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ON WORRYING ABOUT THE CONSTITUTION*

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I am not quite sure that my dear friend Betsy Levin has not been just a little worried about my title for this lecture — a sort of meta-worry, if I may use one of those fashionable phrasings that give an impression — without by any means guaranteeing the reality — of the user's supple command of the most up-to-date philosophical niceties. Perhaps some of you share this meta-worry; "Worrying About The Constitution" does seem a bizarre thing to be talking about on a serious occasion. I must meet this meta-worry head on.

The constitutive work of the American people, springing from a text put together in about a hundred days nearly two hundred years ago, counts four cardinal achievements:

First, there is the formation of a national government, adequately empowered for meeting national needs as these are perceived from time to time, while the smaller constituent entities — the States — are empowered to deal with all matters that for the time being are not perceived as requiring national action. This, I think, is something like a " $\pi = 3.1$ " approximation to the American federal system as it actually stands and works. It is the way I would now describe American federalism to a foreign lawyer who wanted to be told the practical truth about it in a few words.

Secondly, there has been set in place a framework within which the executive and the legislative powers at the center of this national

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government, both of them democratically based, can arrive at different balances between themselves from time to time, without — so far, at least — setting in motion an irreversible process leading to the final victory of one branch and the permanent eclipse of the other.

Thirdly, the American people have invented, and have given first to themselves and then to the world, the noble idea and, humanly speaking, the reality of a system of human rights that stands as a part of constitutional law, and thus, as a matter of law, binds all components of government.

Fourthly, there is the famous American institution of “judicial review,” resting on the thought — clearly expressed in the constitutional text — that our Constitution is law the sort of law that generates rules of decision for judges in their courts.

Now these are glorious achievements. Before they came into being, the world had not seen anything very much like them, though much of the world now admires and tries to imitate them. They have been the basis of the growth of a little country of some three million free citizens, living on or near the Atlantic coast of middle North America, to what our country is today.

Yet I think I am right in saying that many people do worry about them. In greatest part this worry is not so much about their practical usefulness as about their legitimacy, under that very Constitution whose essential working features they have become.

As we approach the bicentennial of 1787, I think it well that we ask ourselves the meta-worrisome question, whether we do well to worry quite so much.

I had hoped to deal systematically and severally with the commonest worries I hear expressed about each of these achievements — the merely perverse worry about the warrant in law for the exercise of judicial review, for which worry I think two aspirin and a good night's sleep are perhaps the best prescription; the quite different and very important worry about the compatibility of judicial review with the commitments of democracy; the worry about the legitimacy of our continuing to protect human rights not expressly named in the Constitution; the worry (for which I can proffer no very promising resolution) about the sliding of power, and in particular the power to initiate war, into the hands of the President; and the worry about the fact that the powers of the national government have come to be very broad. But though I will talk about any of these worries with any of you until I leave Boulder voluntarily or am ridden out of town on a rail, I have found myself forced to confine my talk tonight to

the one I last mentioned — the worry about the broad and open-ended empowerments of the national government. I will say that this is at least a good place to begin, because the binary structure of our government at its political center, the functions of its judiciary, and the capacity of the nation to protect human rights, would all come to nothing if we did not have a real national government, adequately empowered to act as such.

Let us then turn to the first of the constitutional achievements of the American people — the achievement absolutely indispensable to the attainment of every other constitutional objective — the formation of a national government that may lawfully deal with all national needs. Worry about this sometimes takes a rather assertive and even accusatory tone, in something called “strict constructionism,” but I am sure, from a lifetime of reading and listening, that many people who have not ritually embraced “strict constructionism,” go about under the vague and rather saddening impression that there is something not quite according to Hoyle, something a little shady, about the variety and scope of present-day exercise of national power. Insofar as it has strength, this worry tends to the delegitimization of our national government as it stands and beyond any doubt will continue to stand. It is a feeling of baneful political value to those who want to be immune from effective control in the public interest.

I would make one special point here: In years to come, our national government will face new tasks, requiring new actions. To me, the chief of these tasks ought to be a radical redirection of theory and practice toward wiping out poverty in the United States. This is both a human rights problem and an empowerment problem. There is nothing but hypocrisy in our strutting and fretting about “human rights” on the stage of the world, while pussyfooting past the one human right without which all the others are sham — the right to a decent material basis for life. I hope that in talking about this we can stop talking “compassion” and start talking “justice”, which it is the principal business of any government to establish. If we start moving this way, a great deal of the work will have to be done by Congress — just as Congress finally had to move massively against racism, even after the judiciary had lighted the path. The political difficulties will be very great; indeed, I would be discouraged now, if I didn't remember that I was already graying around the temples when the people who were supposed to know were telling us you never could get Congress to move against racism. I remember too — and this is the point I want principally to stress just now — that

efforts to get Congress to move against racism were impeded by the suggestion of doubts — worries if you like — concerning Congress's *power* in the premises. These doubts — or worries — were of such stuff as dreams are made on; like dreams, they are hard now even to remember — though I shall partially refresh that memory a little later. But it would be a shame to go into the next great human rights battle, the fight against poverty, impeded by even the vaguest of worries as to the lawful power of this nation, as a whole nation, to do whatever it takes to establish this kind of justice, to secure the blessings of this kind of liberty, basic as it is to all other kinds. For this reason chiefly, there is seriousness of purpose, as well as reflective interest, in any attempt to deal with the vague worry that nags around the edges of our conceptions about national power.

I think this worry ought first to be addressed by pointing out how broad a revisional enterprise it would be to confine the United States government to enumerated powers, narrowly read. We are not dealing with dubious expansion of one or two or three clauses in the Constitution, or with recent departures from a "strict construction" orthodoxy that prevailed from the very beginning through those happy days just before the New Deal. "Strict constructionists," unless they are perchance utterly unprincipled, the mere manipulators of a slogan in service of their present desires, would lay waste the government of the United States as it exists, and repudiate most of our history as tainted by illegitimacy. If we were to modify our national polity to conform to narrow interpretive canons, we wouldn't need any enemies; we would have destroyed ourselves. In this I intend no hyperbole.

This area of worry is often made to revolve around what is now called (without definite warrant in the constitutional text) the "interstate commerce" power. That is why, when I am about to start a class down the familiar commerce-clause road, from *Gibbons v. Ogden*¹ to *Wickard v. Filburn*² and beyond, I start off with admiralty, than move on to patents — and then proceed to some other national powers not much discussed in constitutional law courses. I draw the students' attention to the one and only textual beginning for admiralty — an Article III grant of *judicial* jurisdiction, to the *courts* of the United States, over "all cases of admiralty and maritime jurisdiction." That is absolutely all the Constitution has to say about admiralty. Yet the clause has been held to adopt, by implica-

1. 22 U.S. (9 Wheat) 1 (1824).
2. 317 U.S. 111 (1942).

tion, a *substantive* maritime law of national character, uniform throughout the country and in some sense the world, and prevailing over state law; "maritime" tort law, for example, is even now expanding into new areas. This admiralty clause has been held to confer on Congress a power to enlarge (as well as to contract) the judicial jurisdiction early held to be comprised in the constitutional phrase, and even to modify that substantive maritime law that had been held to be adopted by constitutional implication.

The patents and copyrights power has been construed with great liberality and even imagination. It serves the garment trade, among others, by what are called "design patents" on garment styles. Phonograph records and motion pictures are "writings" protectable by copyright — a broad analogic extension of the word "writings" that ought to be anathema to "strict constructionists."

Paper money issued by the United States is, by national law, legal tender for all debts public and private. That can hardly surprise you, if you read dollar bills. But try to find authority for it when you read the Constitution. The power to "raise and support armies" has radiated an enormous and complex network of national management. The power to establish post offices and post roads was long ago held to imply, among many other things, the power to punish by imprisonment the use of the mails to defraud. Congress has exercised enormous — virtually plenary — power over aliens and Indians; try to find *those* powers expressly given in the Constitution.

When we do turn, then, to the commerce power, I think my students have been brought correctly to view its expansive use as just another example of something that totally pervades the whole government, as to every power mentioned in or implied by the Constitution. It is the less surprising to them, then, that broad application of the commerce power starts very early. *Gibbons v. Ogden*³ summarily settled two extremely important and by no means obvious points: first, that commerce includes navigation (which is, strictly speaking, only a *means* by which commerce, again in the strictest sense, is made possible) and, secondly, that the transportation of *human passengers* is commerce.

In *Unites States v. Coombs*⁴, decided in 1838 by a unanimous Court with Justice Story writing, Coombs had been indicted under a federal statute for stealing some goods that had been brought ashore from a wrecked ship, "The Bristol" by name, and left lying above

3. 22 U.S. (9 Wheat) 1 (1824).

4. 37 U.S. (12 Pet.) 72 (1838).

high tide on Rockaway Beach on Long Island. The Court based its upholding of the statute and the indictment squarely on the commerce clause. My students, who learned in childhood to lisp the phrase "interstate commerce," are not surprised when the first question I ask them about this case is "Where had the ship Bristol been, and where was she going?" Surprise does slowly dawn as they scan the entire report and find that the nationality, provenience and destination of the Bristol are nowhere mentioned. The Court didn't seem to care about all that. Neither did the drafter of the indictment. Neither did the draftsmen of the 1825 statute, which defines the crime simply as stealing goods belonging to a wrecked ship, without requiring, as an element of the crime, anything about the termini of the voyage. Is it any wonder that this case is conspicuous for its absence, not only from modern casebooks and treatises on constitutional law, but also from the supposedly comprehensive *Annotated Constitution of the United States*? It just doesn't fit in with what we thought we knew. It would mix people up.

But even if we pass over this point, and assume *arguendo* that the Bristol really was on a foreign or interstate voyage, and that Congress, the United States Attorney who drew the indictment, Mr. Justice Story, and his brethren, all just forgot to mention this as an element of the federal crime, the case has real difficulties. These goods were lying on a beach in New York. Stealing them was common-law or statutory larceny under New York law. They might lately have been "in interstate commerce." But now, at conjectural best, they were goods that used to be "in interstate commerce." In the nature of the case, nothing is known of their destination as of the time of larceny.

The 1871 case of *The Daniel Ball*,⁵ unlike *Coombs*, has not simply flickered out of existence in the literature, but it is not often, I think, given the attention it deserves. One question in the case was whether certain federal safety regulations, designed to protect *passengers*, could be applied to a vessel that shuttled between two points in Michigan, but carried some *cargo* that was coming from or going to out-of-state points. (To the best of my knowledge, incidentally, it was in this case, decided eighty-four years after the Constitution was drafted, after the death not only of every Framer but of every Justice on the *Gibbons v. Ogden* and even the *United States v. Coombs* Court, that the word "interstate" achieved, in a Supreme Court

5. 77 U.S. (10 Wall.) 557 (1871).

opinion, its now conventional place as a gloss on "among the several States.") The *Daniel Ball* court upheld the application of the statute. Now you talk about pegs! The fact that some *cargo* was to be transhipped to go interstate was held to justify the imposition of regulations having to do with *passengers'* safety. Remember, these Justices were the real "old men of the tribe," the guardians of ancient ramparts, an ample generation closer to 1787 than they are to us.

One ought not to omit the Limitation of Shipowners' Liability Act of 1851. That Act, though now treated academically and in the practice as a part of admiralty law, was probably conceived of by the Congress that passed it as an exercise of the commerce power. The court upheld it, applied it quite regardless of any question about the sort of trade carried on by the vessel whose owner sought limitation, and applied it against very wide categories of claims, including personal injury. The underlying assumption (expressly stated in a Supreme Court opinion) had to be that drastic limitations of the recoveries of burned and crippled passengers, even where the ship was clearly at fault and liable, encouraged the investment of money in ships, and so promoted commerce. "Directly" or "indirectly"? The question is not answerable, because "directness" and "indirectness" are in the eye of the beholder-as-lexicographer. But this train of nineteenth century events, substantially completed before the Interstate Commerce Act of 1887 was passed, should clear away any illusion that genuine ancient ramparts were being manned by the Court that (for a relatively brief period) used this direct-indirect approach to strike down Acts of Congress regulating manufacture.

These older cases are in a continuous pattern with such more familiar and later cases as the *Shreveport Rate Cases*,⁶ wherein that notorious subversive, Justice Hughes, wrote for a Court that upheld national dealing with certain completely internal railroad rates within Texas, on the ground of their effects on interstate shipment, and the Stockyard Case of 1922, wherein another Old Bolshevik, Chief Justice Taft, wrote for a Court that upheld detailed regulations of the local practices of stockyards, on the ground that these practices affected interstate movements of cattle.

In 1918, the year of *Hammer v. Dagenhart*,⁷ wherein the Court struck down an Act of Congress prohibiting interstate shipment of goods made by child labor, Justice Holmes could say, in his dissent, that he had thought the point settled otherwise by the most conspic-

6. *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914).

7. 247 U.S. 251 (1918).

uous prior decisions of the Court, while the majority opinion could not cite a single case upholding its decision, but could only attempt to distinguish — on what seem to me (as to Holmes) constitutionally trivial grounds — cases that, broadly speaking, looked the other way. No ancient ramparts were being manned here. The ancient ramparts were and are imaginary.

Under the commerce power, then, just as under all the other powers — from taxation to patents, from spending to aliens — the United States has acquired, by a process never fully reversed, and but infrequently and then very little checked since our beginnings, a national government. If we look at this as a result or outcome, it is hard to see why anybody would worry about it or think it undesirable, since it means only that the nation as a nation *may* regulate any matter thought to need such regulation by the nation's political majorities in Congress — representatives of most of the people and Senators from most of the States — two very different things, as a glance at the constitutional arithmetic of the United States will show. And any proposed step must also have presidential approval, or else attain really staggering majorities in both Houses of Congress. But does this result, a genuine national government, however desirable it may be, deserve to have about it still the air of illegitimacy? Ought we still to worry about it?

Several very large factors form the background against which this question must in these late days be addressed. We can begin (and really might end) with the matter of authority. Who decided on the espousal of the creative, imaginative mode of interpretation that has, with as much consistency as is ever attained in large political affairs, marked the two-century life of the American Constitution? And did that decider, or those deciders, have the authority to decide on this interpretive course?

The answer to the first question is: *Everybody* — everybody who could be thought to have the power to make this decision. There is a persisting myth that places the Supreme Court, presided over first by the live and then by a ghostly John Marshall, in the role of lonely protagonist. But I think that view prevails for no better reason than that Supreme Court decisions are the easiest materials to find, and the handiest for using in casebooks. Beyond doubt John Marshall and his successors have played an important role in their reasoned discourse. But in every single case I have mentioned up to now, and in nearly all that I shall mention, and indeed in every one of the very large number of Supreme Court cases sustaining national authority, the Court has only been *validating* and *legitimizing* some

action already taken by Congress. Every claim to national authority thus validated in the Court, through our whole constitutional history, has already been espoused and decided on as right by the Senate, the House of Representatives, and the President — or, in rare cases, by the two-thirds majorities in House and Senate required to override a presidential veto. It is not just that these authorities are *en masse* quite impressive. It is that their enumeration absolutely exhausts the possessors of national authority at the top — the judicial, the legislative, and (except in the special case of veto) the executive authority. There wasn't anybody else to ask; Heaven is silent on this as on so many other practical questions. *The American People*, over two centuries, have had to decide not only on the policy of particular measures but also on the constitutional legitimacy of modes of interpretation of the Constitution. And they have decided, through all the representatives they have for dealing with national affairs, on those expansive modes that have in all their varieties made possible the American government as we know it.

That in itself ought probably to settle the matter, and set the worrying at rest. Speaking in the late eighteenth century on a far more doubtful question, Blackstone said, as I recall, that he need not and would not argue the legitimacy of the transfer of power that took place in the Glorious Revolution of 1688, because the question had been one not for his own generation but for those he called "our ancestors." The principle he relied on underlies all sound constitutionalism. And in our case it is a principle of particularly mild and benign application, because the most expansive interpretation of national powers does not *oblige* Congress to use those powers in any way. If Congress should come to desire it, and should persevere in a patient and thorough work of demolition, the country could still be made into that collection of fifty rustic and decaying-urban republics dreamt of by "strict constructionists."

But there is another less categorically identifiable but no less certain kind of acceptance that has been given to the broad interpretive modes of American constitutional law. I get at it with my students by telling them that there is not and for a very long time has not been any principled constituency whatever for anything within miles of "strict constructionism." I am referring to the plain fact that there is as good as no group in the United States that does not want and indeed press for the exercise, in behalf of its *own* interests, of federal powers that cannot be dreamed to exist except by employment of the expansive modes of interpretation that are now habitual. You can read about this every day. A high official of the drug manu-

facturing company involved in a poisoning scare of yesteryear was quoted as saying that his firm was above all insistent on a *nationwide* set of packaging regulations, pre-empting all state and local authority; he didn't seem to have heard that murder by poison is a local crime, facilitated perhaps, but only "indirectly," by the want of protective packaging. In about the same edition of the *New York Times*, it was reported that bankers were pressing for a uniform national law overruling state laws that had invalidated the due-on-sale clause in real-property mortgages. Now there's a "local subject" for you! A little later we heard that the truckers, to serve us better, had won a national law forcing the States to allow on their highways truck-rigs of a size some States considered unsafe. The person who grieves over the constitutional impropriety of financing medical care on a national basis is not very likely to be someone who thinks the national government has no business dealing with narcotics or kidnapping. There is hardly anybody with any interest at all in the problem of resident aliens who wants Congress to abstain from regulating this subject, though some may desire primarily the tough comprehensiveness of a federal regime, while some may be more interested in the pre-emptive force of federal law, as against patchy and locally motivated state regulations.

The danger in listing examples is that the list may be thought exhaustive. The very contrary is true here; the desired uses of the national power, expansively construed, are practically infinite in number; the satisfaction of these desires saturates the national government.

It is important to bring up and so to emphasize that the American people's acceptance, through their lawful representatives and in the less formal ways just alluded to, of the expansive and creative modes of interpretation of national powers, is not a thing of yesterday or of the last few decades. As soon as the country began its existence under the present Constitution, the long war began. Probably the chief controversy just then was over the Bank of the United States, with Hamilton and Jefferson in the lead of the respective parties. The protective use of the tariff soon claimed eager attention. The use of federal funds for "internal improvements" — roads, bridges and canals — was bitterly protested against. Extensions of the admiralty power were assailed in the strongest possible language. The power of Congress to make paper money legal tender was first actually denied, and then affirmed, by the Supreme Court, not long

after the Civil War. The 1904 decision in *Champion v. Ames*,⁸ sustaining Congress in its prohibition of the interstate shipment of lottery tickets, was not a mere unnoted inadvertence; it drew four dissents, and was deplored by some as marking the demise of federalism. I think many people forget that the general question of expansive interpretation of national powers has been fought over and over and over again, with the result (reached, I remind you, by every authority that could conceivably be thought competent) always the same, in the not very long run. I doubt that any large and complex constitutional question in the history of the world has received as much consideration as this one, or been so clearly settled so many times.

Yet the new case, which usually ought to be treated as nothing but a footnote illustration of principles too well settled to be worth many words, is sometimes talked about as though it were a case of first impression, an impudent improvising of interpretative techniques hitherto unknown. One of the best modern illustrations is to be found in the discourse surrounding the passage and validation of the Public Accommodations Title of the Civil Rights of 1964. Fearing with good reason that the Court might fall back to old-fashioned views of "state action," which would have excluded the Fourteenth Amendment from application, Congress chose to base this Title mainly on the commerce clause, prohibiting racial discrimination in service by establishments that offered to serve interstate travellers, or that received a substantial proportion of their food by interstate shipment. In an ideal world, one might have preferred, for esthetic reasons, to rely on the Fourteenth Amendment, but the managers of the bill concluded that the prudent course was to rely on what they very naturally took to be an absolutely settled commerce-clause doctrine. Yet some of the commentary, inside and outside of Congress, treated this choice in language that seemed close to charging disingenuousness, putting something of an unmerited cloud around the origin of this profoundly just and in the event most efficacious Public Accommodation Title.

What were the facts and the law? Few things have ever been better proven than that racially discriminative practices very gravely inconvenienced the interstate travel of black people; congressional committee reports established this to the point of absolute demonstration — hardly to the surprise of anybody who knew anything

8. 188 U.S. 321 (1903).

about the subject. You might say, if you landed from Mars and read a dictionary, that "commerce" does not include the movement of human beings, but *Gibbons v. Ogden*,⁹ almost a century and a half earlier, had rejected just that argument. Regulations promoting passenger safety and comfort on steamboats had already lived their century. The Interstate Commerce Commission, authorized by Congress under the commerce clause and under that clause alone, had by 1964 been regulating the same subjects, as to railroads, for something like seventy years, and had for a fairly long time been prohibiting on railroads even racial segregation of some sorts, as discriminatory in their effect. One case had actually held that the forcing of black people to move to the back of the bus, when the bus passed into a segregating State, imposed an impermissible burden on interstate commerce. The distinction would have had to be that in these earlier cases the black people were riding on somebody else's wheels, while in the present case they were often riding on their own wheels. Can one fault the draftsmen of the Title for thinking that this was a merely whimsical distinction, obviously trivial in the constitutional context?

As for the jurisdictional base depending on the restaurant's having received a substantial part of its food from outside the State, this is an obvious application of the well-established rule that Congress may prohibit interstate traffic in goods whose expected use Congress believes to be harmful to the country; with a slightly different, somewhat closer fitting and more efficient method of enforcement applied to the type of conduct, interstate shipment plus harmful use, that Congress has dealt with as a matter of course for a very long time. Not even the quite untenable and long-abandoned distinction suggested in *Hammer v. Dagenhart*,¹⁰ that Congress may act only when the anticipated harm is in the *receiving* rather than in the *sending* State, would have faulted this part of the Public Accommodation Title.

I must add that this commerce clause use has a high esthetic of its own, worthy, in this context, to compete with the esthetic of the Fourteenth Amendment. What this Title said was: "The whole American people have built an integrated nation, whose parts freely intercommunicate. If you want to make money from that creation, you may not do so while discriminating, in a materially harmful and morally humiliating manner, against a great body of citizens within

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

10. 247 U.S. 251 (1918).

that same American people.”

In some of its regions and reaches, the discourse of worry about the constitutional realities of national power touches upon one of the many aspects of that rather morose and embittered body of doctrine *manque* that wears the label “States’ rights.” It may happen that some factually new federal measure, say, the criminalization of loan-sharking, will be assailed not so much for its being inherently in excess of federal power as for its “invading” concerns “reserved to the several States.” The earliest case I know of in which something like this contention was at least implicitly rejected was the 1838 *Coombs* case that I discussed a while ago,¹¹ the case of the goods stolen off Rockaway Beach; of course the offense, in addition to being a federal offense, was a state crime. The latest case of the same kind that I happen to remember right now is the 1971 *Perez* case,¹² the loan-sharking case just alluded to; New York, again, either did make or might make loan-sharking a crime. This argument always loses, and pretty much always has been a loser, but I think the anomaly commonly found in its invocation is insufficiently attended to. Because, as these two cases, and a near infinitude of others, illustrate, the litigant party interposing a claim of “States’ rights” is usually (though there are many exceptions) *not any State*; the records in these cases far more often than not fail to show any *State’s* interest in seeing the Act of Congress fall to the ground. Take *Champion v. Ames*,¹³ the 1904 lottery-tickets case. The shipment of lottery tickets was between Texas and California. The defendant’s contention was that the regulation of lotteries, and therefore of lottery tickets, was a matter “reserved to the States.” Yet the report of the case gives no indication that either Texas or California, as a State, had any objection at all to the national law. Now that is a peculiar position in a lawsuit, no matter how many times we have seen it, no matter how accustomed to it we have grown. I often wonder what the law would have looked like if persons in no way representing any State had not been allowed to plead “States’ rights” at all, just as, generally, nobody but me can plead my rights.

The “States’ rights” line of thought hits another snag. The States of the Union are represented, one-by-one and on a basis of equality, in the Senate. Every Act of Congress must have been favored by more of these Senators than disfavored it; often, of course,

11. 37 U.S. (12 Pet.) 72 (1938).

12. *Perez v. United States*, 402 U.S. 146 (1971).

13. 188 U.S. 321 (1903).

bills pass by considerably more than a bare majority in the Senate. (And one must allow for the rare case of a tie.) In *Champion v. Ames*, for an example that is also a paradigm, we know that more Senators than not voted for the national law forbidding interstate shipment of lottery tickets. Quite aside from questions of estoppel and waiver, this makes of "States' rights" a two-edged sword, rather sharper on the side that favors the national action than on the negative side. The passage of the Lottery Act showed that the accredited representatives of the States as States favored it; we have no other way of registering, on the national level, the desire and even the constitutional judgment of a State. The States that favored the Lottery Act were claiming the right, as components and constituents of the federal Union, to use their power in the Congress of the Union to keep lottery tickets outside their borders, a thing that, as States, they could not practically do for themselves. The "States' rights" slogan comes into court on both sides of every argument about federal power over persons and events within the States, with at least a slight presumptive weight in favor of the affirmative.

But after and above all, the expansive mode of interpretation of our national constitutional powers is a thing we should be unworried about for intellectual reasons. Our way of interpreting our Constitution, over all the years since 1787, has been the right way. It is the right way because it was what it took to make the Constitution work, and so was guided by the highest canon of constitutional interpretation. It is strikingly shown to be the right way by the intellectual quality of the semi-objections to it that one hears in academic circles. These are now generally marked, I think, by their being merely worried queries, rather than robust and viable alternatives to the road we have gone. Much of this sort of worrying surrounds the commerce and taxation clauses. There is some talk of "principled" limits to these clauses, but little or no tendering of any actual developed and articulated principles. And it seems not always to be remembered that "principles," to prevail in law, must be not only "principles," but principles actually shown to be *valid*, by preponderance of legal reason. It is against this background that I have chosen to speak on "worrying" about the extent of the national powers, rather than addressing myself to clearly articulated alternatives to the interpretation of those powers that actually marks American constitutional law. I don't seem to find such clearly articulated alternatives. Only worries.

The stress of these worries shows up in many guises. In the

*Kahriger*¹⁴ case, for example, wherein the Court sustained a national tax on the occupation of being a professional gambler, Justice Jackson, concurring in the judgment said:

I concur in the judgment and opinion of the Court, but with such doubt that if the minority agreed upon an opinion which did not impair legitimate using of the taxing power, I probably would join it.¹⁵

Jackson had an efficaciously and restlessly probing mind. His statement might put a period to worry about the use of general powers, such as those over taxation and commerce, for such ends as to Congress seem good, at least until someone comes along who can do, affirmatively and constructively, what Jackson by implication disclaims power to do.

In the loan-shark case, Justice Stewart took a different and to me far less appealing line. He said:

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes which distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact.¹⁶

Now I'm not sure Justice Stewart was right even in his factual estimate. Testimony before congressional committees seemed to show that some 350 million dollars a year were involved in the loan-sharking business, and that much of this money was serving as working capital for interstate crime. On these facts, I believe I could think of

14. *United States v. Kahriger*, 345 U.S. 22 (1953).

15. *Id.* at 34.

16. 402 U.S. 146, 157-58.

crimes ("flashing," bar-room fisticuffs, incest?) less connected than loan-sharking with national concerns. But my main trouble is with the larger pattern of Stewart's reasoning. He does not say that loan-sharking is unconnected with national concerns. He does not even say that it is not "substantially" connected with national concerns. He seems to be saying that, even if it is so connected, it must be left unregulated because he can't think of anything *less* connected. Would not the indicated conclusion rather be that *all* crime is regulable by the national power? If that were to happen, it would not be because anybody wanted to cheat, or was behaving disingenuously, but because it had turned out that in modern times connections between crime and the national economy and society always exist.

Perhaps the most extreme and stress-induced behavior stimulated by the worry I am thinking about is the tendering of simple imaginary cases about the reach of the powers of the nation. Let one example suffice: Robert Stern asks:

Can Congress forbid the possession or transfer of all pills, or all white pills, because of the difficulty of distinguishing dangerous pills from others and because some might move interstate?¹⁷

I always refuse my students' requests that I discuss this question, or any others like it, but I always hope they will ask me to do so, because that enables me to get in a valuable point: Such questions are fatally incomplete, Hamlet without the Prince of Denmark, unless we know *why* Congress did what it did; unless we are prepared to perform the task of imagining every State of fact that might underly and motivate such a legislative measure, then we are talking about nothing. (As to the white pill question, fate has, since its propounding, played quite a trick; after the Tylenol scare, and given the possibility that potassium cyanide may be easier to mix undetected with white materials, and supposing a wide epidemic of such poisonings . . . well, who can say? I'd want to see the Committee reports.)

So if you're among those worried about the expansive mode of interpretation that marks our employment of the national powers, I suggest to you that now, as we prepare for the Constitution's bicentennial, might be a good time to stop worrying. If you're seriously worried, then you're worried about something very serious because, if your worries have any ground, virtually our entire government is

17. See Stern, *The Commerce Clause Revisited*, 15 ARIZ. L. REV. 271 (1973).

suspect of illegitimacy. I think you ought also to consider that the only thing that could have been done about deciding on the legitimacy of our interpretive modes was to submit them to some authority, and that they have been submitted to, and an affirmative answer given by *all* the national authorities we have, *all* the national representatives there are of the conscience and will of the whole American people and of the States one by one. Remember, too, that virtually every interest-group in the country has for a long time insisted on the use of expansively interpreted federal power to serve its own ends; your worries have no principled constituency. If your worry takes the "States' rights" form, remember that most cases in which "States' rights" are asserted do not involve any State as a party in interest; that on the whole no bill can get through the Senate without the support of the Senators of more States than oppose it; and that the States who want the federal power to act have their rights too. At least suspend your worry until somebody comes forward with a well-articulated, and above all a well-validated, theory about "principled limits" on, say, the commerce power, something more nutritive and sustaining than the mere wistful yearning for such "principled limits." And whatever you do don't worry over fanciful cases about white pills, or one-eyed donkeys; no instance of the exercise of national power can be evaluated without reference to the shape and size of the national interest actually believed by a *real* Congress to be involved. If you follow the implication of even this last suggestion, I think you'll wait a long time before you worry, because Congress does not, in fact, pass laws that are not substantially related to national interests. Not often enough for you to worry about.

And remember, most indispensably, that worry about the enormous scope and reach of the national powers, the commerce power, the taxing power, the spending power, the admiralty power, and all the rest, most often expresses itself, among thoughtful and disinterested people, as a yearning for "principled limits" on the employment of those powers. But these people seem to have overlooked that there is no lack, but rather an abundance, of such limits, some of them in robust being, some visibly developing, some yet to come into sight. I am referring, of course, to those "limits" that are to be found where limits belong, in the material that Cooley, in the nineteenth century, called "Constitutional Limitations," the material we designate generically as the "Bill of Rights" material, the material that is forming itself, even in our years, into a *system* of human rights capable of much the same creativeness as is exhibited by our system of national empowerments, by broad reading, by analogic reasoning, by

reasoning from structure and relationships, by discovery of substantive-law implications in the concept of "citizenship," by the unfolding at last into law of our centrally placed and most ancient commitments, those made in the Declaration of Independence and in the Preamble to the Constitution. If you're worried about the quite real dangers in broad governmental power, I recommend you redirect the energy consumed in worrying about the fact that the United States government never has been and never will be a generally feeble organism, flawed here and there by textual accident, hemmed in by imaginary and quite unvalidated bounds on the exercise of powers stated without bounds. Direct that energy instead towards thought about the limits that exist, by their nature, where limits belong, where they directly and ever more powerfully and creatively can protect the human rights of human beings, as against *all* government power, state and national, and not the interest of an extortionate loan-shark, or a kidnapper, or a polluter of earth, air and water, in being put in jail by one government rather than by another.

Of course there are some people who, in the very teeth of the words of the Ninth Amendment, worry about the legitimacy of the development, under the shield of that Amendment, of a generalized system of human rights. I think there are antidotes to that worry as well. I have just mentioned one very powerful antidote, the perception that there is, to say the least, no reason why our constitutional law of human rights should not grow by the use of interpretive methods as liberalizing and creative as those that have been accepted and employed in our constitutional law of empowerments. There are other antidotes as well. But time does pass, and that will have to be another story.