Yale Law Journal

Volume 92
Issue 7 *Yale Law Journal*

Article 10

1983

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Chief Justice Marshall articulated a theory of national legislative powers that has shaped the course of judicial review since the early nineteenth century. Marshall argued that Congress enjoys plenary powers over areas enumerated in Article I of the Constitution,[1] and that courts may not review the exercise of these enumerated powers.[2]

From this view of national powers flows a theory postulating that there can be no federalism constraints on the enumerated powers of the national government; neither the Tenth Amendment nor any theory of states' rights can limit such powers. Thus, the threshold inquiry in analyzing federalism issues concerns the definition of enumerated powers, which are vested solely in the federal government, and unenumerated powers, which are retained under the Tenth Amendment by the states (and the people).

Implicit in Marshall's formulation is a commitment to political—that is, electoral—process rather than to law as the mechanism to protect the public against federal overreaching. The assumption underlying this conception of federalism is that states have the political means to fight exercises of national power that seriously damage their interests. Indeed, to protect such interests, they can use the power of their own governmental machinery, the influence of local political parties on the national parties, and the influence of their congressional delegations—presumably dominated by local elites—on federal policy.

While the Marshall view has prevailed, almost uninterruptedly, with respect to the commerce power and most other heads of national authority, it has been vigorously disputed with respect to the spending power. During the New Deal, the Supreme Court decided that taxing and spending constitute a separate and distinct congressional power. The Court also considered whether the general theory of federalism—that an enumerated power is subject to no federalism constraints—would hold for the spending power as well. In the Social Security and unemployment compensation cases, decided in 1937, the Court responded in the affirmative.[3] But

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1. U.S. CONST. art. 1, § 8.

2. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.").

3. *See* Helvering v. Davis, 301 U.S. 619, 640-41 (1937); Steward Machine Co. v. Davis, 301 U.S.

in a prior case, *United States v. Butler*,[4] by now abandoned if not implicitly overruled, the Court imposed more stringent constraints on the exercise of the spending power than upon other national powers.[5] In *Butler*, the Court implicitly recognized that the politics of spending differed from the politics of national regulation: Through the unfettered exercise of the spending power, the national government could co-opt local opposition, purchase acquiescence.

If the exercise of the spending power can, in general, disarm and diffuse political opposition by compensating those subjected to regulation, it can have more complex and potentially more dangerous consequences when federal funds are employed in cooperative schemes, in which the federal government provides grants-in-aid to state and local governments. Intrusive federal programs that establish independent federal bases for patronage and impinge on areas of traditional state and local concern will normally be opposed by local elites, which tend to benefit from the control of their own affairs.[6] Cooperative programs, in contrast, co-opt this potential opposition. They actually increase the patronage exercised by local elites and retain local elite domination over beneficiary groups. As a result, state and local political figures and party organizations are "bought off," co-opted from pursuing opposition to national governmental programs.

By debilitating, if not disarming, the alternative sources of political power in our federal structure, "cooperative federalism" undermines the only viable restraint on the congressional exercise of enumerated powers: the political process. Thus, cooperative ventures should be considered of dubious constitutionality.

"Combative federalism," under which federal programs are exclusively federal, presents a desirable alternative, fully consistent with Marshall's theory of enumerated powers. To protect the feedback mechanism that permits states to react to federal actions, the federal government ought to do more itself; it ought to provide funds directly, and be responsible for the administration of the programs it funds. Only the ensuing combat, prompted by the reactions of the states, can guarantee an effective political check on the exercise of national power.

548, 581 (1937).

4. 297 U.S. 1 (1936).

5. *Id.* at 62-78.

6. *See* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 867-68 (1979).