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Federalism and The Ninth Amendment

Joseph L. Call

FEDERALISM AND THE NINTH AMENDMENT

BY THE HONORABLE JOSEPH L. CALL *

Liberty is not a means to a higher political end. It is of itself the highest political end.

LORD ACTON

IN DISCUSSING the ninth amendment [1] we should remember that the construction of the Constitution and the analysis of fundamental liberties of the people should never be made on grounds of supposed convenience or necessity and that the Constitution,

> speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.

That:

> Any other rule of construction would . . . make it the mere reflex of the popular opinion or passion of the day.[2]

Further, it follows by parallelism that if the Constitution speaks today with the same meaning and intent as it did when ratified, the most effective way in ascertaining the true intent and meaning of the Constitution and its amendments is to analyze the history of the time when they were framed and to learn the conditions then existing and the mischief which they sought to correct.[3] Approached in this light, certain cardinal principles underlying the genesis of the states and the federal government must be kept distinctly in mind.

Initially, it should be remembered that the origin of the American colonies was the result of many years of itinerate colonization, basically stemming from

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* Judge of the Superior Court, County of Los Angeles, State of California.

[1] The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[2] South Carolina v. United States, 199 U.S. 437 (1905); Opinion by Justice Brewer.

[3] Rhode Island v. Massachusetts, 12 Peters 723 (1838); *Ex Parte* Williams, 114 U.S. 422 (1884); Maxwell v. Dow, 176 U.S. 602 (1900).

There has been scant judicial consideration of the ninth amendment, and research would seem to indicate there has been no direct construction of this amendment by the United States Supreme Court. Cases touching upon this subject are as follows: Livingston v. Moore, 7 Peters 469 (1833); Eilenbecker v. The District Court of Plymouth County, Iowa, 134 U.S. 31 (1890); Brown v. Walker, 161 U.S. 591 (1895); Holden v. Hardy, 169 U.S. 366 (1897); Bolin v. Nebraska, 176 U.S. 83 (1899); Ohio v. Dollison, 194 U.S. 445 (1903); Palko v. Connecticut, 302 U.S. 319 (1937); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Whelchel v. McDonald, 176 F. 2d 260 (1949), *aff'd*, 340 U.S. 122 (1950); Woods v. Miller, 333 U.S. 138 (1948); Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U.S. 118 (1939); Aschwander v. Tennessee Valley Authority, 297 U.S. 288 (1935); and United States v. Fujimoto, 102 F. Supp. 890 (1952).

English shores. Each colony, small at first, and separated by many hundreds of miles of uninhabited land, grew and spread energetically from its center until each became a separate and distinct social unit subject to the sovereign power of England. When independence was declared by the colonies, the irrefutable right of self-government in all matters became a constituent part of the separate life of each commonwealth. Each assumed individuality within its own body politic; in fact, each society became an independent and sovereign state.[4] Additionally, it must be recognized that the citizens of a state comprise the state; that states are: "a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." [5] Under these principles the further abstractions follow that each citizen severally obeys the law, while collectively they make the law. Thus, we can say that as the citizens in the aggregate are the state, they are actually the *real government,* and it is through them that existence and authority is given to constitutions, laws, and trustees and officers of government.[6]

Thus it was with the grave earnestness of these intrinsic and component rights that the states thereafter confederated themselves together under the Articles of Confederation and Perpetual Union among the states. Each state retained its sovereignty, freedom and independence and every power, jurisdiction, and right which was not expressly delegated.[7]

However, the functional operation of the federation under the Articles soon proved defective, and the inability of Congress to obtain additional power from the states to regulate trade or commerce, or to raise revenue other than by requisition on the states, demanded remedial amendment. As a result, after the recommendation of the "Annapolis Convention" on September 11, 1786,

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[4] The Declaration of Independence, July 4, 1776, provides in part: "We, therefore . . . declare, That these United Colonies are, and of Right ought to be *Free and Independent States;* that they are Absolved from all allegiance to the British Crown . . . and that as Free and Independent States, they have full power to levy war, conclude peace . . . and do all other acts and things which Independent States may of right do." (Emphasis added.)

It must be remembered that the Declaration was executed under the authority of each colony *separately,* although it was a congress of states which adopted it. In this way it was a joint act of all of the States, and no deputy from any state assumed to vote for it until specifically authorized in advance by written sanction from his individual State. It was because of the late arrival of instructions from New York and Pennsylvania that final action could not be taken by the Continental Congress until July 4th of 1776.

[5] Preamble: [Excerpt] Constitution of Massachusetts.

[6] The organic law of the State of Pennsylvania as adopted by the convention of the people September 28, 1776, at Carpenter's Hall, Philadelphia, typifies these basic principles as follows: "We the people of the Commonwealth of Pennsylvania, ordain and establish this constitution . . . *all powers are inherent in the people,* and all free governments are founded on their authority, and instituted for their *peace,* safety and happiness. The community hath an indisputable, inalienable and indefensible right to reform, alter, or abolish governents, in such a manner as shall be, by that community, judged most productive to the common weal. All officers of the government are *their trustees and servants,* and at all times accountabe to them." (Emphasis added.)

[7] Articles of Confederation and Perpetual Union Between the States—Article II.

Congress asked that a convention of delegates be held in Philadelphia May 4, 1787. The delegates were to be appointed by the several states individually for the sole and express purpose of *revising* the Articles of Confederation and reporting the proposed revision to Congress and the Legislatures of the several states for their consideration and approval.

Thus, it can be seen that the purpose in calling the convention was not to change the federal nature of the union, but to ordain new powers to the confederation. All deputations of power to the convention delegates were executed by the states upon such an express premise. This background clearly shows that the states contemplated a Federal Union by states and for states,[8] with all delegated powers stemming from a junction between the commonwealths constituting it, and this is true regardless of any direct action permitted by legislation on the individual citizen of the several states.[9] Such background is very important because of the contemplated vesting of such powers as the regulation of interstate commerce, taxation, the right to pass laws operating directly on

[8] In this connection, it is of supreme importance to remember that the Constitution itself declares that the ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same, (U. S. CONST. art. IV), and that the word "between" the states was carefully weighed, debated and discussed, and then placed in the proposed Constitution by the convention on special motion, 1 Elliott's Debates, 277. This, as nothing else, clearly refutes any suggestion or theory that the Constitution was to be approved by the people of all of the states in one aggregate mass.

[9] Judge Story, in his commentaries, states: "In the convention that formed the Constitution of the United States, the first resolution adopted by that body was 'that a national government ought to be established, consisting of a supreme legislative, judiciary and executive' and from this fundamental proposition sprung a subsequent organization of the whole government of the United States." Vol. II, Book 3, Chap. 7, Sec. 518. This statement is a form of political heresy and not in accordance with the history of the United States. The facts are as follows: The Convention was sitting as a committee of the whole and had under consideration a plan of government submitted by Governor Randolph of Virginia. Grovenor Morris of Pennsylvania offered a series of three resolutions to be substituted in lieu of the first resolution offered in the plan of Governor Randolph. The three resolutions offered by Grovenor Morris are as follows:

> "1. RESOLVED, That a Union of the States, merely Federal, will not accomplish the objects proposed by the Articles of Confederation, namely, common defence, security of liberty, and general welfare.
>
> "2. RESOLVED, That no treaty or treaties among any of the the States, as Sovereign, will accomplish or secure for common defence, liberty, or welfare.
>
> "3. RESOLVED, That a National Government ought to be established, consisting of a Supreme [*sic*], Judicial, Legislative, and Executive." 1 Elliott's Debates, 391.

The first two resolutions were not agreed to and were dropped. The last resolution, which is the resolution referred to by Judge Story, was adopted after considerable debate with only eight States present. 1 Elliott's Debates, 392. However, the controlling fact, and the one that entirely annihilates every contention of Judge Story that this is a *national government rather than a federation,* is that on June 20th, when the report of the committee of the whole was before the entire convention for consideration, and after the use of the word "national" had been fully discussed with eleven states present, it was moved by Mr. Ellsworth of Connecticut to *strike out this resolution* and insert the following: "RESOLVED, That the Government of the United States ought to consist of a Supreme, Legislative, Judiciary, and Executive." 1 Elliott's Debates, 83. This resolution was passed and approved, and thereafter wherever the word *national* occurred through Governor Randolph's plan of government, it was rejected and the "Government of the United States" or its counterpart placed in lieu thereof. Thus the cardinal proposition of Judge Story that this is a *national government* is completely dissipated, and the entire period of its impermanence lasted only for a short period of twenty-one days. 1 Elliott's Debates, 183. (Emphasis added.)

citizens, and other express delegations of power in the new government. These could only be delegated by the people of the states in their sovereign capacity.[10] Such strength could only flow from an ultimate sovereignty residing in the people acting in their original right. This is of primary emphasis when we start to consider the nature of powers delegated or entrusted, and those retained or reserved by the people of the states themselves.

When the Constitution of 1787 was finally considered by the several state conventions for ratification or rejection, however, one of the biggest problems confronting them was apprehension and fear of the evils that could result from plenary constructions which might be placed upon the delegations of power to Congress, and the schism that it was felt would be given to the rights retained by the people. This cause of concern is vividly illustrated by the debates and disputations that took place in at least seven state conventions in the ratification of the new Constitution.

Four ratifying conventions approved the Constitution with relatively no prolonged debate, although it is clear that all acts of ratification recognized the Union as operating under a "Federal Constitution." [11]

The Pennsylvania Convention and the Connecticut Convention were decidedly different. There was heavy debate throughout these proceedings for and against the adoption of the Constitution. With regard to the Pennsylvania Convention, only the speeches of Mr. Wilson are preserved, but from these it is manifestly clear that the formation, character, and nature of the proposed government were thoroughly discussed and analyzed. The federal nature of the new Constitution was rigidly advocated by Wilson. He strenuously contended that the proposed government was not a "consolidated government," but federal in nature, and a government of limited powers.[12] As to the Connecticut Convention the same dominant thought and argument was forcibly presented by Mr. Ellsworth, a member of the Philadelphia Convention, and later Chief Justice of the United States Supreme Court. "This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity," he told the convention,[13] and he continued to assert that it established a federal government, and that the rights of the states were amply secured by it. Thus, after the continuing assurances of these prominent leaders, as well as other outstanding delegates, the

[10] On September 28, 1787, Congress unanimously resolved as follows: "That the said report, with the resolutions and letter accompanying the same, be submitted to the several Legislatures, in order to be submitted to a convention of delegates, chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case." 1 Elliott's Debates, 319.

[11] 1 Elliott's Debates, 319-324. The four states are Delaware, New Jersey, Georgia and Maryland.

[12] 2 Elliott's Debates, 481-482, 502-503.

[13] 2 Elliott's Debates, 197.

sanction of both state conventions was given to the Constitution without the addition of a Bill of Rights or other reservations.

In the remaining seven states, the Constitution encountered such serious hostility and resistance that ratification could be secured only by the addition of a proposed Bill of Rights, setting forth the understanding of the state ratifying conventions in the ratification of the Constitution and recommending the immediate adoption of the proposed amendments into the new Constitution.

The grave apprehension in all of these conventions was that of ultimate consolidation of power in the federal government and that this would be accomplished either by enlargement of the powers delegated to Congress through interpolation, amplification, and interlineation, or by the gradual absorption and appropriation of powers retained and not delegated by the people.[14] In this struggle, those advocating the adoption of the Constitution in its submitted status emphatically asserted that in a federal government consisting of enumerated powers, all powers that are not granted through the Constitution are retained by the people. Hence, they felt that a Bill of Rights was entirely unnecessary, and further, that by enumerating particular exceptions to the powers granted, it would disparage those retained rights not enumerated. It would follow by indirection that those rights which were not singled out were intended to be assigned to the federal government, and were obviously insecure.

The outstanding advocates of this postulation were Alexander Hamilton and James Wilson. Their position can probably be summed up in Wilson's reasoning:

> [I]n a government consisting of enumerated powers such as is proposed for the United States a Bill of Rights would not only be unnecessary, but, in my humble judgment, highly imprudent. . . . A Bill of Rights annexed to a Constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government preserves all implied power to the people; and by that means the Constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the Constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.[15]

[14] Madison, in his letter to Washington, philosophizing as to the difference between the powers granted and the powers retained, states his enigma as follows: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that that shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing." V. *The Writings of James Madison,* Hunt Edition, 431-432 (1904).

[15] 2 Elliott's Debates, 436-437. See also, Hamilton's similar analysis, THE FEDERALIST, No. 84.

Thus it can be seen that the contention of Wilson was actually twofold; first, that by being a government only of enumerated powers, a Bill of Rights is unnecessary, and second, that an imperfect enumeration of rights would render incomplete other rights retained by the people.

These arguments, however, did not satisfy all the state conventions,[16] and when a forceful Bill of Rights was demanded by such states, Madison, recognizing a strong moral responsibility, undertook the covenant of leadership to assure such amendments a place in the Constitution. Accordingly, on June 8, 1789, in an earnest predication to the House of Representatives, he proposed his amendments, and in so doing responded to the arguments of Wilson. With respect to the argument that a Bill of Rights was unnecessary because powers not granted by the Constitution are retained, he stated:

> It is true, the powers of the general government are circumscribed . . . but even if government keeps within those limits it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . because in the Constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, ... Now may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper; . . .[17]

As to the contention that enumerating particular exceptions to the granting of power might result in a disparagement of non-enumerated rights and, by implication, place them in the hands of the federal government, Madison referred to the last clause of the fourth resolution (ultimately to become the ninth amendment).

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[18]

However, Madison's effort to guard against those opposing a Bill of Rights through the last clause of the fourth resolution underwent considerable face lifting in the Select Committee,[19] and when reported back to the House of Repre-

[16] The state conventions in Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island were not satisfied by these arguments.

[17] I Annals of Congress, 428 (1789).

[18] I Annals of Congress, 435 (1789).

[19] On July 21, 1789, it was resolved by the House of Representatives that all of Madison's amendments, together with all amendments proposed by the states be referred to a committee consisting of one member from each of the eleven states, with instructions to consider all amendments and report thereon to the House. The members of the committee appointed were: Messrs. Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale.

sentatives, then resolved as a committee of the whole, the amendment was approved as submitted, and reads as follows: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." [20] This is in its present form, and it is clear that had the Madison amendment or the amendments suggested by New York or Virginia been adopted,[21] there would have been a constitutional declaration mandating a strict construction of delegated powers to Congress. The mandate would have precluded construing the exceptions in favor of particular rights so as to enlarge powers delegated by the Constitution. It also would have prohibited the present plenary construction called for with respect to the rights "retained by the people." However, while Madison's proposed last clause of the fourth resolution did revamp and restate the suggested amendments of New York and Virginia, with probably less virility, he did not favor supplemental circumscription of delegated power to the Federal Congress. Although Madison was in later life very apprehensive of the dangers of centralized power,[22] he was at least at this time an opponent of an "express" limitation of delegated powers. This is true despite the fact that in Massachusetts,[23] South Carolina,[24] New Hampshire,[25] and New York,[26] it was pointed out by the ratifying conventions that all powers either not "expressly" or "particularly" or "clearly" delegated are reserved to the ratifying States.[27]

This is probably why, as a member of the Select Committee, he did not press for his amendment as introduced, but was content with the less virile amendment as approved by the Committee, and ultimately approved by the House of Representatives.

Indeed, Madison's philosophy with respect to curtailment of legislative powers was keenly illustrated when the House of Representatives, seated as a committee of the whole, was considering the ninth proposition (now the tenth amendment) as submitted by the Select Committee. It then read as follows: "The powers not delegated by the Constitution, nor prohibited by it to the States,

[20] I Annals of Congress, 754 (1789).

[21] Four states had recognized the strength of Wilson's (and Hamilton's) arguments, and the result was that the state conventions in New York and Virginia both advanced amendments to cover it. Parallel amendments were reaffirmed by North Carolina on November 21, 1789, and Rhode Island on May 29, 1790. The New York proposal, typical of all pronouncements, reads as follows: "[T]hat those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution. 1 Elliott's Debates 327-329.

[22] See note 43 *supra.*

[23] 1 Elliott's Debates, 322-323.

[24] 1 Elliott's Debates, 325.

[25] 1 Elliott's Debates, 325-327.

[26] 1 Elliott's Debates, 327-329.

[27] Upon the subsequent accession of North Carolina and Rhode Island to the Union, they also reserved respectively all rights either not "particularly" or "clearly" delegated. 4 Elliott's Debates, 249; 1 Elliott's Debates, 334-335.

are reserved to the States respectively." At that time Mr. Tucker moved, among other things, that the word "expressly" be added so it would read: "The powers not 'expressly' delegated by this Constitution." The chief objection to this inclusion came from Mr. Madison with some minor assistance from Mr. Sherman. Madison thought it was impossible to confine a government to the exercise of "express" powers; and it was necessary to admit powers by implication. To this argument Mr. Tucker stated he thought that every power expressly given could be clearly comprehensive within any accurate definition of the general power. The Tucker motion was lost,[28] and the tenth amendment now stands as originally submitted, except for the addition of the words "or to the people" at the end of the amendment.

With respect to delegations of power, Madison felt that "without the substance of the 'necessary and proper' clause,[29] the whole Constitution would be a dead letter." He was, however, certain that the means employed must be related to the powers conferred. Yet on the other hand, and by way of possible inconsistency, he contended that even if the "necessary and proper" clause was not in the Constitution, the powers delegated to Congress would be sufficient of themselves by irresistible implication to carry such means for their enforcement, arguing: "[N]o axiom is more clearly established in law or in reason, than that . . . wherever a general power to do a thing is given, every particular power necessary for doing it is included." [30]

In summation, it is apparent that what is now the ninth amendment was submitted to Congress from the Select Committee, approved by Congress, and submitted to the states for ratification *without* provisions as requested by some states that, "those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; . . . ." [31] Further, what is now the tenth amendment was in like manner submitted to the states for ratification without inclusion of the word "expressly," after four states had ratified the Constitution on the fixed assumption and assertion that "no section or paragraph of said Constitution warrants a construction that the States do not retain every power not *expressly* relinquished by them. . . ." [32] (Emphasis added.)

Madison was firmly convinced that the people were "the only legitimate fountain of power" [33] and the "fountain of authority." [34] Consequently, the

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[28] I Annals of Congress, 761 (1789).
[29] U. S. CONST. art. I, § 8, cl. 18.
[30] THE FEDERALIST No. 44.
[31] See note 21 *supra.*
[32] See notes 23, 24, 25 and 26 *supra.* Subsequent corroborative action was taken by North Carolina and Rhode Island; see note 27 *supra.*
[33] THE FEDERALIST, No. 49.
[34] THE FEDERALIST, No. 51.

people both form and support the government. It was Madison's desire, in the ninth amendment, to obtain a construction with respect to powers delegated *to* the federal government, as well as a statement with respect to rights *retained* by the people. His purpose was not to effectuate a restraint or amplification of delegated powers, but rather to emphasize a polarity of powers and rights.

Whether the first eight amendments to the federal constitution are construed as exceptions to the powers delegated to government or as a reaffirmation and restatement of powers retained by the people, it was Madison's opinion concerning all constitutional provisions which make exceptions to powers of government, that the courts have an inherent responsibility to preserve these rights and that the courts alone are in a position to oppose the arbitrary power of the executive or legislative department. This was manifest in his statement to the House of Representatives when he introduced his proposed amendments to the First Congress. He stated that the courts would,

> consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to respect every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[35]

This charism, however, was effectively forsaken some thirty years later by Madison. At that time Chief Justice Marshall had just enunciated the doctrine with respect to implied powers in *McCulloch v. Maryland*: [36]

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

Madison's letter of September 2, 1819, to Spencer Roane attacked this decision. It stated in part:

> [I]t was anticipated . . . by few, if any, of the friends of the Constitution, that a rule of construction would be introduced as broad and as pliant as what has accurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification.[37]

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[35] I Annals of Congress, 439.

[36] McCulloch v. Maryland, 17 U.S. 159 (1819).

[37] 8 Madison, 450-51.

These later conclusions of Madison abridge and particularize the apprehensions of such patriots as Henry, Mason, Martin, Lowndes, Yates, Lansing, Gerry and others, who feared more than anything a consolidation of power in the national government; hence an ultimate totalitarian form of government, and consequently the destruction of the true federal character of the Union.[38]

Considered in its intended and proper purpose it is clear that by the calculus of rights in the ninth amendment, nothing has or can be lost by the people because these rights exist independent of the limited powers granted to the federal government. Viewed in this light it is difficult to understand the persuasion and enthymeme advanced by Justice Reed who states in *United Public Workers v. Mitchell*: [39]

> Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. . . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the States and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

His deduction that, "[T]hese fundamental human rights are not absolutes," and his accent on *"finding"* power granted rather than recognizing *"rights retained,"* carried to an ultimate goal, can, through the "sponge of inference," absorption and peculation, negate entirely the ninth and tenth amendments and

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[38] The enunciation by Justice Marshall of the doctrine of implied powers, in McCulloch v. Maryland, was the genesis and the birth in the United States of what is often termed the "growth and development theory" of the Constitution.

The theory of this development, briefly stated, is that a republican government can and does grow commensurately with the area, population, conditions, and greatness of the nation, and that as a result it is the duty of the officers of government to recognize these facts and to effectuate change and increments in the principles of government to meet such changes. This situation was fully comprehended by the founders of the Union who did foresee the need of ultimate changes and provided for such changes in a constitutional manner. Article V of the United States Constitution fully apprehends the necessary revision. If amendments and alterations cannot be made in pursuance of the principles enunciated by the people of the states who possess the sovereign power, self-government and constitutional principles are at an end. But in further analysis of this situation and of the "growth and development theory" isn't it absurd to say that officers of government hold a power to watch for some growth and development, and determine of themselves when constitutional changes are to be made or utilized, and to finally formulate and enforce such changes and precepts? Such a theory of government re-introduces into government the very discretion of rulers which constitutions were made to prevent, and which when permitted has never failed to overthrow free society. Edmund Burke states the principles much more succinctly as follows: "This change," he said, "from an immediate state of procuration and delegation, to a course of acting as from original power, is the way in which all the popular magistries of the world have been perverted from their purpose."

[39] 330 U.S. 75-95 (1947).

create by judicial construction a centralized government of inherent and unlimited powers.[40] Unfortunately, all power of government is insatiable.

Francis Leiber recognized this principle when he advocated a strict construction of everything favoring power in government because such power by its very nature tends to increase. He believed power of government should be construed in favor of the security and protection of the citizen.

Of course, in ultimate reduction the first object of a free people is the preservation of their liberty.

In the United States liberty can be preserved, not by blind confidence in government or its officers, but by effectually maintaining constitutional restraints, and this duty in its strictest primacy resolves upon the people themselves.

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[40] John Taylor described such disintegration of true constitutional principle as follows: "[This] . . . is another instance, in which unlimited power is attempted to be inferred from a power acknowledged to be limited. Thus the wisdom of concession and the ingenuity of retraction are so consistently blended as finally to invest a government acknowledged to be limited with an unlimited power over the very restrictions imposed upon itself. . . ." CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED (1820). These precepts and conclusions of John Taylor have been a reality in the United States for better than twenty years. One has but to read the opinions of the United States Supreme Court with respect to the power to regulate commerce, to coin money, and the "General Welfare Clause," to arrive at these conclusions.

With respect to such constructions of the "commerce clause" see: U. S. v. Darby, 312 U.S. 100 (1940); Wickard v. Filburn [applying the Agricultural Act of 1938 to the commerce caluse], 317 U.S. 111 (1942); Mulford v. Smith, 307 U.S. 38 (1939); Yakus v. U.S., 321 U.S. 414 (1944); Phelps-Dodge v. National Labor Relations Board, 313 U.S. 177 (1941); National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).

With respect to the "power to coin money" see: The Legal Tender Cases—Knox v. Lee and Parker v. Davis, 12 Wallace 457 (1871); Julliard v. Greenman, 110 U.S. 421 (1884).

With respect to the "general welfare clause" see: U.S. v. Butler, 297 U.S. 1 (1936); Helvering v. Davis, 301 U.S. 619 (1937); Stewart Machine Company v. Davis, 301 U.S. 548 (1937).