

THE *THIRD* DEATH OF FEDERALISM?

In a recent article,¹ Professor Van Alstyne decried the Supreme Court's opinion in *Garcia*² as the "second death of federalism," the first being the Court's abandonment of state's rights after 1936. Others have taken a more favorable view of the Court's holding that Congress could require San Antonio to pay the minimum wage to transit workers.³ Although the debate is still underway, we suspect the issue may already have become moot. While the commentators are still discussing the second death, the third may already have occurred.

The occasion was a presidential press conference. President Reagan, who campaigned twice on the promise to get Washington "off the back" of the rest of the country, revealed his own view of federalism in the following exchange:

- Q. The Supreme Court decided today to not interfere with a woman's right to have an abortion. Is your Administration going to pick another case to fight this position or are you going to let it stand as the law of the land?
- A. We're going to see—if we interpret the decision right of the Court, their objection was not to what we were trying to accomplish but the fact that evidently the regulations in H.H.S. that we asked for were based on that previous bill that had to do with discrimination against the handicapped and they, the Court, said they thought that this was putting the Federal Government—they were getting into something that properly was the province of the state and all. So what we have to do is look for what are the proper way we can do this.

Because I feel very strongly that we're talking about a human life. And the case that prompted this entire act was one in which the determination is made that this life is to be taken away and yet it isn't done as you would with an animal, it isn't done with a merciful putting to sleep or—they can't do that so instead they just let it starve to death.

And I just don't think that—if our Constitution means anything it means that we, the Federal Government, are entrusted with preserving life, liberty and the pursuit of happiness. Well, where do we draw the line? Can we say to someone, "It's all right for you to in whatever way you choose and dispose of this human life, and for whatever reason"? And I think—I just don't think we're finished with this problem at all.⁴

We could take a couple of cheap shots at the President's re-

1. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).
2. *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985).
3. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMM. 341 (1985).
4. New York Times, June 12, 1986, at A20, cols. 2-3 (late ed.).

sponse. He obviously was talking about the wrong case—the reporter asked about the abortion decision,⁵ while the President talked about the “Baby Doe” case, decided two days earlier.⁶ Still, his propensity for such slips is well-known, and most people find it rather endearing. We only hope that he’s more careful in dealing with matters of greater importance than constitutional law.

Another fairly cheap shot would be to point out that the President’s support for federal intervention in this area is inconsistent with his general belief in a diminished role for federal regulatory agencies. That’s true, but most of his liberal critics are open to a similar charge of inconsistency.

No, what is noteworthy about the President’s response is the view of national power he expressed. If you skimmed the quote, reread the final paragraph. Note the President’s view of federal power: “if our Constitution means anything it means that we, the Federal Government, are entrusted with preserving life, liberty, and the pursuit of happiness.” Has any Justice, from John Marshall on, ever expressed a broader view of federal power? It is, indeed, hard to imagine a broader view. The power to preserve “the pursuit of happiness” seems to encompass just about anything worth doing at all.

In this, as in many things, President Reagan’s views are much like the general public’s. As most Americans see things, arguments about federalism aren’t matters of principle. They’re ordinary matters of government policy. The federal government should do whatever it can do better than the states, just as the Navy should do whatever it can do better than the Air Force. Today, disputes about the scope of federal power almost never turn on any great matter of constitutional principle—not necessarily because no such principle exists, but because hardly anyone, from President Reagan to the ordinary citizen, really cares about federalism as a principle. In short, the country as a whole no longer thinks that anything of constitutional dimensions is at stake.

Maybe federalism, as a constitutional principle, isn’t quite dead. But surely, like Tinker Bell, it must be close to expiring because no one believes in it anymore.

5. *Thornburgh v. American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618 (1986).

6. *Bowen v. American Hospital Ass’n*, 54 U.S.L.W. 4579 (1986).