerce."[220] According to Justice Rehnquist, to be subject to congressional regulation an activity must have a *substantial* effect on interstate commerce. This *substantial* effect, he indicated, "is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause."[221] Thus, in Justice Rehnquist's view, congressional legislation must meet two different

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215. *Id. Cf.* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded,* 431 U.S. 99 (1977) (The Ninth Circuit rejected the argument that certain regulations promulgated by the EPA which sought to coerce the states' implementation of federal environmental law under the Clean Air Act unconstitutionally intruded on state sovereignty. The Supreme Court granted certiorari but vacated the grant when the EPA voluntarily withdrew and revised the offending regulations).

Significantly, although Justice Marshall does not say that the national government cannot constitutionally coerce state action under its commerce power, he does point out that SMCRA does not coerce the states. Hodel v. Virginia Surface Mining & Reclamation Ass'n 101 S. Ct. at 2366 (1981). *See also* Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243, 1247 (1968). ("To many, the word coercion implies arbitrary decisions of distant and irresponsible bureaucrats; but this is not a necessary part of its meaning. The only kind of coercion I recommend is mutual coercion, mutually agreed upon by a majority of the people affected.")

216. 101 S. Ct. at 2366.

217. *Id.*

218. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2389, 2389 (1981) (Rehnquist, J., concurring).

219. *Id.* at 2390 (Rehnquist, J., concurring) (emphasis in original).

220. *Id.* at 2391 (Rehnquist, J., concurring) (emphasis in original).

221. *Id.* (Rehnquist, J., concurring).

challenges while state legislation must meet only one. Both state and national legislative authorities must observe the prohibitions contained in the Constitution, but only Congress must prove that its power to regulate is based on a *substantial* effect on interstate commerce.[222]

4. An Analysis of the SMCRA Decisions

Even if narrowly construed, the Supreme Court decisions unanimously upholding the constitutionality of the federal strip mining law constitute a strong endorsement of the power of Congress to impose environmental regulations on recalcitrant states and property owners. This "unwelcome legal victory for the Government"[223] reaffirmed Congress' generally broad authority under the commerce clause, but also shed some light on the possible limits to that power.

The SMCRA majority opinions contain two inconsistent approaches to Congress' exercise of its commerce powers. The opinions, on the one hand, defer to congressional judgment concerning the proper purpose and means of implementing its commerce powers.[224] On the other hand, they articulate a test, apparently based on the tenth amendment, which portends an intrusive determination by the Court concerning which congressional policy choices may be precluded by affirmative constitutional limits.[225] In the SMCRA cases the Court rejected challenges based on the states' inviolable powers and functions reserved by the tenth amendment because they failed to pass the first, and analytically easiest, part of Justice Marshall's three-pronged test—whether the national regulation operates to control states rather than private parties.[226] The determination of the second part of the test—whether a fed-

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222. *Id.* (Rehnquist, J., concurring).

223. N.Y. Times, June 16, 1981, at B9, col. 1, B9, col. 4. Secretary of the Interior James G. Watt is an adamant foe of the stripmining law. Even as the Court was deciding the SMCRA decisions Secretary Watt was moving to reduce the staff of the Office of Surface Mining, the agency charged with enforcing the statute. At the time the Court granted certiorari in the SMCRA cases, Secretary Watt headed the Mountain States Legal Foundation, a politically conservative public interest law firm. In that role, he filed a brief on behalf of the coal mining industry arguing that SMCRA "usurped state government functions" and was a step in the "continuing trend toward centralized decision-making that threatens to destroy the Federal structure of government in America." *Id.*

224. *See* text accompanying notes 204-08 *supra.*

225. *See* text accompanying note 212 *supra. But cf.* text accompanying notes 218-22 *supra* (Rehnquist's concurrence in the SMCRA decisions in which he states that congressional commerce powers must be based on a *substantial* effect on interstate commerce).

226. *See* text accompanying notes 209-17 *supra.*

eral statute regulates "matters that are indisputably 'attributes of state sovereignty' "[227]—constitutes a more difficult task.

The vagueness of the phrase "attributes of state sovereignty" complicates the second step of the analysis. The Court has offered little guidance about this ambiguous aspect of its test. Aside from each state's internal political process[228] and, apparently, the determination of the wages and hours of certain employees,[229] the lower courts and Congress cannot easily determine which matters must be reserved exclusively to the states. The second step of the test is also problematic because, in its practical operation, the American federal system shares most governmental functions among its several levels.[230] Moreover, the implementation of any nationwide social or economic policy requires the compliance of state governments because the states increasingly affect the national welfare.[231] This necessary cooperation among levels of government makes the Court's attempt to single out certain functions as "attributes of state sovereignty" a determination which may conflict with policy decisions of the states as well as of the national government.

The third part of the test—whether "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions' "[232] —further creates the opportunity for judicial policymaking in defiance of the political branches. It is doubtful whether any principled approach can guide the judiciary in its construction of such ambiguous phrases as "integral operations" or "areas of traditional functions." Moreover, in an ever-changing world that frequently requires imagination and innovation to deal with novel and complex problems, a test that shackles the national government to an observance of "areas of traditional functions" threatens a repetition of the scenario enacted by the Depression-era Court in which national power was thwarted because it conflicted with the Court's

227. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. at 2366.

228. *But cf.* Reynolds v. Sims, 377 U.S. 533 (1964) (Court may determine that state legislative apportionment scheme constitutes an invidious discrimination violative of rights protected by the equal protection clause); Baker v. Carr, 369 U.S. 186 (1962) (state legislative apportionment schemes are justiciable).

229. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (police and firemen). *Usery*'s overruling of Maryland v. Wirtz, 392 U.S. 183 (1968), implies that the federal government may not constitutionally use its commerce power to regulate the wages and hours of state employees in schools and hospitals.

230. *See* notes 128-36 *supra* and accompanying text.

231. *See* D. ELAZAR, *supra* note 7; Schlesinger, *supra* note 143 (state government has grown at a much faster rate than the federal government).

232. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. at 2366.

laissez-faire philosophy. Similarly, Justice Marshall's test provides the Court with a tool for use whenever the Court disagrees with congressional policy.

The Supreme Court's modern test, however, is not as rigid as classic doctrinaire dual federalism. In a footnote to *Virginia Surface Mining*[233] the Court carefully warned that even the satisfaction of the test was no assurance that a federal regulation would fail because "the nature of the federal interest advanced may be such that it justifies State submission."[234] Thus, the Court's approach falls somewhere between a rigid, but at least principled, dual federalism model, and a balance of national and state interests. This half-way approach provides no guidance to lower courts that must deal with questions concerning the "proper" allocation of governmental powers and functions. The primary use of the approach can only be as an ex post facto justification for an ad hoc judicial policy decision.

5. A Proposed Pragmatic Analysis

Justice Marshall's test assumes the existence of some definitive standard, established by the Founding Fathers, by which the allocation of powers and functions in the federal system must be measured. His test assumes that such a standard is the paragon for ordering men and women in political society and that its principle is suited for all people, in all situations, for all time. The paragon, however, is a myth. The Founding Fathers were pragmatists, rather than divinely inspired political philosophers. They purposefully avoided allocating powers and functions among the levels of the new government[235] because they could not agree among themselves on the proper allocation for late eighteenth-century America, much less for all time. The Constitution nowhere defines either "attributes of sovereiguty" or "integral operations in areas of traditional [state] functions." Rather, it contemplates that such decisions will be made by the political branches within the broad bounds set by the operation of powers delegated to the national government and implemented through the necessary and proper clause.[236] The Supreme Court naturally has *some* role in determin-

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233. *Id.* at 2366 n.29.

234. *Id.*

235. *See* notes 72-75 *supra* and accompanying text.

236. *See* Berns, *The Meaning of the Tenth Amendment*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM, *supra* note 6, at 126-48. Berns argues that the meaning of the tenth amendment is beyond legitimate dispute, that it is merely declaratory

ing federal relations, and there are *some* limits to Congress' delegated powers.[237] The Court's proper role in federalism questions, however, is limited to an interpretation of the scope and breadth of the delegated powers, together with a determination of whether national laws are, in light of contemporary circumstances,[238] "necessary and proper" to the exercise of the delegated national powers.

Thus, the role of the Court, once the existence of national power is ascertained, is to determine whether a particular law is a necessary and proper exercise of that power. This determination involves a limited balancing of competing interests. Although judicial balancing inevitably amounts to judicial policymaking, an acknowledgment that the Court is choosing among competing interests would at least be a straightforward approach. Once the Supreme Court has identified certain interests that carry greater weight than others, lower courts, as well as the national and state legislatures, can determine for themselves which interests shall prevail. Such an approach will allow the Court to reassume a limited role as arbiter in federalism questions and will allow Congress to make most decisions while reserving to the Court a veto over particularly egregious attempts by the national legislature to overstep the bounds of its delegated powers in setting national policy. Moreover, the proposed analytical approach corresponds with the reality of cooperative federalism's interplay among several governmental units. It rejects the myth of rigid spheres of sovereignty and recognizes the overlap of governmental power and responsibility. The SMCRA situation provides a useful context in which to examine the application of this approach. First, one must determine whether surface mining possesses a sufficiently rational con-

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of the distribution of powers in the Constitution, that the attempts to rely on it for a rule of constitutional law rather than of construction require a distortion of the text of the amendment, and that the decisive argument concerns the meaning of the necessary and proper clause.

237. *See* text accompanying notes 82-98 *supra*.

238. The determination of what is a "necessary and proper" implementation of a delegated power must respond to a changing world. The Framers could not envision all possible situations that might require action by the national government. For example, they could not foresee mass urbanization, an energy crisis, or the problems of environmental degradation. Similarly, the problems of tomorrow cannot be predicted with accuracy today. A rigid definition of what is necessary and proper can no more be made today than it could in the late eighteenth century. *Cf.* Jackson, *Introduction* to M. RAMASWAMY, THE COMMERCE CLAUSE IN THE CONSTITUTION OF THE UNITED STATES, at v (1948) (Justice Jackson noted that the commerce clause "prescribed an allocation between states and nation of power over activities that [the Framers] could not have foreseen").

nection with commerce to fall within Congress' commerce power, and if it does, whether the means chosen are reasonably related to congressional goals.[239] The Court is customarily deferential to Congress in this part of the test. In view of the legislative findings contained in SMCRA, surface mining has substantial[240] effects on interstate commerce and the Act's regulatory scheme is reasonably related to congressional goals. Thus, SMCRA would pass step one of the test.

Second, the proposed approach requires a determination of whether the regulation of the interstate commerce effects of surface mining is a necessary and proper exercise of congressional commerce power. This determination requires balancing the interest of the national government in controlling the adverse nationwide environmental and economic effects of surface coal mining with the states' general interest in controlling land-use within their borders. In his concurring opinion in *Usery* Justice Blackmun suggested that the national government has a great interest in environmental regulation.[241] The basis for this great interest is multifold. Environmental protection safeguards an interest that has widespread ramifications which the individual states cannot adequately serve.[242] Moreover, environmental protection provides a public good that the private sector cannot supply.[243] On the other hand, the states' interest in controlling land-use is a general interest that serves largely intangible values, including the opportunity for local citizens to participate in land-use decisions and the ability to make such decisions responsive to the needs and desires of those who will be affected.[244] Such values, however, can be served in other ways. For example, a national program regulating land-use

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239. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).

240. 30 U.S.C. § 1201(j) (Supp. III 1979) (surface coal mining affects interstate commerce, contributes to Nation's economic well-being, and should be conducted with a concern for the Nation's environment). *See generally Symposium*, *supra* note 206.

241. National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring). Blackmun states, "[I]t seems to me that [the Court] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.*

242. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1197 n.5 (1977) ("land-use planning or natural resources management, where the obstacles to realization of national policies may be even greater than in the field of pollution control").

243. *See* Hardin, *supra* note 215, at 1244-45.

244. *See generally* D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION (1977); Stewart, *supra* note 242, at 1232-33.

can be tailored to provide for adaptation to local conditions, and to permit local participation in the decisionmaking process.[245] Thus, after balancing the competing interests, the national interest in regulation of the interstate effects of surface mining outweighs the state interest, which is more general, less concrete, and which may be served even under a national regulatory scheme.

IV. SUMMARY AND CONCLUSION

The Supreme Court has paid homage to the myth of federalism as a paragon of government for far too many years. Although federalism is an abstract ideal without specific form or content, the Court has used the myth to justify its choice of public policy and its role as arbiter in federalism decisions. The Founding Fathers were pragmatic men who realized the dangers and difficulties inherent in a rigid allocation of powers and functions between the governments of the nation and the states. Thus, they declined to delineate any particular division and, instead, left the choice for each generation.

During the era of the Depression, the Supreme Court used the myth of federalism to justify the imposition of its policy choice and to constrain the ability of the national government to deal with the grave problems caused by the general economic collapse. Then, in an abrupt about-face, the Court swung to the opposite extreme and virtually abdicated its role as arbiter of federalism. Recently, the Justices have begun to move towards some participation in federalism decisions. To this end, the Court's recent decisions have resurrected the myth of federalism and confused the analysis of federalism issues.

The Supreme Court's SMCRA decisions, summarizing the vague *Usery* rationale, articulated a test that continues to confuse the mythical federalism standard with the Court's pragmatic choice among competing values. This Note argues that such a test provides no guidance for the lower courts and interferes with the operation of cooperative federalism. As an alternative, the Note proposes that the Court reveal the underlying basis for its federalism decisions. The Court should recoguize the cluster of competing

245. SMCRA is designed to maximize these values, hut it contains imperfections. The factual context of *Virginia Surface Mining* provides one example. There, SMCRA's requirement that strip-mined land be returned to its "approximate original contour" was economically infeasible and physically impossible in Virginia's steep-slope areas. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 433-34 (W.D. Va. 1980), *rev'd sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

interests and assign weights to each interest. Such an approach would allow the Court a role in federalism issues, but would permit the political branches to make most decisions about the allocation of powers and functions in the federal system. Such decisions could then begin from a premise of cooperation, rather than conflict.

The Note employs its proposed approach in the context of a commerce clause question, but a similar analysis may be used in relation to questions concerning other exercises of national power. The approach rests on the determination of whether the exercise of national power is a necessary and proper use of a delegated power in light of competing interests affected by such use. Unlike the *Usery* Court's approach, this Note suggests an analysis that can be used in many different contexts because it is not premised upon inherent limitations to the commerce power. Moreover, this approach is grounded in pragmatic conditions rather than in an ethereal abstract analysis. It seeks to banish the confusion of myth and introduce the clarity of reality.

ROBERT CHARLES BRIGHTON, JR.