

Conservatism, Centralization, and Constitutional Federalism

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MY PURPOSE IS TO SET FORTH and explore the ramifications of two different conceptions or paradigms of American federalism whose roots can be traced to *The Federalist* essays of both Hamilton and Madison. Certain conclusions flow from this analysis that, in my judgment, are important to the conservative approach and thinking about centralization. Perhaps the most significant of these stems from the apparent incongruity between the arguments and position of American conservatives, who lament the decline of federalism and the ensuing centralization, and the more traditional and theoretical arguments in conservative thought concerning the virtues of decentralization and the dangers of centralization.

My examination of *The Federalist's* teaching regarding federalism should help clarify the bases for the disputes that have arisen over its meaning since the inception of the American constitutional system. It should make clear, as well, that there is more than one legitimate interpretation of the Framers' understanding of the division of powers between the states and national government. It will, more importantly, provide

the background for shedding some light on the nature of the disconnect between the traditional conservative concerns about centralization and those that figure most prominently in the American context. In fact, as I think my analysis will show, the conception of American federalism advanced by conservatives renders it extremely difficult to achieve the virtues associated with decentralization that are emphasized in conservative thought stretching back to Burke and Tocqueville.

Constitutional Federalism

We turn first to *The Federalist* and its teachings regarding the federal principle. For our purposes the most relevant of these relates to the "extent" of national power, a matter most tellingly discussed in *Federalist* no. 39. While Madison, the author of this particular essay, regarded the extent of powers of the national and state governments to be one of only five "tests" for determining the true federal character of the proposed Constitution, this test is the essence of federalism as it is understood today. In his brief discussion of the extent of powers, Madison sets forth the notion of divided sovereignty: the "jurisdiction [of the proposed government] extends to certain enumerated objects only, and leaves to the several states, a residuary and inviolable sovereignty over all other objects."¹ Hamilton

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in *Federalist* no. 9 set forth the same understanding: “The proposed constitution.... Leaves in their [the states’] possession certain exclusive, and very important, portions of sovereign power” (41). In both formulations the states are understood to possess a residuary sovereignty that cannot be “invaded” or infringed by the national government.

This divided sovereignty conception of federalism raises perplexing problems, not the least of which is whether, in the last analysis, sovereignty can be divided. Madison faces up to certain of the more obvious and immediate difficulties in *Federalist* no. 39 by way of tackling the question, what if controversies between the states and national government should arise over the extent of their respective jurisdictions?—controversies that, Madison believed, are inevitable. His answer is that a “tribunal,” which “is to be established under the general government,” should “ultimately...decide.” He is quick to add that this tribunal should make its decisions “impartially, according to the rules of the constitution.” At the same time, he insists this tribunal should be “established under the general, rather than under the local governments” in order to avoid “an appeal to the sword, and a dissolution of the compact.” This “position,” he felt, was “not likely to be combated” (198).

To the innocent eye, it is not at all clear from the textual context that by “tribunal” Madison means the Supreme Court, though in his later correspondence he maintains that this was, indeed, his meaning. Nevertheless, his solution has obvious drawbacks. Can an institution of the national government render an impartial decision when the national government is itself a party to the dispute? This is a concern raised most effectively by the antifederalist Brutus during the ratification struggle and later echoed by Jefferson, Taylor, and, among others, Calhoun. Moreover, Madison’s reference to “rules of the

Constitution” is somewhat baffling in that it suggests there are agreed upon “rules” to be found in the Constitution that will help the “tribunal” in rendering an “impartial” decision. On this score, we cannot help but note that Justice Marshall found no such “rules” in rendering his decision in *McCulloch v. Maryland* (1819), the first major case involving competing jurisdictional claims. In sum, a second look at Madison’s solution to the problems posed by divided sovereignty shows that it is not free from serious difficulties. As we shall see in short order, even profounder difficulties arise when we consider whether there can be any such thing as residuary state sovereignty, given the authority that national government must possess to defend the nation in time of war.

Leaving these concerns to one side, Madison’s discussion and Hamilton’s statement regarding state residual sovereignty leads directly to what can appropriately be termed *constitutional federalism*. Simply put, this understanding of federalism derives from the divided sovereignty paradigm which envisions a constitutional division of powers such as that set forth by Madison and Hamilton; a division of powers that, perforce, can only be altered by constitutional amendment. The Supreme Court is the institution vested with the responsibility of maintaining this division, a function it should perform by impartially applying the “rules” of the Constitution.

The constitutional federalism “model” of state/national relations, it should be noted, was accepted, albeit intermittently, by the Supreme Court well into the twentieth century. Indeed, over the decades, the Court occasionally took great pains to confine Congress’s commerce power in order to preserve what it perceived to be the constitutionally reserved powers of the states. At one point it drew a distinction between manufacture and commerce, thereby limiting the power of

the national government to curb monopolies under the Sherman Anti-Trust Act (1890).² In the famous Child Labor Case, Justice Day, speaking for a majority, went so far as to add the word “expressly” to the terms of the Tenth Amendment in striking down federal legislation designed to eliminate child labor. “In interpreting the Constitution,” he maintained, “it must never be forgotten that the nation is made up of states to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved.”³ At various times, the Court further limited the reach of the commerce power by employing the “direct/indirect affect” test; that is, “where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.”⁴ The persistence of this constitutional federalism model over the decades is attested to by the fact that an amendment to the Constitution was felt to be necessary to impose prohibition upon the country. Today, ordinary legislation would suffice for this purpose—a fact that illustrates how much our understanding of federalism has changed.

Clearly this constitutional federalism proved incompatible with the underlying philosophy of the New Deal. In fact, its core principle of divided sovereignty, that the states possessed inviolable portions of sovereign power, provided solid grounds for declaring major New Deal policies unconstitutional. And when the Court, under intense political pressures, abandoned the constitutional federalism framework in 1937, thereby clearing the way for the New Deal, many observers felt that constitutional federalism, itself, had finally seen its last days. And so it seemed for a period of nearly sixty years as the Court in one decision after another clearly repudiated this framework. Yet, and somewhat of a surprise, there are indications that the doctrine might be coming back

to life, the most important of these being the Court’s decision in *U. S. v. Lopez* (1995). In this decision, almost universally hailed by conservatives, a majority of the Court returned to the constitutional federalism model to strike down the federal Gun-Free School Zones Act that banned all guns in the vicinity of public or private schools. More specifically, it held that the prohibited action did not “substantially affect” interstate commerce, which therefore placed the matter under state jurisdiction.⁵

Political Federalism

The foregoing account, while familiar to virtually all students of American government, is a necessary prelude to the development of the second model or framework of federalism that emerges from the pages of *The Federalist*. The outlines of this second understanding of state/national relations is found in the very first paragraph of essay number forty-six. Madison points out here that the national and state government are both “substantially dependent on the great body of citizens of the United States”; that they are “but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” He notes that “The adversaries of the Constitution” have viewed them in a different light, “as mutual rivals and enemies” lacking any common superior. This view, he insists, is erroneous. At this juncture in his argument, we might expect Madison to repeat what he has said about an impartial tribunal in number thirty nine; to wit, that a tribunal will impartially resolve disputes between the two jurisdictions... But he does not do so. Instead he contends that these adversaries “must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them,

will be able to enlarge its sphere of jurisdiction at the expense of the other.” He concludes, “Truth, no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents” (243).

By “the sentiments and sanction of their common constituents” it seems clear that Madison has in mind the people of the United States, collectively speaking. It is the sentiments and sanction of the people comprising the nation—whether the people in this context be thought of as a majority of the adult population or in a more restrictive sense, *e.g.*, the majority of qualified voters—that ought to be the ultimate authority in determining the extent of national/states powers. It seems equally clear that the will or sentiments of the people or common constituents can only be determined through an organ of national government, principally by the distinctly political departments of the national government, primarily the Congress. These conclusions are clearly affirmed by what both Madison and Hamilton write elsewhere concerning the relative strengths and appeals of the two governments in securing popular support. For instance, at various points in *The Federalist* both simply assume that disputes between the states and national government will be settled by the people. Hamilton acknowledges in Federalist no. 31 that “in republics, strength is always on the side of the people” and points out—supporting Madison’s estimate set forth later in *Federalist* nos. 45 and 46—that there are “weighty reasons” to believe that the state governments will enjoy advantages in any contest for popular support (153). But neither is certain that this will necessarily be the case. Madison, for instance, writes that the national government can overcome the advantages enjoyed by the states with the common constituents by “manifest and irresistible proofs of a better administration”

(46:244), and Hamilton in essay no. 27 sets forth a variety of reasons for believing it very probable that “the general government will be better administered than the particular governments” (133).

In this vein, other aspects of the tensions between the state and national governments ought to be noted. If the national government should unduly encroach upon the states, both Madison and Hamilton look to political remedies. “If the federal government,” Hamilton argues, “should overpass the just bounds of its authority, and make a tyrannical use of its powers; the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify” (33:160). One such obvious measure, expressly put forth by Madison, is the “election of more faithful representatives” who can “annul the act of the usurpers” (44:235). Both emphasize the limits that state resistance will place upon the national government’s efforts to aggrandize state powers. In Federalist no. 46, Madison points out that the “means of opposition” possessed by the states to unpopular national legislation are “powerful and at hand.” The more benign would include the “frowns of the executive magistracy of the state,” the “disquietude of the people” and their refusal “to co-operate with the officers of the union.” But matters could get far worse. The “ambitious encroachments of the federal government, on the authority of the state governments,” he contends, would arouse not only the opposition of a “single state, or of a few states only. They would be signals of general alarm,” either resulting in the national government backing down or in a resort to arms. At this point Madison asks rhetorically: “But what degree of madness could ever drive the federal government to such an extremity?” How could it come to pass, he wonders, that “one set of representatives would be contending

against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter” (246). His point, on this score, seems well taken.

Clearly this understanding of state/national conflicts and the means of their resolution is miles apart from that of the constitutional federalism which featured an impartial tribunal. In fact, what we have from this view of *The Federalist’s* teachings is another, distinct model of federalism; namely, a *political federalism* that relies upon the political agencies of national government, principally the Congress, to use its best lights in determining what the relationship between the states and national government ought to be. In doing this, Congress is necessarily constrained by what the common constituents will allow, but there are no *constitutional* barriers or limits to its intrusion upon the states’ reserved powers. In this context, the only limitation suggested by Hamilton or Madison is practicality or efficiency. As Madison puts it, the people ought to be able to repose their trust where they think it “most due,” but even then the states will retain certain powers and responsibilities “because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered” (46:244). In this model or framework of federalism, the division of powers between the states and national government does not possess any constitutional sanction. Under its “rules” disputes are to be resolved through the political processes, not through the agency of an impartial tribunal (*i.e.*, the Supreme Court).

The distinction between constitutional federalism and political federalism should not be viewed as merely a theoretical refinement bearing little relation to practical politics. The intense controversy over the role of the Supreme Court during the 1930s—a controversy that led to Roosevelt’s court packing plan—was

essentially a clash between these two paradigms of federalism. Those supporting Roosevelt’s New Deal programs were, in effect, arguing that the common constituents wanted to readjust the boundaries between state and national authority; that, through the election of and continued support for those committed to New Deal policies, they had effectively rendered an authoritative decision validating the expansion of national authority. On the opposite side, of course, were those (mostly conservative) who contended that New Deal policies involved the usurpation of the traditional residual sovereignty of the states; that constitutional amendments expanding national authority were required before such policies could legitimately be put into effect.⁶

In surveying the political debates surrounding issues of federalism—*e.g.*, the growing centralization of authority, decline of the states—both paradigms come into play, often in a mixed fashion. For instance, many conservatives, if we are to judge from their rhetoric over the decades, actually embrace both paradigms. Consider the familiar conservative refrain that the “downfall” of the Framers’ federal design occurred with the passage of the Seventeenth Amendment that allowed for the direct election of Senators. From this point on, it is maintained, there has been no effective check against the aggrandizement of the states’ residual sovereignty by the national government. This view, so far as it goes, is compatible with the political version of federalism; that is, whatever emerged from a the political processes when state “interests” had effective representation would not intrude upon the states’ residual sovereignty. Yet, at the same time, conservatives—even those who embrace this view—also seem to cling to the constitutional conception of federalism. So much is evident in their common lament that since New Deal days the Supreme Court has largely abdicated its role as impartial arbiter between the

states and national government. Clearly conservatives would prefer a double protection, political and constitutional, for state sovereignty, though at present they must necessarily be content with adopting and urging constitutional federalism.

There are, of course, practical, if not logical, difficulties with the conservative stance towards federalism. From a purely theoretical view, political federalism does not acknowledge a fixed, unalterable division of sovereignty between the state and national governments. As a consequence, the Court has no legitimate role in second guessing the outcome of the political processes which presumably embody the wishes of the common constituents. Likewise, constitutional federalism is not concerned with the political processes or whether state interests are effectively represented or not. Within this framework the concern is whether the outcome of the political process conforms with what is understood to be the constitutional division of powers. In this determination, of course, the Court would play a decisive role. And, while Publius is guilty of speaking with forked tongue regarding the resolution of state/national disputes, the weight of evidence supports the view that he embraced the political federalism paradigm; a paradigm, it should be added, that is far more compatible with his more general teachings as we will see immediately below.

Inherent Difficulties

Neither the constitutional or political understanding of federalism is free from difficulties, though they are of a different order for each. Constitutional federalism is incompatible with other, critical elements of Publius's thought. Hamilton regarded it as axiomatic that "the *means* ought to be proportioned to the *end*; the person from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained" (23:113). He repeats and ex-

pands upon this axiom a bit later in the essays: "the means ought to be proportioned to the end; ...every power ought to be commensurate with its object; ...there ought to be no limitation of a power destined to effect which is itself incapable of definition" (31:150). Clearly Madison shared this view: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included" (44:235). Moreover, what Madison has to say about the powers of the national government and defense fits in nicely with Hamilton's views: "The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is vain to oppose constitutional barriers to the impulse of self-preservation" (41:209). In sum, the national government, given the end of providing for the common defense, may well have to use powers well beyond those that are specifically enumerated in the Constitution. Additionally, these powers and their extent cannot be anticipated in advance.

From this ends/means view, the constitutional formulation of federalism with its stipulations of inviolable state sovereignty—which, as we have noted, is found at two distinct and pivotal places in Publius's discussion of federalism—is perhaps best understood as calculated to dampen antifederalist arguments relative to the subordinate role of the states under the proposed Constitution. Simply put, from what he does say about the means being commensurate with the end, it seems highly doubtful that Publius could subscribe to the notion of inviolable state sovereignty. Specifically, it seems clear that Publius would abandon the notion of an inviolable state sovereignty if preserving this sovereignty obstructed or impeded the efforts of the national government to provide for the

common defense. The extent to which encroachments on the states' reserved powers would be necessary, given the ends entrusted to national authority and what the nature of these intrusions might be, Publius as much as tells us, cannot be foreseen. But it seems evident, from his discussion, that he would not be so imprudent as to subscribe to the doctrine of any state inviolable sovereignty which, in effect, says "never" to any federal encroachment of the states' domain, particularly when the survival of the nation might be involved.

Again, if this seems too abstract or theoretical, we need only recall the justifications for the national government setting speed limits for automobiles, a function traditionally regarded as well within the province of the states' police powers. The issue at stake was the preservation of fuels that were regarded as essential for our national defense. Likewise, it was possible for some to argue at the height of the "Cold War" that an effective civil defense, one that would minimize the impact of a nuclear strike, necessitated, *inter alia*, the national government dictating zoning laws and promulgating material and structural minimums for buildings with the end of securing neighborhoods "self-sufficient for survival purposes."⁷

This consideration leads to what would seem to be an insurmountable obstacle in implementing constitutional federalism, to wit, the Court would have to articulate a test or tests that could effectively delineate when the national government has "overreached" its legitimate realm. The difficulties in this are illustrated in the long history of the Court's interpretation of the Congress's commerce power, the power most frequently used to expand the domain of national authority. To recur to our previous discussion, Can the "direct/indirect" test be refined to a sufficient degree in all circumstances such that its application is

not arbitrary or such that the decisions flowing from its application do not bear the characteristics of ad hoc determinations, lacking any fixed guidelines or principles? Could tests of this kind be fashioned with the precision and clarity necessary for members of the political branches to understand the limits of their powers? The lack of such tests, of course, is a major reason why modern Courts have, in the main, subscribed to the model of political federalism.

This analysis points up as well the great difficulty associated with the political federalism, namely, there are no recognized limits to the powers of the national government. In effect, Congress becomes the judge of its own power relative to the states. Again, to recur to our previous survey of the commerce powers, the line of reasoning that supports the federal Gun-Free School Zone Act of 1990 knows no limits. That reasoning, as Chief Justice Rehnquist observes in the Lopez case, would give Congress the authority to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." He concludes, in effect, that in the absence of any constitutional limitations on the commerce power—*i.e.*, the state of affairs in the paradigm of political federalism—the Congress could assume "a general police power of the sort retained by the States." And this, as he points out, would mean "that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local."⁸

In short, the conservative understanding of federalism, a constitutional federalism that would restrict the centralizing of the national government, is not free of insurmountable difficulties. Nor, can it be said, that this understanding of federalism is the same as the Framers', a fact

that should give conservatives pause for concern. At the same time, it should be emphasized that the liberals' embrace of political federalism rests upon a reasoning that would allow the national government to take over every function of government, from issuing marriage licenses to garbage collection. But, while neither conception of federalism is, by itself, satisfactory, political federalism now holds sway. And there is every prospect that it will continue to do so for the indefinite future.

Conservatism, Centralization, and Constitutional Federalism

With this before us, we can now turn to the task of putting the concerns about federalism into the broader context of conservative thinking about the virtues of decentralization and the dangers of centralization, themes common to virtually all schools of conservative thought. We do so by focusing on major, relatively discrete issues.

(1) Conservatives have good reason to look upon the decline and death of constitutional federalism as a potential blessing. We say this despite the fact that this version of federalism is presently championed by conservatives. Why so? Simply because their constitutional federalism offers no solution to the basic problems caused by the centralized welfare state—not, at least, those identified by proponents of decentralization whose views reflect traditional conservative thought. Robert Nisbet, for instance, while granting that “the single most decisive influence upon Western social organization has been the rise and development of the centralized territorial State,” informs us at the same time that “The conflict between the central power of the political State and the whole set of functions and authorities contained in church, family, guild, and local community has been...the main source of those dislocations of social structure and uprooting of status

which lie behind the problem of community in our age.”⁹ One of Nisbet's overriding concerns is the atrophy of social institutions and voluntary associations which mediate between the individual and the broader society; entities that impart to the individual “his concept of the outer world and his sense of position in it.”¹⁰ Bertrand de Jouvenel's concern about centralization likewise centers on the absorption of society by the state whose “beneficent authority will watch over every man from cradle to grave, repairing the disasters which befall him, even when they are of his own making, controlling his personal development and orienting him toward the most appropriate use of his faculties.”¹¹ This state of affairs represents, he writes, the victory of securitarianism over libertarianism, “of fear over self-confidence”;¹² a fear fueled by a prevailing view of society “which has refused to see...anything except the individual men and women who make it, and a central mainspring, the state. Everything else it has disregarded, and the role of the spiritual and social authorities has been denied.”¹³ Finally, Wilhelm Roepke, after drawing a distinction between feudal decentralization, authoritarian in nature, and “communal” decentralization, consisting of intermediate associations of various kinds, contends that “Only [communal] decentralization seems to be a net gain to liberty and the healthy equilibrium of society, and a counterweight to the state.”¹⁴ In other words, these theorists view the key dimensions of decentralization and its virtues largely apart from simply the political decentralization called for by constitutional federalism.

This point regarding the relationship between the broader theoretical arguments for decentralization and constitutional federalism deserves attention, if only because those who urge a return to constitutional federalism seem to assume tacitly that with its restoration the virtues of decentralization, such as those

identified by Jouvenel, Nisbet, Roepke and others, will be realized. To be sure, constitutional federalism for a period thwarted those policies that have over the decades caused the disintegration of mediating associations and institutions; policies that have resulted in what is, at least legalistically speaking, a unitary political system. For this reason there is a certain linkage between the two. Yet, as we have seen, the grounds or principles constitutional federalists used to thwart these policies were arbitrary, highly vulnerable to legitimate criticism. More importantly, they relied on a reasoning about the constitution that, understandably, had nothing to say about the social consequences of the programs in question. These clearly were matters beyond its ken. We can, perhaps, best illustrate the shortcomings of constitutional federalism by asking: Suppose a resurgence of constitutional federalism and the states acquire substantial powers now exercised by the national government, what values or guidelines might be derived from it by way of informing state legislators how they should exercise their new found powers? If this came to pass, what principles could constitutional federalism offer, say, the California legislature by way of indicating the proper relationship between the state government and local jurisdictions? Or, are we to accept the very dubious assumption that decision-making at the state level will by itself be the cure for what ails us?

As we have endeavored to show, there is an incongruity between the outlook and position of those who argue for constitutional federalism and the values and goals normally associated with decentralization emphasized in more comprehensive conservative theory. There is a difference in focus: the comprehensive approach looks to social and economic factors and values, to intermediate associations and the individuals' integration into the larger society in a productive

and worthwhile fashion; the constitutional approach, when one goes beyond its legalisms, emphasizes a greater, normally unspecified, liberty; wider and more enthusiastic political participation; and more immediate, "hands on" government. The vocabulary of the two approaches differs. The constitutional federalist speaks about "reserved powers," "states rights," "local control," Tenth Amendment, whereas the theorists speak of "alienation," "deracination," "mediating institutions," "secularization."

(2) If I am essentially correct in saying that constitutional federalism is probably dead and that, in any event, it possesses no "hooks" to grapple with the problems caused by centralization (nor, we must acknowledge, was it designed to), then what potential does political federalism possess for achieving the values of decentralization associated with conservative thought? This question may seem odd because in the United States, as we have already remarked, political federalism eventually opened the door to political centralization and the emergence of the welfare state. It is, nevertheless, the paradigm that has and, by all evidences, will prevail for the indefinite future. Consequently, if there is to be any realization of the benefits of centralization or cures for the problems that have arisen because of policies pursued through the agencies of the central government, they must be realized within its confines. If that proves impossible, we have no recourse within the confines of the existing regime.

In answering this question, we should note at the outset that political federalism is as normatively vacuous as constitutional federalism. By itself it provides no principles or guidelines that would serve to inform decision makers about the "proper" division of powers or when the national government ought to desist or push ahead with its policies involving state/national relations. The only re-

straint against an unproductive concentration of power at the national level or against the initiation or perpetuation of policies destructive of the social fibre necessary for a healthy society would be the acceptance by decision makers of a “constitutional morality” that would itself serve as a restraint.

Now the principle that is frequently and appropriately mentioned in this context—and one that is often, though erroneously, connected with constitutional federalism—is subsidiarity.¹⁵ The principle of subsidiarity, which has received its most extensive development in Catholic social thought, is based on a “fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community that which [individuals] can accomplish by their own enterprise and industry.”¹⁶ This principle clearly takes us beyond the narrow constitutional federalism to those relationships most important to the social conservatives because it leads straightaway to the proposition that government ought not to wrest functions and responsibilities best fulfilled by mediating groups, associations, or institutions, an injunction that would apply to the state governments as well as the national. By observing this proscription, it is contended, the state is enabled to “perform with greater freedom, vigor and effectiveness, the tasks belonging properly to it, and which it alone can accomplish.”¹⁷

Obviously the principle of subsidiarity is efficacious only to the extent that it is the prevailing morality in the sense set forth above. Catholic teaching acknowledges so much: “Let those in power, therefore be convinced that the more faithfully this principle of ‘subsidiarity’ is followed and a hierarchical order prevails among the various organizations, the more excellent will be the authority and efficiency of the society, and the happier and more prosperous the condition of

the commonwealth.”¹⁸ The operative words here are “Let those in power...be convinced.” There is no inherent reason why our leaders cannot be convinced, nor is there any inherent reason why the subsidiarity principle cannot serve to provide a “constitutional morality” in the sense suggested above. And political federalism, far from being incompatible with the subsidiarity principle, provides the latitude and means for such a conversion. Political federalism, this is to say, is itself neutral with respect to the issues surrounding state/national relations. While, as noted above, it is associated with the progressive agenda and the New Deal, we should remember that Progressives championed this conception of federalism in order to clear the path for their policies; policies, moreover, that they believed enjoyed the support of the common constituents. In this context, political federalism was only regarded as instrumental to centralization, not as a doctrine that should determine the substance and character of policies. The bright side of political federalism, briefly put, is that the decision-making process it sanctions is receptive to the introduction of a morality such as that embodied in the subsidiarity principle. In other words, the possibility exists that the subsidiarity principle might be “sold” to the people and Congress as the basis for judging policies and programs that touch upon the concerns shared by conservatives.

(3) The critical question, of course, is whether the subsidiarity principle can ever be sold in the sense suggested above. To begin with, the principle is not as simple as it is presented here; it will not yield easy answers regarding the role of the national government with respect to the states, much less the varied mediating institutions and associations within society.¹⁹ This is not to say that its basic principles would not set off alarm bells for such measures as the Gun-Free School Zone Act, Violence Against Women Act or gov-

ernmentally sponsored faith based initiatives. No doubt, they would lead to a reexamination of existing policies that have led to an erosion of our intermediate structures and institutions. But complexities would arise when, for instance, questions arise over the degree and kind of aid the national government might lend to subsidiary organizations without stunting their development.

Whatever difficulties might arise in the interpretation and application of subsidiarity pale in contrast to those that arise from the political culture created by decades of centralization. As even the most casual observer realizes, the system now displays the major shortcomings of mass democracy. Virtually all major groups, economic, racial, and social, are recipients of governmental largesse; welfare programs once begun are looked upon as bestowing "entitlements," rendering them invulnerable to elimination or reduction. The politicians to gain reelection pander to immediate popular interests and demands, pay scant heed to considerations of long-term common good. The governments' appetite for revenues seems boundless as the people's dependency on government grows. Indeed, large sectors of the population are approaching the state of "perpetual childhood" pictured by Tocqueville with their wants, cares, pleasures tended to by government. To overcome the lure of the centralized welfare state once it has taken root is, perhaps, impossible.

And (4). Another major obstacle to subsidiarity—and one that is part of a broader dispute concerning the essential character of the constitution regime—is the prevailing morality that the judiciary, particularly the Supreme Court, possesses some special insight into the "spirit" of the Constitution which sanctions its role in policing state and local governments. From the conservative viewpoint the ill effects of centralization on the states, communities, private associa-

tions, religious institutions, and such have come about, not from the legislative action, but from judicial decisions. The Court has outlawed voluntary prayers in the public schools, held most forms of state aid to religious schools as unconstitutional, forced localities to bus children to distant schools in the name of achieving racial integration, invalidated most state and local laws relating to pornography and obscenity, imposed upon the states uniform procedures in criminal cases, set down requirements concerning police-enforcement procedures and, *inter alia*, substantially altered the degree and kinds of punishment that states may impose upon the criminally guilty. In these and other areas the Court has deprived citizens control over matters that directly affect their daily lives and the character of their communities.²⁰ There can be no denying that for the past seventy years, a period roughly paralleling the growth of the welfare state, there has emerged an imperial judiciary which has acted in a manner totally oblivious to the principle of subsidiarity.

Paradoxically the Court in its interpretation of the Fourteenth Amendment has adopted a rigid position, but one which rests on very dubious constitutional grounds. It has, in the main, sought to constitutionalize matters that are best resolved in the political arena, thereby assuming an approach ill-suited to accommodate the values associated with subsidiarity. The modern Court's reluctance to trust the common constituents on such a wide variety of concerns affecting their communities and quality of life reflects the same rigidity as earlier Courts that adhered to constitutional federalism. Whereas, however, the earlier Courts exercised largely a negative function, the modern Court issues positive commands that have the effect of law.

If the foregoing analysis is essentially correct, what conclusions seem warranted? From our perspective, one seems

paramount: Conservatives would do well to reassess their approach to the issues surrounding federalism, in large part because, unlike political federalism, constitutional federalism does not have the capacity to embrace principles that would strike to the heart of the concerns associated with centralization. Concretely, and contrary to what many suppose, constitutional federalism does not embrace the

subsidiarity principle. Nor can the subsidiarity principle “operate” effectively within the confines of constitutional federalism. These considerations point to the compelling need for a strategic revision in conservative thinking about the nature of American federalism; a revision sanctioned by the teachings of *The Federalist*, and vital, if the evils of centralization are to be remedied or prevented.

1. *The Federalist* (Indianapolis, 2000), 198. The page references within the parentheses in the text are to this edition. 2. *U.S. v. E.C. Knight Co.*, 156 U.S.1 (1895). 3. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918). 4. *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 547 (1935). 5. *U.S. v. Lopez*, 514 U.S. 549, 554 (1995). 6. For the best defense of constitutional federalism and critique of Court’s decisions that supported political federalism, see Raoul Berger, *Federalism* (Norman, Okla., 1998). Berger, who originally supported the New Deal policies, came to have second thoughts, arguing that the New Deal programs encroached upon the residual sovereignty of the states. While support for this position, as we have remarked, is to be found in *The Federalist*, the weight of its argument, in our judgment, inclines towards the political federalism model. 7. Harry V. Jaffa, “The Case for a Stronger National Government,” in *A Nation of States* (Chicago, 1963), 115. Jaffa’s position shows how the extension of national powers can go under the banner of national security. As we indicate in our discussion, Publius was not unaware of this line of reasoning. How far one should go in situations of national emergency or danger is, of course, a matter of prudence, not constitutional prescription. 8. *United States v.*

Lopez, 514 U.S. 549, 559 (1995). 9. Robert Nisbet, *Quest for Community* (San Francisco, 1953), 89. Nisbet subscribes to the view of Alexis de Tocqueville regarding the dangers of centralization. 10. Nisbet, 45. 11. Bertrand de Jouvenel, *On Power* (Indianapolis, 1993), 396. 12. Jouvenel, 388. 13. Jouvenel, 415. 14. Wilhelm Roepke, *The Moral Foundations of Civil Society* (New Brunswick, 1996), 109. 15. For a good deal of my analysis here I am drawing upon Professor Ken Grasso’s splendid, but as yet, unpublished article, “The Common Good, the State and the Principle of Subsidiarity in Catholic Social Thought.” 16. From the papal encyclical, *Quadragesimo Anno*, quoted in Grasso, 10. 17. *Ibid.* 18. *Ibid.* 19. To cite one complexity: When necessary the subsidiarity principle would call upon the national government to assist and help mediating institutions in fulfilling their unique functions. The question arises, particularly in light of the well meaning “Great Society” legislation that has had the unanticipated effect of undermining the family structure, what policies or measures would constitute genuine help? 20. For an excellent treatment of the Court’s encroachment on the Framers’ republican design, see: Lino A. Graglia, “How the Constitution Disappeared,” *Commentary* (February, 1986).