# NATIONALISM, FEDERALISM AND POLITICAL CONSENSUS

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## I. INTRODUCTION

The current talk of new federalism has a very practical side. The current administration, in its efforts to "take the country back as far as the Constitution"[1] has encouraged changes in fiscal federal programs which portend increased hardship for state and local governments, and citizens alike. The practical details are still unfolding,[2] but the direction is clear: an "implicit redefinition of the federal government's role in the lives of individuals and the government."[3]

Theoretical dimensions of this new federalism are just as serious. Though it is clear that talk of more power-sharing between the state and federal governments is influenced by the perception that the current political consensus demands such sharing, President Ronald Reagan's pronouncements on new federalism also seem to be grounded in constitutional perceptions. At the Inauguration, for example, President Reagan said that he desired to

> [C]urb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.[4]

More recently, the President said that the basis for his new federalism was:

> [M]ainly the Constitution. We might start with the 10th article of the Bill of Rights, the 10th Amendment . . . Which [sic] says that those powers which are granted to the Federal Government are in the constitution and all others shall remain with the states or with the people . . . I know that everyone used to say that I am trying to take the country back. No, only as far as the Constitution.[5]

The possibility that a perception of the Constitution might compel Reagan's views seems to cast a different light on the "Reaganomics" phenomenon and on his talk of new federalism. If Reagan's approach is sanctioned, legislatively and societally, as one required by the Constitution, it creates some extremely serious implications. President Reagan's forays into the constitutional sphere demand attention, thought, and discussion, lest casual

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1. *Reagan Reaffirms Determination to Cut Federal Aid Even Further*, N.Y. Times, Nov. 22, 1981, § 1, at 1, col. 1.

2. *See generally* 30 CONG. Q. WEEKLEY REP. 808 (1971).

3. *New Federalism No Panacea for State, Local Governments*, 39 CONG. Q. WEEKLY REP. 708, 710 (1981).

4. 17 Weekly Compilation of Presidential Documents 42 (1981) (Inaugural Address of President Reagan).

5. *Reagan Reaffirms Determination to Cut Federal Aid Even Further*, N.Y. Times, Nov. 22, 1981, § 1, at 32, col. 5.

presidential conversation before reporters influence our perceptions of national power.

Three words come to mind when federalism is discussed. They are quite simple: power, discretion, and duty. The next few pages will contain some observations on these three words in the context of power to solve national problems or local problems with national implications.

## II. POWER

Frederick Douglass, in one of his most famous speeches, repeatedly told the crowd: "This struggle will go on . . . ."[6] Douglas was talking of course, about the "Negro" problem, but his words are equally applicable to discussions of the role of blacks in national power. His statement certainly suggests that blacks play a role in the phenomena of ongoing discussions of national power, not just for intellectual reasons, but for reasons of survival. This article will join and summarize the basic argument for broad national power, comment on the conditions in which broad national power flourishes, and express a few thoughts on the limits of this power.

### A. *The Existence of Broad National Power*

While the history of the framing of the Constitution does not settle questions of national power, it does provide useful direction in any debate on national power and states' rights. The case for a strong national government is strengthened by an examination of the events leading to the Constitutional Convention and the progression of events during the Convention. In short, under the Articles of Confederation the central government was clearly subordinate to the state governments if one thoroughly examines numerous features of that government's structure and power.[7] The efforts to amend the Articles to increase national power were completely unsuccessful,[8] and the failure of these efforts led to the calling of the Constitutional Convention.[9]

There were two plans which competed for consideration during the 1787 convention, the Randolph Plan[10] and the Patterson Plan.[11] While both plans proposed important increases in national power, the Randolph Plan

6. B. QUARLES, FREDERICK DOUGLASS 19 (1968).

7. *See generally* M. JENSEN, THE ARTICLES OF CONFEDERATION (1940).

8. *See* I DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 180-85 (M. Jensen ed. 1976) [hereinafter cited as I DOCUMENTARY HISTORY].

9. *Id.* at 176-77 (Annapolis Convention was precipitated, *inter alia*, by the failure of proposed amendments to Articles of Confederation).

10. I THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-3 (M. Farrands ed. 1911) [hereinafter cited as I RECORDS]. The plan introduced by Edmund Randolph of Virginia became the focus for much of the debate of the 1787 Constitutional Convention. *Id.* at 223, 235; I DOCUMENTARY HISTORY, *supra* note 8, at 236.

11. I RECORDS, *supra* note 11, at 242-45. On June 15, 1787, William Patterson of New Jersey laid before the Convention a plan which also proposed an enlargement of national power in comparison to that permitted under the Articles of Confederation. *Id.* at 249-311. For example, it was observed by Mr. John Lansing of New York that "the plan of Mr. [Randolph] in short absorbs all power except what may be exercised in the little local matters of the States which are not objects worthy of the supreme cognizance." *Id.* at 249. Mr. Alexander Hamilton from New York meticulously compared the two plans, and said that the Randolph plan desired to locate sovereignty in the people, while the Patterson plan would preserve that of the states. Hamilton also discussed the many evils of a weak government, and in support of the Randolph plan suggested that these evils

was considered stronger in its conception of the basis for federal legislative power. The Randolph Plan's wording had been influenced by the perception that state power and state individuality, taken too far, would destroy the Union.[12] Thus it attempted to broadly formulate the basis for federal legislative power in terms of state incompetence and national harmony. Certain difficulties during the confederation period had justified this belief.[13] At a crucial point in the Convention, when each was squarely considered against the other, the Patterson Plan was rejected.[14] While the language and measures which were finally adopted contained elements of both plans, perceptions regarding the scope of national power conferred in the enumerated powers were influenced by the passage of the Randolph Plan.[15] The conception of national power which resulted was broad, essentially encompassing matters which required national attention in spite of individual state interests.

There has been much precedent since that time for a broad theory of national power. Early cases such as *Gibbons v. Ogden*[16] and *M'Culloch v. Maryland*[17] laid a powerful, though sometimes dormant, basis for broad power. The demand for effective governmental response to the Great Depression of the 1930s led to legislation which was ultimately tested and which eventually judicially sanctioned the existence of broad power.[18] More recent cases espouse tests for national power which are not substantially different from those established in the spate of cases during the late 1930's and early 1940's.[19] However, there is ever present concern among certain United

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could "be avoided only by such a complete sovereignty in the general government. . . ." *Id.* at 286.

12. Randolph proposed "that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." I RECORDS, *supra* note 11, at 21.

13. *See supra* note 11. *See also* J. NOWAK, CONSTITUTIONAL LAW 132-34 (1978) (summarizing the difficulties and disharmony created as a result of independent colonial power to regulate commerce and the need for a national commerce power as impetus for 1789 constitution).

14. I RECORDS, *supra* note 11, at 312.

15. *See* C. BOWEN, MIRACLE AT PHILADELPHIA (1966); Stern, *The Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1365-66 (1934).

16. 9 Wheat. 1 (1824).

17. 4 Wheat. 316 (1819).

18. *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935 struck down as unconstitutional) and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act of 1933 unconstitutional) with National Labor Regulations Board v. Jones and Loughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act constitutional) and United States v. Darby, 312 U.S. 100 (1941) (Fair Labor Standards Act of 1938 constitutional). Though the factual circumstances which gave rise to the legislation noted here differed, the theory underlying the legislation was identical—that local activities which affect interstate commerce can be regulated pursuant to the commerce clause. In *Carter* and *Schecter*, the Supreme Court attempted to distinguish between "local" and "interstate" activities, between manufacturing—production and commerce. *National Labor Relations Board* and *Darby* put to rest those distinctions and recognized a broad power to regulate pursuant to the commerce clause and the necessary and proper clause, unconfined by artificial labels.

19. Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 258 (1964) ("[T]he power of Congress to promote interstate commerce also includes the power to regulate . . . local . . ., which might have a substantial and harmful effect upon that commerce."); Katzenbach v. McClung, 379

States Supreme Court justices over the scope of national legislative power.

Although broad national power is supportable, given the nationalistic underpinning of the enumerated powers, in addition to being sanctioned by judicial approval, the impact of political consensus on this established broad power deserves important attention.

First, it seems important to observe that while a foundation exists for broad national power in the nationalistic underpinning of the Constitution, the broad language of the Constitution, as a practical matter, "textually commits" the question "how broad is the power?" to the legislative branch.[20] Thus, though support exists for broad national power, the existence of such power has only been tested to the extent that a political consensus exists, evidenced by the congressional legislative process. The nature of the Constitution presents an elastic framework within which the limits of broad national power may be fleshed out, and the document itself accommodates different views regarding national power. Current views regarding the appropriate amount of power to be exercised must not be confused with the available power to be exercised.[21] The flexible nature of the Constitution[22] permits the existence of a strong political consensus about the scope of national power to shape our perceptions on the power actually extant. It follows, then, that in the formulation of strategies for strong governmental solutions to our problems, the achievement of political consensus about which branch of government has the power to solve particular problems ultimately determines the perception that the power indeed exists.

Is the practical existence of broad national power threatened by the current political consensus? Most likely not, at least not immediately. It has been stated earlier that the perception that broad national power exists de-

U.S. 294, 302 (1964) (local activity may "[B]e reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."); Hodel v. Virginia Surface Min. & Rec. Assn., 452 U.S. 264, 281 (1981) "[T]he commerce power extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce' " [citations omitted]. *See also Hodel*, 452 U.S. at 281 (Rehnquist, J., concurring) ("[I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited.").

20. In Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court noted that the extent of power enjoyed by the three branches of the federal government must be determined as a result of constitutional interpretation, and that pursuant to Marbury v. Madison, I Cranch 137 (1803), judicial review of the constitutional legitimacy was a legitimate function of the judicial branch. But if the interpretation of the Constitution reveals that a branch has unlimited authority to interpret a grant of constitutional power, the federal courts will conclude that the constitution "textually commits" the exercise of that power to that branch. *Powell*, 395 U.S. at 519. The result of a finding of "textual commitment" is that the judicial remedy sought in dissatisfaction is unavailable; the complainant is remitted to political process for whatever redress is available there.

It is appropriate to characterize the commerce clause as an instance of "textual commitment." Though the clause is not literally unlimited, its broad underpinnings and sparse language provide little opportunity for effective judicial checking through judicial interpretation. *See* Wickard v. Filburn, 317 U.S. 111, 120 (1942) (effective restraints on the exercise of the commerce power proceed from political rather than judicial process); *accord* National League of Cities v. Usery, 426 U.S. 833, 857-58 (1976) (Brennan, J., dissenting) *citing Wickard*; Heart of Atlanta Motel v. United States, 379 U.S. at 261-62 (choice of methods to eliminate obstructions on commerce caused by racial discrimination "[I]s a matter of policy that rests entirely with Congress . . . what means are to be employed is within the sound and exclusive discretion of the Congress.").

21. *M'Culloch*, 4 Wheat. at 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding.").

22. *Id.*

pends on the existence of a strong consensus in favor of that power. Though there is much talk about reducing the federal budget,[23] serious analyses of remaining federal regulation probably would reveal a strongly nationalistic federal program which may be overshadowed by the current focus on the curtailment of social programs.[24] If it is true that a great deal of regulation and national involvement continues in certain programs, then the current focus on particular programs is not properly viewed as the result of a consensus on weak national power.

### B. *Limits on Broad National Power*

If the limits of national power are difficult to fix due to the nationalistic underpinnings and broad language of the Constitution, it follows that restraints on the existence of the power are difficult to fix as well. Judicial attempts to define these limits failed during our last major economic crisis—the Great Depression—because they failed to take into account both the legal basis for broad national power and the existence of political consensus on the need for extensive federal power. Current attempts by the judiciary has not been entirely successful because they acknowledge both constitutional and political support for the exercise of this power, but then disregard these to answer the question whether the exercise of broad power is legitimate.

These attempts to limit national power will ultimately be unsuccessful. *National League of Cities* v. *Usery*[25] essentially held that the federal government may not "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[26] The National League of Cities, the plaintiffs in this action, succeeded because the Court based its constitutional interpretation on the dual sovereign structure and the implications which flow with that structure, rather than on the language of the Constitution. But just as state sovereignty arguments were successful because they transcended semantic analysis and utilized structural analysis they must fail due to the use of structural analysis. The analysis fails because the actual structure of our dual sovereign system does not treat state interests as distinct from the interests of state citizens who are also federal citizens. The structure of government under the Articles of Confederation contains protection for state interests,[27] thus any exercise of national

23. *See supra* note 1.

24. *See New Federalism No Panacea for State, Local Government*, 39 CONG. Q. WEEKLY REP. 708, 709 (1981).

25. 426 U.S. 833 (1976).

26. *Id.* at 852.

27. Numerous features of the Articles of Confederation structurally enforced the subordination of national interests to the interests of the individual states. For example, the delegates to the Congress were appointed by the legislatures of each states, and the states had the power to recall those delegates at any time and send others in their place. I DOCUMENTARY HISTORY, *supra* note 8, at 87. Each state had one vote; thus all states, large, small, rich, or poor, were equal in the Confederation. The equality of voting power was more significant as a vehicle for the subordination of national interests to local interest in view of the significant limitation imposed by confederation consensus requirements on the exercise of national power. Numerous powers were delegated by the states to the national government, but the most significant of these powers, e.g. to enter into treaties, coin money, borrow money, and engage in war, could only be exercised upon the vote of nine of the states. *Id.* at 89-92. This substantial consensus requirement, combined with the direct

power under the Articles, especially of the most important powers, was routinely and structurally subjected to a state qua state interest test.[28]

Nullification as a movement was not successful[29] and because the existing structure exempts national consensus from a state veto, the impacts of national political consensus on state interests are not automatically considered.[30] Thus, the perception of national needs, as evidenced by political consensus, continues to evidence itself in congressional majorities requiring, in spite of *National League of Cities*, that national power be tested in light of asserted state interests. The result so far confirms my faith in the uselessness of the *National League of Cities* theory: the courts have virtually confined *National League of Cities* to its facts to accommodate the factual existence of broad national power,[31] and the clear political support for its exercise.

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and equal representation of the states in the Congress structurally subordinated national interests to state interests.

The organization of administration of the United States during periods when Congress was not in session subjected the exercise of national power to state interests. The Articles provided for a "committee of the states" which was authorized to carry out the power of the Congress during periods when Congress was not in session. The committee was made up of one delegate from each of the states. But the committee could only carry out the powers of Congress during recess when they were authorized to do so by a vote of nine of the states; and the committee was prohibited from exercising any of the powers which was required for their exercise the approval of nine states. *Id.* at 91-2. Thus though the committee did enjoy a degree of independence, the composition its consensus requirements, and the reservation of important powers to Congress severely limited the independence of the committee from state interests.

28. Perhaps the only real check on the exercise of national power would be afforded by a constitutional amendment which might rebuild in structural controls on the exercise of national power. Under the Articles of Confederation, the states hoped to check any change in the expansion of national government through both the structural arrangements as well as the amendment process. With respect to the latter, the Articles provided that only unanimous agreement of all the states would result in an amendment to the Articles. I DOCUMENTARY HISTORY, *supra* note 8, at 93. Unless these controls can be reinstated, it is likely that the size and power of government will only be checked by the very citizens who have demanded that it grow.

29. *See generally* J. CALHOUN, A DISQUISITION ON GOVERNMENT (1953).

30. State interests, are, of course, practically considered in the lobbying process but in this context state interests or objections are not determinative.

31. For example in *Hodel*, 452 U.S. 264 an association of coal producers challenged federal legislation which governed the activities of coal mine operators. Among their various contentions included a claim that the federal legislation invaded the sovereignty of the states because it displaced states ability to regulate unless states submitted a permanent program complying with the federal legislation and its regulations. *Hodel*, 452 U.S. at 284-91. The argument that this scheme violated limits established in *National League of Cities* was rejected; the Court said "[I]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment [*sic*] prohibits Congress from displacing state police power laws regulating private activity. Nothing in *National League of Cities* compels or even hints at such a departure." *Hodel*, 452 U.S. at 292. *See also* Friends of the Earth v. Carey, 552 F.2d 25, 33-39 (2d Cir. 1977) (judicial enforcement of city and state formulated pollution plan did not violate *National League of Cities* limitations); North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 536 n.10 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978) (federal legislative requirement that states establish state health planning and development agencies as condition to federal health planning grants was constitutional in spite of the holding in *National League of Cities*).

In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), a majority of the Supreme Court rejected plaintiffs' assertion that state receipt of federal Developmentally Disabled Assistance was conditioned upon adherence to a "Bill of Rights" for the mentally disabled also enacted by Congress. Though there is language in *Pennhurst* which suggests that *Usery* limits the exercise of the spending power, the majority opinion based its decision upon a finding that Congress did not intend to impose on the state obligations asserted by plaintiff. *Pennhurst*, 451 U.S. at 17, n.13. Thus *Pennhurst* left open the question whether "affirmative" obligations with burdensome fiscal impact may be imposed pursuant to the Spending Clause in spite of *National League of Cities*.

Continued testing of the limits of state power against assertions of national power are important because these tests actually heighten the conflict between the individual as a state citizen and the individual as a national citizen, forcing into their conscious thought the ultimate dilemma of dual citizenship. The perception that states' interests are harmed is less likely to be articulated by state and local governments where a strong national consensus exists that national power be exercised to its limits because of the political pressure which will be brought to bear by the states' constituency. This conclusion should follow from the fact of dual citizenship and the possibility of political repercussions from that status. When a strong national consensus expressed in legislation and evidenced in the legislative record, is tested, the likelihood that such a consensus will be rejected depends upon the willingness of the courts to reject the commitment of primary interpretative authority in Congress, the clear nationalistic underpinnings of national power and the popular support for its full exercise. If the lessons of the 1930's have been noted by judicial decisionmakers, it is unlikely that the rejection will occur.

## III. DISCRETION

As the existence of power is influenced by the presence of political consensus on the question of power, the scope of national discretion to solve problems is also influenced. But whereas political consensus influences perceptions of power and thereby influences the full exercise of existing power, discretion and political consensus are coextensive.

It is the existence of broad discretion, justified long ago by Chief Justice Marshall in *M'Culloch* on numerous grounds[32] and currently upheld[33] which permits the process of political consensus to sort out numerous alternatives for the solution of problems within the scope of national power. But within this discretion lies room for the consideration and adoption of various alternatives to the solution of national problems.

The state-oriented solutions proposed as components of President Reagan's new federalism are squarely within the scope of discretion that Congress may exercise. These state-oriented solutions merely represent "means"

32. *M'Culloch*, 4 Wheat. 316, 402-4 (1819). Through a variety of reasoning methods, Mr. Justice Marshall established the existence of broad implied power to carry out the enumerated powers. First, Marshall argued that deference should be given to Congress in its interpretation of the Constitution that the power to establish a bank existed. The measure was deeply debated, Marshall observed, and "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance." *M'Culloch*, 4 Wheat. at 402. The suggestion that broad power was impermissible and must be exercised in subordination to the states was also rejected. Marshall said that state sovereignty had given way to popular sovereignty, and that the scope of national power did not depend on state desires. Marshall also argued that pragmatic reasons supported the power of the United States to establish a national bank. If powers were granted, asked Marshall, "Can we . . . impute to the framers . . . the intention of impeding their exercise by withholding a choice of means?" *Id.* at 408. Finally, Marshall argued that the necessary and proper clause of the Constitution, Art. I, § 8, cl. 18, actually expanded implied power which the United States would have in any event enjoyed had that clause not been included in the Constitution. *Id.* 412-25. In this effort, Marshall employed semantic, pragmatic, and structural reasoning to expansively interpret the necessary and proper clause. The result was a masterfully constructed argument for broad implied power, and one which has stood the test of time.

33. *Hodel*, 452 U.S. 264.

for the solution of problems with a national scope. The implied power approved in *M'Culloch* clearly encompasses discretion to choose means which, in Congress' judgment, are appropriate. Moreover, sources describing the manner in which national power has been exercised in the past suggest that state participation alternatives have always competed with other alternatives as "means" for exercising extant broad power.[34]

It is therefore very important to place the Reagan orientation within this discretion framework rather than within a power framework. This view is consistent with prior assertions that strong national power has not been denied generally, despite a current orientation to decentralization of "social programs." It is no comfort to individuals affected, nor to local governments, that discretion is being exercised rather than power denied. But the solution to that difficulty lies in the legislative process which determines how that discretion will be exercised.[35]

## IV. DUTY

Though much has been written in case law on the power of the national government and the limits of that power, there seems to be a virtual dearth of legal thought on the *duties* of the national government. It is possible to infer such duty from the existence of broad grants of national power and from the nationalistic underpinning of the Constitution. It is also possible to infer such power as corollary to the lack of state power to accomplish certain objectives. A view that a duty may exist to solve problems of national scope and beyond the realm of state power provides an opportunity to merge dormant commerce clause analysis[36] with national power analysis. The proposition to be supported, if possible, is this: where states are powerless to effect solutions to local problems with national implications the national government may owe an obligation to undertake solutions.[37]

The problem with such a duty lies not in its plausibility, but in its enforceability. It is doubtful whether current conceptions of standing permit the judicial enforcement of such a duty,[38] but if so, then what remedy shall

34. *See* GRODZINS, CENTRALIZATION AND DECENTRALIZATION IN THE AMERICAN SYSTEM, A NATION OF STATES: ESSAYS OF THE AMERICAN SYSTEM 3-4, 7 (1963) (using the now-famous "marble cake" analogy); CLARK, THE RISE OF A NEW FEDERALISM (1938) (describing various means utilized for the cooperative exercise of national power during the thirties); L.D. WHITE, THE FEDERALISTS 387-405 (1948) (describing cooperative administrative efforts as means of carrying out national policy from 1789-1801, the first Federalist period); *But see* THE NEW FEDERALISM 20-39 (F. Smallwood ed. 1967) (disputing that important federal state cooperative programs have always characterized American federalism).

For an interesting collection of empirical data on the extent of this cooperation, *see* U.S. Advisory Comm'n on Intergovernmental Relations, *Fiscal Balance in the Federal System* (1967).

35. The judicial tests which upheld almost unlimited legislative discretion pursuant to *M'Culloch* offer no consolation here. Indeed, if pressed, the current court would probably applaud the incorporation of cooperative federalism means for the achievement of nationalistic ends since the approach lessens tension caused by the exercise of broad national power.

36. Recent examples of such analysis can be found in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470-74 (1981).

37. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 308-18 (1976). Tribe suggested that converse in his interpretation of *National League of Cities*. He urged that the decision holding federal government powerless to impose obligations which restructure the states ability to deliver essential services may mean that state and local government have a duty to render certain services, and that state and local citizens possess an individual right to such services.

38. The agreed upon purpose of the standing doctrine is to insure a context of concrete adver-

be used and how effective can it be? In other words, is the remedy consideration of the problem, proposal of a solution, or enactment of a solution? It may be that courts are powerless to enforce a political solution, but their pronouncements on the duty to find one might be helpful indeed.

In any event, if there are conditions under which the judiciary might consider such a theory, those conditions would probably include the existence of a strong political consensus on the nature of the problem and the necessity of a solution. The difficulties with judicial solution aside, it is not likely that the concept of a constitutional duty will develop without strong political consensus on the existence of a duty to solve problems national in scope. To this extent, the concept of duty to solve pressing national problems, like our conceptions of broad national power, will most likely be effectively developed within Congress, if history's lessons are accurate.

## CONCLUSION

I have suggested that the development of a political consensus on a national level, and more particularly within the congressional legislative process, plays an important role in the development of perceptions of national power, the exercise of discretion, and the potential for a concept of duty. Each of these concepts is inextricably tied to the availability of political consensus.

Thus, if important and pressing problems are to be solved on a national level, the existence of potential power, discretion, and duty, as abstractions, will be inadequate. If the national power is to be exercised, it will likely not be exercised as a matter of course, but as a matter of political compromise, consensus or compulsion.

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sity when legal questions are decided. The requirement of concrete adversity limits the federal courts to activities traditionally labeled "judicial"—those involving the resolution and remedy of controversies between opposing parties. *See* Sierra Club v. Morton, 405 U.S. 727, 757-58 (1972) (Blackmun, J., dissenting). The standing doctrine ensures that the federal courts, which are characterized as nonrepresentative institutions, do not unnecessarily interfere with the democratic, majoritarian institutions in our society. *See also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing doctrine addresses limited role of federal courts in democratic society); Jaffe, *The Citizen as Litigants in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1038 (1968); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 683 (1973). As a result of these perceptions distinctions are made between standing to sue for constitutional violations and standing to sue pursuant to federal statutes. In the absence of congressional action broadly conferring standing, standing to sue is narrowly available. *Warth*, 422 U.S. 490.