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THE
CONSTITUTION
THAT DELICATE BALANCE

**Federalism: The National
Government Versus the States**

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Hon. Potter Stewart, Justice (retired), U.S. Supreme Court
Hon. Dick Thornburgh, Governor, Pennsylvania
Hon. Patricia M. Wald, U.S. Court of Appeals, D.C. Circuit
Hon. J. Clifford Wallace, U.S. Court of Appeals, Ninth Circuit

MEDIA AND SOCIETY SEMINARS

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Federalism: The National Government Versus the States

FRED W. FRIENDLY, **Columbia University School of Journalism**: From the birthplace of the United States Constitution in Philadelphia, can the states which created the federal government be forced to accept federal standards for education?

Gov. BRUCE E. BABBITT, **Arizona**: You lay the deadening hand of the United States Congress on this issue, and you're going to be maligned in history for having a stopped a revolution that's already underway.

Sen. DANIEL P. MOYNIHAN, **New York**: Mr. President, it's called politics, and what we're talking about here is not the Constitution but politics.

FRED GRAHAM, **law correspondent, CBS News**: These states need the money, and for politicians to turn down money because of principle is news.

Sen. ORRIN HATCH, **Utah**: What do the states have to do? Do they lose control, do they lose autonomy, are they going to really just be puppets of the federal government? And see, I don't think all wisdom comes from the federal government.

Gov. LAMAR ALEXANDER, **Tennessee**: And congressmen and presidents ought to worry about what you usually worry about in Washington, which is welfare and taxes and debt and minor scandals and things like that.

Prof. LEWIS KADEN, **Columbia Law School**: Should the courts, and particularly the Supreme Court, play a role in protecting your independence against the federal government?

Gov. BABBITT: The idea of the Supreme Court as a referee in a striped shirt at the fifty-yard line between the contending forces of federal and state government, I think, has a lot of appeal.

* * *

Mr. FRIENDLY: Carl Sandburg, the poet and historian, loved to come here to Independence Hall, and he used to say, "Before the Civil War and the Fourteenth Amendment, the United States were. After the Civil War, the United States is."

The truth is, when the state delegates to the Constitutional Convention assembled here in this room in 1787, they saw themselves almost as independent nations, forging a network of individual, separate states which could work together, especially in foreign affairs. But they weren't thinking of a federal nation. That's all changed now. We're 50 states and the United States is. But the debate over the relationship of those states and what is called federalism is still the center of a storm.

Watch, now, in our hypothetical case study as that storm affects a small boy in a wheelchair who wants to go to public school with all the other kids. Moderator Lewis Kaden of Columbia Law School begins his hypothetical case with some federal rules that the states already live by.

Prof. KADEN: Mr. Graham, you and your family have just moved into a new neighborhood with your son Andrew, who's eleven. Andrew is paralyzed from the waist down and confined to a wheelchair, but he's a good student; he's always attended regular classes and done pretty well. However, in this new school district, you've received a notice that Andrew will have to go to a special school for the disabled on the other part of town, because they can't accommodate him in the neighborhood school. That neighborhood school was built in the 1930s, has four stories, no elevators, no access ramps. You and Andrew are very upset about this, think it will be bad for him, and you're determined to fight it. What's your first step?

Mr. GRAHAM: Well, I know that I have some legal rights and that Andrew has some legal rights, but I think this is one where I would try to use persuasion.

Prof. KADEN: Mr. Crim is the superintendent in your new district. Why don't you try to

persuade him?

Mr. GRAHAM: Mr. Crim, it seems to me that you should recognize that you have an opportunity here to help a child get a normal education. It's one of these things where you can do a wonderful thing, and all it's going to require is, perhaps, a little bit of cost.

ALONZO CRIM, superintendent, Atlanta Public Schools: We fully concur with your perception and, certainly, that next to you, we feel that we're the greatest advocates of children. However, this is a new regulation for our school system and we just genuinely don't have budget to provide for all of the needs of the children whom we must serve.

Prof. KADEN: Mr. Crim, what's the problem? Why can't Andrew go to the neighborhood school?

Mr. CRIM: Simply because we do not have a barrier-free facility to provide for him.

Prof. KADEN: Mr. Graham, it sounds like he's sympathetic with Andrew's problem, but he's not giving you much relief. What do you do next?

Mr. GRAHAM: Well, I wasn't satisfied with his answer as to—that there are federal regulations which—and then he waffled around. I think those regulations require that handicapped children be permitted to be educated along with their peers, non-handicapped children, and I don't think he wants to get sued, because it's an unpleasant, expensive process, and I think he should rethink this.

Prof. KADEN: Are you going to rethink this, Mr. Crim?

Mr. CRIM: Well, when we speak about suits, we suggest that he join the club and get in line. *[laughter]* And so certainly that wherever we have barrier-free facilities that—certainly, we would be willing to accommodate your child, but we just cannot change this facility in your immediate neighborhood.

Prof. KADEN: Mr. Brademas, Mr. Graham said he thought that there were federal regulations that might give Andrew the chance to go to this neighborhood school.

JOHN BRADEMAS, president, New York University; former U.S. Representative, Indiana: I think you should be aware, Mr. Crim, that in your school system, you're way, way behind the times, and also I'm surprised that you would not be able to provide a rather *de minimis* expenditure if we're talking about getting a wheelchair onto the first floor of a schoolroom. And what the federal government did in 1975 was to provide funds to the states and local school systems to enable them to make good on their own state mandates, which heretofore they had not been enforcing, so that the response that Mr. Crim has given is really not on target.

Mr. CRIM: The federal government pledged over a period of years that it would encumber up to 40 percent of the costs of special education, and it never exceeded 12 percent.

Prof. KADEN: So, your answer to Andrew Graham is that you're doing as well as you can, but you can't afford to equip that neighborhood school to let him go there? Mr. Graham, what are you going to do about that?

Mr. GRAHAM: I'm going to take this to the media. *[laughter]* I think that the local television station might be interested. I've heard that they're paying all sorts of high salaries to administrators in the schools, and not as much to teachers and for the kinds of facilities that the children need in making it possible for this little child to go to school with his neighbors and friends.

Prof. KADEN: It sounds to me, Mr. Graham, like the school district's doing what it can, but it's going to take some time, and in the meantime, they want Andrew to go to the special school. It sounds like, in the great American tradition, you need a lawyer.

Mr. GRAHAM: I was thinking we'd get to that. *[laughter]*

Prof. KADEN: Suppose you went to Mr. Hearne and asked him for his advice. Mr. Hearne? **PAUL HEARNE, executive director, Just One Break, Inc.:** Well, I feel there's a number of remedies that we have. First of all, on the local level, we can go to the local committee on the handicapped, assuming that Mr. Crim's district has one.

Prof. KADEN: Local committee on the handicapped? Mr. Crim, do you have one of those?

Mr. CRIM: Absolutely.

Prof. KADEN: Mr. Crim, he has the local committee for the handicapped because the federal government told him to set that up?

Mr. HEARNE: Yes, that's correct. It's been stated earlier that Andrew's got very high grades and doesn't need a special class, so it sounds like the only problem we're dealing with is a flight of stairs for Andrew to go to school.

Prof. KADEN: What are you going to do?

Mr. HEARNE: I'd go to Mr. Crim and I'd ask him what sort of modifications are necessary, forgetting the budget. Once the committee on the handicapped has found that Andrew has an appropriate placement in that area, we then have a right to a state hearing before the state administrative body, and then we—

Prof. KADEN: Before the state school board?

Mr. HEARNE: That's right.

Prof. KADEN: Mrs. Ravitch is the chairman of that state school board. You want to ask her any questions?

Mr. HEARNE: Well, what do you find for Andrew? Have you found, at that hearing, that Andrew should be placed in that school?

Prof. DIANE RAVITCH, Teachers College, Columbia University; author, "The Troubled Crusade": Yes, we had a hearing, and we determined that inasmuch as he doesn't need special education, and should be mainstream, we've ordered the local school board to forthwith admit him to the regular school and deal with the problems.

Prof. KADEN: Mr. Shanker, why do these procedures exist—these committees for the handicapped in the local district and the commission on the handicapped at the state level; the discussions about whether the money will come from somewhere else in the budget?

ALBERT SHANKER, president, American Federation of Teachers: Because large numbers of handicapped children were receiving no education at all in many cases.

Prof. KADEN: And the federal government is designing regulations that determine what Mr. Crim must do?

Mr. SHANKER: In part, yes.

Prof. KADEN: What Mrs. Ravitch must do?

Mr. SHANKER: Yes.

Prof. KADEN: And where the money in the school budget is going to be spent?

Mr. SHANKER: It will result either in somebody finding additional money, which is pretty rare these days, or results in great internal shifts in money.

Prof. KADEN: And I think I heard you say that the federal government decided that this group of children, the disabled children, would have the benefit of these procedures, and money would be spent to accommodate them in the schools, even if it came from another part of the budget.

Mr. SHANKER: There were state court decisions in a number of states before the federal legislation was passed, and there is now state legislation as well as the federal legislation.

Mr. CRIM: Our current facility problem, in terms of the expenditures, because we are presently required to remove the asbestos from all of our facilities. *[laughter]* And we're loaded, and in fact, so that this being a health imperative that we are devoting our total facilities budget to that purpose.

Mr. HEARNE: Perhaps you should take all that asbestos and make a ramp out of it. *[laughter]*

Prof. KADEN: Suppose, Mr. Hearne, that these discussions with the local district don't get Andrew into the neighborhood school? Mr. Graham's very upset about that. What's your advice about the next step?

Mr. HEARNE: Perhaps there's a state statute that would allow us to go into state court. More than likely, there is. The state can be effective and we also have a cause of action in federal court.

Prof. KADEN: Before you go to federal court, let me ask Governor Thornburgh, is there anything the state government can do for Andrew Graham?

Gov. DICK THORNBURGH, Pennsylvania: Part of the problem is that you've got two different needs to meet: The so-called "special education" need and the accessibility need for students who don't really need special education. They're like Andrew, they're perfectly capable of handling their own opportunities, and—

Prof. KADEN: Are these procedures that you speak of for Andrew Graham, are they there because of the federal government?

Gov. THORNBURGH: Yeah. They're due process hearings, essentially, so they're an undertaking that states, federal and local governments have all participated in. None of us 50 years ago were doing anywhere near what we should have done for handicapped or retarded special needs children.

Prof. KADEN: Mr. Brademas, what happened to the idea that the schools are the responsibility of the local government?

Mr. BRADEMAs: The schools are the responsibility of the local government and of the state governments; not only of the local government, Mr. Counselor, but of both. And what happened was that the states were simply not making good on their own state obligations.

Prof. KADEN: Did you tell the states that they had to do it?

Mr. BRADEMAs: No. This is a voluntary statute, but if you take the money then you have to spend it on handicapped children.

Prof. KADEN: Governor Babbitt, you've heard Mr. Brademas. He says that it's voluntary. You can take the money and follow these rules, or you can turn it down.

Gov. BABBITT: Well, it's my idea of a Hobson's choice. A lot of money is held out and it's said, "If you don't like our rules, don't take the money." That's no choice at all. But I've got one idea for Mr. Crim. I'm familiar with Mr. Graham. I think his son has a strong case. I think what I'd do is call you up. Mr. Crim, and say, "Look. You've got to take care of this. Now, there's a lot of state money that comes to you in the form of discretionary grants. You take this kid, make it work, and I'll see if I can load a little extra onto some of those discretionary grants for textbooks." [laughter] "Can we do that?"

Mr. CRIM: Thank you, Governor. [laughter]

Prof. KADEN: Mr. Crim, that sounds like a pretty good deal. [laughter] Governor Matheson? [laughter] This sounds like a pretty good business. Have you got that kind of money? Have you got that kind of money to give Mr. Crim?

Gov. SCOTT MATHESON, Utah: I've learned a new lesson from Governor Babbitt this morning already. [laughter]

Prof. KADEN: It's a lot of money. If you're now giving the school districts in the state \$10 million, this is going to change it to \$13 or \$14 million.

Gov. MATHESON: There's no doubt about it, but in terms of special education, Mr. Brademas is right. I do believe that the states did not come forward, and I think we defaulted our responsibility, and so I think someone had to come along and fill that gap.

Prof. KADEN: And the federal government did that?

Gov. MATHESON: They did that. Now, we have the problem, the federal government mandates a certain standard of availability and a standard of educational capability for the handicapped. And we all agree with that. And we all realize that we can't do it all at once.

Mr. HEARNE: The states have been extremely slow in this. In fact, had my state not caught up with me by the time I was 16, my client would be deprived of the right to counsel, because I wouldn't have had a public education, being tutored at home 'til that age.

Prof. KADEN: Senator Hatch, did the Congress make a mistake in 1975 when it followed Mr. Brademas's advice?

Sen. HATCH: I don't think so. I'm a strong supporter of 94-142, this public law, and I agree with Governor Matheson over here that the states were not doing the job and we have to do it. Under the Constitution, there is no independent authority at all for the federal government to be involved in education, other than these conditioning grants. "We will give

you so much money conditioned upon what you do, if you follow our regulations, your regulations."

Prof. KADEN: So long as you're writing the check, you can tie any strings—

Sen. HATCH: That's right.

Prof. KADEN:—to that check you want?

Sen. HATCH: And what's wrong with that is, is that the Congress, sometimes, they sometimes write the check, and they set up a broad general rule, and then they turn it over to the educational bureaucrats in Washington, who then set up even broader general regulations that people really can't—that states can't abide by in the fullest sense of the term, and then the final policy-maker becomes the courts of the United States, and that's why so many judges throughout our country are determining what football fields to play on, where the cars should park, whether or not they should use Bunsen burners or not, and all kinds of other idiotic policy decisions that, really, the courts are the least capable of making.

Prof. KADEN: Judge Wallace, you've heard the arguments. Suppose that case came before you. Does Andrew Graham get to go to the neighborhood school? Do you want to make a decision here concerning Andrew?

Judge J. CLIFFORD WALLACE, U.S. Court of Appeals: No, I'd rather wait until it's before me in full briefs.

Prof. KADEN: Suppose there were—[laughter]—suppose there was no statute and Mr. Hearne had brought this claim on the basis of the Constitution. Any possibility he would succeed?

Judge WALLACE: Well, if there's no statute, there's nothing in the Constitution that guarantees a right to an education. And so it's not in the federal court that you would go to try to do that; you'd have to find something in the state law or the state constitution. There's nothing in the federal Constitution that guarantees a right to education. In the federal Constitution.

Prof. KADEN: Justice Stewart, is that right?

POTTER STEWART, Justice (retired), U.S. Supreme Court: That is correct.

Prof. KADEN: Now, why is that?

Justice STEWART: And the Constitution leaves education unmentioned.

Prof. KADEN: In other words—

Justice STEWART: Of course, there's an equal protection clause in the Fourteenth Amendment, which requires a state to accord equal—not to discriminate.

Prof. KADEN: But if the state's not giving an education to anyone—

Justice STEWART: It doesn't have to do it—

Prof. KADEN: It doesn't have to under our Constitution?

Justice STEWART:—so far as the Constitution goes.

Prof. KADEN: Mr. Hearne, notwithstanding all these difficult procedures, are we doing better in educating the disabled today because of what Congress did in 1975?

Mr. HEARNE: Obviously. I think we're doing much better than—certainly, I've seen the change in my lifetime, in the last 15 years. I mean, I did not have a committee on the handicapped. I certainly didn't have a right to a hearing before the state school board. Certainly not on the issue of me being a disabled student deprived of an education.

Prof. KADEN: And those procedures exist, at least in all 50 states, because of that act of Congress?

Mr. HEARNE: Because of the Education of All Handicapped Children Act.

* * *

Mr. FRIENDLY: Now, we turn in the debate from the facts of the past, how the federal government has acted on behalf of the disabled, to a future situation. Education has always been a matter of local control, but in this hypothetical case, we'll

meet a president who feels the federal government must get involved in a big way, to solve a national educational crisis.

* * *

Prof. KADEN: It's a time in the not too distant future, and I've just been elected president of the United States. We're lagging behind the Japanese and the Russians in important areas of scientific achievement and technological innovation. This nation must commit itself to improving the quality of our schools, and I've promised the American people a program to do that.

First, the federal government will make available an annual salary supplement to every one of the two million teachers in this country of \$5,000, in order to attract better qualified teachers to our schools. But to be eligible for those funds, every secondary school must require four years of English, math, science and a foreign language from every high school student. And third, every state must develop uniform competency tests, consistent with federal guidelines, to insure that every high school graduate meets those standards.

Mr. Cutler, what do we have to do to get it passed?

LLOYD CUTLER, former counsel to President Carter: What else have you—has the President promised? Has he promised a balanced budget? *[laughter]* Has he promised to respect states' rights? What else has he done?

Sen. DANIEL P. MOYNIHAN, New York: Mr. Cutler, would you yield?

Mr. CUTLER: I yield to—

Sen. MOYNIHAN: Now, sir, Mr. President, you said there were two million teachers in this country, right?

Prof. KADEN: Yes.

Sen. MOYNIHAN: Wrong. There are 2,391,000; the others are in non-public schools. My question, Mr. President, are you willing to give this \$5,000 grant to those non-public schoolteachers as well?

Prof. KADEN: I think we'll deal with that. I want to know from Mr. Cutler, first—*[laughter]*—what I have to do. And maybe that's—I was going to suggest—

Mr. CUTLER: Well, the first thing I'm going to tell him is that you'd better make your peace with the senior senator from New York.

Prof. KADEN: That's right. I was going to suggest, Mr. Cutler, that we talk to Senator Moynihan early in this process. I think he's already told us one of the things that we have to do. What's our first step?

Mr. CUTLER: We'd go through, assuming it isn't the kind of problem for which you want to appoint a commission to begin with and then face it a year later.

Prof. KADEN: No, I want to get this done. *[laughter]*

Mr. CUTLER: You want to get it done now?

Prof. KADEN: I haven't been here long enough, but one thing I know is if you want to put it off, you appoint a commission. If you want to get it done, you put a bill before the Congress. But who do we have to talk to to get this passed?

Mr. CUTLER: Oh! *[laughter]* You've got to talk to Brother Shanker over here.

Prof. KADEN: Mr. Shanker?

Mr. SHANKER: If you had told me you were for this program, you would have had a tough time getting my support. *[laughter]* Have you ever been locked in a room with 35 kids for 10 months a year, and you're going to take away my two months during the summer? *[laughter]* Besides—

Prof. KADEN: Well, I didn't say anything about two months during the summer, but maybe that's a good idea. Look, Mr. Shanker—

Mr. SHANKER: Well, it says extend it to 12 months. That's what you said. That's what you're using the \$5,000 for. Now, there are only 12 months in the year. I don't think that people who have an education need two months a year to upgrade their skills for the rest of

their lives.

Prof. KADEN: Don't tell anyone else, but you've convinced me. The contract stays at 10 months. Are you with me?

Mr. SHANKER: Well, now, what's the money for?

Prof. KADEN: The money's for salary supplements.

Mr. SHANKER: Just plain salary supplements?

Prof. KADEN: Uh-huh.

Mr. SHANKER: I'll take it.

Prof. KADEN: Okay. *[laughter]* You see, I'm not doing so badly so far. You said the governors. How are we going to approach them? Some of them supported me, some didn't.

Mr. CUTLER: I'd start with the ones that supported you. And they might settle you down a little on this. *[laughter]*

Prof. KADEN: Let's start with Governor Babbitt.

Gov. BABBITT: Mr. President, as a supporter, a friend and an advisor, I'm going to tell you candidly, you can't win and you won't, for this reason: The revolution is already on out there. California, Florida, Texas, Pennsylvania—they're raising teachers' salaries. They're upping standards. It's already happening. And I'll tell you candidly as somebody who supports your goals, you lay the deadening hand of the United States Congress on this issue, and you're going to be maligned in history for having stopped a revolution that's already underway.

Prof. KADEN: Governor Alexander? Do you want this kind of federal aid?

Gov. ALEXANDER: Mr. President, I know it must come as a disappointment to you to find so little support in your own party, so I'll try to help you some. Congressmen and presidents ought to worry about what you usually worry about in Washington, which is welfare and taxes and debt and minor scandals and things like that—*[laughter]*—and leave to us in the local governments better schools and what's going on in the third grade.

Prof. KADEN: Why? Why?

Gov. ALEXANDER: Well, the reason is, we divided up a long time ago the notion that the national government—it's not all in the Constitution, we just kind of worked this out—that because we're a big nation with a lot of different small communities, that we work out locally better on the long run, most of the problems that are important to us every day. The states can't figure out what to do about national defense, and neither can you have much to do with quality of public education except for your campaign. You've done what you can; you've raised the issue. Now leave it to us.

Prof. KADEN: Governor Thornburgh? Am I going to get any support from you?

Gov. THORNBURGH: Well, I've learned about the deal that you and Shanker cut, and—*[laughter]*—I figure you're open for negotiation.

Prof. KADEN: Okay.

Gov. THORNBURGH: And I'm looking at a package that would bring about half a billion new federal dollars into Pennsylvania, and I'd say—make kind of a counter-offer and say, you know, this half a billion dollars, if it came to us in the form of a block grant for education that will enable us to use it where we in Pennsylvania, rather than those in Washington, or those who might represent Tennessee or Arizona or Utah—other states that have different needs—if we could decide where to put this money, that you might have my support.

Prof. KADEN: In other words, you'll take the money and I can keep my standards?

Gov. THORNBURGH: And I think the thing that probably is more troublesome about this package than anything else is the dictating of a very tight four-year curriculum that leaves very little movement at the school district level to decide what priority needs of a particular community have to be met.

Prof. KADEN: Mr. Amig, suppose that, after this kind of discussion, we had gone back and done some more homework and modified our program so that at least our friends were enthusiastic. What's our strategy? How are we going to get the people under the tent whom

we need?

GREGORY ANRIG, president, Educational Testing Service: Well, I think you've already done that, in terms of Al Shanker. I think leaders in the education arena you have to get with you. But that's not enough. You didn't get elected because things were going so well at the state level. We know the states have got the responsibility here, but we've got to give them some help and some adrenalin, if you will, to get this job done. But let's get on with it; let's not make it a question as to whether there'll be a law or not, just what that law will be.

Prof. KADEN: Mrs. Ravitch, do you have anything to add to that?

Ms. RAVITCH: Oh, certainly, Mr. President, I think we have a problem here. What you've proposed is too ambitious. Clearly, there's a crisis in education, but you have to put the carrot out — the large carrot, whether it's \$5,000 or perhaps even more — and say that the requirements will be very small. Say that it will only be one year of math and science, so that you get them to initiate the program, because I think what you're aiming at is something like a national curriculum and national test, and there's naturally a great deal of resistance on the part of the states to this.

Sen. HATCH: You know, as you start massively transfusing monies from the federal government into the states, I'm still concerned, as I think these governors are, of just what are the tickets on that. What do we have to — what do the states have to do? Do they lose control? Do they lose autonomy? Are they going to really just be puppets of the federal government? And, see, I don't think all wisdom comes from the federal government. Especially in education. I think that, as federal government expenditures have gone up through the years, I believe that the S.A.T. scores and other telltale signs of education quality have gone down, and in those areas where the states are abdiquating their responsibility, are not doing what they really should do, then perhaps that will be appropriate for the federal government to step in.

Prof. KADEN: Mr. Anrig?

Mr. SHANKER: Mr. President, you should know that that federal money was not wasted and that your program has a good deal of merit, because those federal funds were targeted toward poor kids, black kids and Hispanics, and they're the only ones whose scores have gone up in the last 15 years, and they're the only ones who are going to college in much greater numbers, so this story about federal money going in and the scores going down just isn't right.

Prof. KADEN: Let me ask Mr. McCree, what's the constitutional authority for the President to do what he's proposed?

Prof. WADE H. MCCREE, Jr., University of Michigan Law School; former U.S. Solicitor General: I see no constitutional problem with it. The appropriations power of the Congress permits it to attach certain restrictions and limitations on the use of the money if it's accepted. If this is any different from the others, it's that the restrictions are so explicit and so detailed, they might be found to offend concepts of federalism.

Prof. KADEN: What concept of federalism? What do you mean by that?

Prof. MCCREE: Well, the federal government, of course, is the creature of the several states, and it holds powers that the states surrendered to it and —

Prof. KADEN: Senator Moynihan, we've seen in the last couple of hundred years, the federal government do a lot of things that perhaps were not conceived of as their role in 1787. Are there any limits on what the federal government can do about education?

Sen. MOYNIHAN: Madison was of the view that the Constitution was not created by the states but by the peoples of the states, and so stated in *The Federalist*. But Article One, Section Eight, provides that the Congress can enact laws and spend money for the general welfare, and when the time comes, as it did, that the general welfare was considered to include free available education, then Congress is free to provide funds for that purpose.

Prof. KADEN: And to attach to those funds standards, conditions, strings?

Sen. MOYNIHAN: Yes. So long as they don't violate other rights and that is normal to any legislation.

Prof. KADEN: Let's go on and assume, contrary to all expectations, that my program has

passed. *[laughter]* Governor Alexander, are you going to take the money? Mr. Anrig has called you up and said, "For your state, it's \$300 million. Where do we send the check?"

Gov. ALEXANDER: Well, that's a lot of money for us — *[laughter]* Let's see, we've got 50,000 —

Prof. KADEN: But he also says that — *[laughter]*

Gov. ALEXANDER: The answer to your question —

Prof. KADEN: There'll be a few other things in the packet with the check.

Gov. ALEXANDER: Well, the answer to your question is, of course, we would have to take it. Tennessee is one of the poorest states in the country. I totally oppose the notion that the federal government ought to be paying teachers' salaries, so what we will do in Tennessee is we will give it out based upon how well teachers teach, and that's not ever been done in America before in public education, so this will create a very novel situation in our state.

Prof. KADEN: And you'll take your chances about whether Mr. Anrig finds that in violation of the regulations or not.

Gov. ALEXANDER: Well, if he finds that in violation, why, we'll make it a major political issue, Mr. President. You're already in deep trouble for — *[laughter]* — for having taken over local control of the public schools, but if you want to come out against the position that good teachers ought to be paid more for doing a good job, why, that's up to you. *[laughter]*

Prof. KADEN: I tell you, I keep a close watch on the polls, and I think I'm in pretty good shape. Governor Babbitt, are you going to take the money?

Gov. BABBITT: I'm going to send the check back and I'm going to send with it a cover letter saying that the idea of imposing federal control over curriculum standards will, ultimately, erode and destroy the connection between people and their schools, and the interactive ability of local taxpayers and parents to really get involved in the fate of the education of their children, and I might support your opponent in the next election.

Prof. KADEN: It's one to one. Governor Thornburgh?

Gov. THORNBURGH: I think what I'd want to do is talk to fellow governors and see if the sentiment was there to really do something dramatic about this, to say, "No, we don't want the money. We don't want the money because you are fundamentally altering the process of education and the traditions of local control over the schools."

Prof. KADEN: Governor Matheson?

Gov. MATHESON: I need the money in my state for teachers' salaries, but I've gone through the process of the carrot and the stick with the federal government for so many years, and been so disappointed, that I would be very concerned that you would be generous the first year, but you won't be president for too long, and we'll run out of the money as we typically do. But I recognize one fundamental principle which has underscored the reason you have done this: The nature of the economy of the United States has changed. We're in world competition and we can't compete successfully unless our education level goes up dramatically. But that's as far as you —

Prof. KADEN: But having the federal government tell you to teach English for four years, or math, science —

Gov. MATHESON: That's very offensive. That gets into the heart of the total education process, and frankly, I think the states are equipped, have demonstrated in recent years beyond a preventive of a doubt that they are coping with that problem. And I think they're prepared to do it. They have the tradition, the background and the commitment to do it. So, I guess I would have to come down with Governors Alexander and Babbitt on the issue.

Prof. KADEN: Well, as I heard it, Governor Babbitt's going to turn down the money; Governor Alexander's going to take it; Governor Thornburgh's looking for company in turning it down.

Gov. MATHESON: In that case, I guess, Bruce, it's you and me.

Prof. KADEN: So you're going to turn it down?

Gov. MATHESON: Yes, I am.

Gov. ALEXANDER: You offered a poor state that much money; you said you got it through

somehow, the Congress, but you've made a terrible, with all respect, Mr. President, a terrible error, and ignores all the basic concepts of federalism.

Prof. KADEN: What do you mean when you talk about federalism?

Gov. ALEXANDER: The short answer is that when the Constitution was created, a national government was set up to do a few things that the communities and the states couldn't do. The most local function that American people agree on is education. People want to have some control over the decisions that affect their lives the most every day. Is the third grade good? Is the road in front of the house paved? Is the water they drink clean? And most of that should be decided at a local level.

Mr. ANRIG: Mr. President, could I pick up—

Prof. KADEN: Yes.

Mr. ANRIG: —a point that Mr. Heame said earlier and connect it to the point Senator Hatch has made. In the area of the handicapped, because the federal government intervened, handicapped citizens are getting better services than they got when that was left to the states. Senator Hatch is saying when we do that we put too many conditions on it. Why not allow a state to say, "I want to do it but in a different way," just as Governor Alexander has said, "I want to improve salaries but in my way, not in the specific way you have chosen." It's the end that we're concerned with, not the means, and we can build into the regulations and into the state plan mechanism options for states that achieve the same goals but may be in different ways.

Prof. KADEN: Mr. Graham? Three governors turned down a large pot of federal funds. Is there a story in that?

Mr. GRAHAM: That three states had done it?

Prof. KADEN: Yeah.

Mr. GRAHAM: Yes, and I think that this would be a story that would be fascinating to the public, because as Governor Alexander has said, these states need the money, and for politicians to turn down money because of principle is news. *[laughter]*

Prof. KADEN: Would you refer to the Tenth Amendment or the principles of federalism in that story?

Mr. GRAHAM: I would refer to the Tenth Amendment. As I understand it, it says that the powers that were not directly granted to the federal government by the people of the states when they formed the Union, are retained by the people.

Prof. KADEN: Are reserved to the states and to the people?

Mr. GRAHAM: I would explain it in terms of traditionally, questions such as what do you teach in the local schools have been decided on the local level, and that federal bureaucrats have a way of doing things that are offensive to people at some local levels and, sometimes, hard to comprehend and we wouldn't want them to be dabbling in matters that have been so traditionally done by the local people.

Prof. KADEN: Uh-huh. Senator—

Gov. THORNBURGH: If Fred Graham's going to do three and a half minutes on the evening news, that's enough drama for me, and you can make it four governors.

Prof. KADEN: Make it four? Four out of four. *[laughter]* Senator Moynihan, in 1791, when the Congress passed the statute creating the first bank of the United States, President Washington asked various members of his cabinet to comment on that statute.

Sen. MOYNIHAN: Right.

Prof. KADEN: And Thomas Jefferson said that the foundation of the Constitution was that phrase that Mr. Graham just read; the phrase that says the powers not specifically enumerated are reserved to the states.

Sen. MOYNIHAN: Yes, sir, we know that. Thomas Jefferson said that as secretary of state, because he didn't like what Hamilton was doing. When he got to be president and he wanted to buy Louisiana, he did not notice that that wasn't in the Constitution, either. *[laughter]*

Prof. KADEN: What explains that?

Sen. MOYNIHAN: Mr. President, it's called politics. And what we're talking about here is

not the Constitution but politics. And remember that when these gentlemen say they do not want curricula enforced by the federal government because that takes away a deep right of Americans, they are usually saying they don't want to do something that they know they ought to do and the nation ought to try to make them do, but that's—why you got to be president, not to be told this can't be done or it shouldn't be done because of some non-existent constitutional prohibition.

Prof. KADEN: Justice Stewart, at the Constitutional Convention, or in the debates shortly after it, James Madison said that in the competition between the states and the national government, the advantage would always lie with the states. Do you think our experience has borne that out?

Justice STEWART: No, I think it's borne out the proposition that he was very wrong. Observably and demonstrably, there's been a movement toward this centralized power in our government. Just as a matter of fact, the United States of America used to be a plural verb, now it's a singular one.

Prof. KADEN: Governor Alexander? James Madison wrong? the advantage doesn't lie with you and the tensions between the states and the national government?

Gov. ALEXANDER: It does not. If we were writing a constitution today and the question were to come up, "Who should be in charge of educating our children in Hendersonville, Tennessee," the answer would be either, "Leave it out of the Constitution," or, "Make clear it's the local community first, the state second," and there probably would be a strong, overwhelming majority where I come from, to keep the national government entirely out of it.

Prof. KADEN: Mr. Brademas? Isn't the federal government responsible for some of the good things that have happened to American education in the last 25 years?

Mr. BRADEMAS: What I think we're missing in this discussion, Mr. President, is an understanding that there are separate roles, politically, not constitutionally, for the several levels of government in support of education, so that we basically support public elementary and secondary education at the local and state level. Only about eight percent of all of the cost of that education comes from the federal government.

Gov. ALEXANDER: But why should a national government in a distant place that pays eight to ten percent of the bill tell a local community what to teach?

Mr. BRADEMAS: I agree with you, Governor. We're not fighting about that.

Gov. ALEXANDER: Well, then, we both oppose this bill.

Mr. BRADEMAS: As I said earlier, I'm strongly opposed to his bill. I thought I made that point clear.

Prof. KADEN: Mr. Cutler?

Mr. CUTLER: The federal government today—although the responsibility for education is on the states, it is beyond the means of the states to discharge that responsibility today, as a practical matter, and the federal government has picked up a large share of the financial stroke. That's a good thing. The problem is, when the federal government provides the funds, how hands-on should that provision be? Should it have conditions, mandatory conditions, attached to it? How deep should those conditions reach? The art of it is to do it in a fashion that doesn't appear at the local level to be hands-on to an excessive extent.

Prof. KADEN: Mr. Crim, you remember, part of this program was the application of competency tests. A large number of students in your district are not passing the test. Are you concerned about that?

Mr. CRIM: Absolutely.

Prof. KADEN: What can we do about it?

Mr. CRIM: I think that, in terms of state imposition or federal imposition, that we have to impose those standards in such a way that we don't give up on the children. We're getting into the business of sorting and selecting of people and not allowing people to elect themselves.

Prof. KADEN: Ms. Marshall? You're a lawyer in the town where Mr. Crim is the school superintendent, and some of the parents of those high school seniors who are having difficulty

on the tests come to you and ask you if there's anything they can do to avoid being denied their high school diploma.

MARGARET MARSHALL, attorney, Caspiar and Bok: Is there anything that distinguishes the parents? Are they from any particular group?

Prof. KADEN: There are a large number of minorities, and the failure rates in that poor urban school district are somewhat higher than in the state as a whole.

Ms. MARSHALL: This is a test which is being implemented, theoretically, to improve science and mathematic teaching, so the chances are there's a disparate group of young women in that group. And you've already told me that there are a large number of minorities. They're poor people. All of those are classes who are particularly and specifically protected constitutionally from unequal application of the laws to them.

Prof. KADEN: Mr. McCree, if you're the counsel to the school board against which this challenge is brought, can these tests be upset, or their results upset under the Fourteenth Amendment?

Mr. MCCREE: Oh, I'd move to dismiss the complaint. I don't see any offense to the equal protection clause in any of the respects that she's mentioned.

Prof. KADEN: Ms. Marshall?

Ms. MARSHALL: Let's remember what's happened here. The effect of the application of the test and the subsequent failure of the test by a group of children has meant that they have been denied a high school diploma, as I understand it. They will not be able to graduate. I think, in this society of mass public education and secondary education, it is well nigh impossible for any young American to obtain a job, any kind of employment, without a high school diploma. I believe that there is a claim, at least, if not the Fourteenth Amendment, because this is a federal statute, the Fifth Amendment, there's been a denial of equal protection here. If there's a disparate impact and I may an enormous proof problem, which we haven't even got into—

Prof. KADEN: But Mr. McCree says the different impact, the fact that the failure rate is different, doesn't get you very far under the Fourteenth Amendment.

Ms. MARSHALL: Well, he is partly correct and partly incorrect. I mean, it is not, I believe, an open-and-shut case, by any stretch of the imagination.

Prof. KADEN: Judge Wallace?

Judge WALLACE: Well, I think Ms. Marshall has a difficult row to hoe, because education is not a fundamental right, and I would look to some other constitutional principle. And the only one I can think of that's most interesting, as I see it, would be federalism. When the framers brought the Constitution together, they were afraid of power being developed into one area that could be misused. The Bill of Rights, as it came on later, wasn't in the minds of the framers, as I understand it, because they believed they were developing a type of government which would protect, and they did this by separating powers, and they did it horizontally, on the federal level, between the three independent branches, and they did it vertically between the federal government and the states, and the idea was that, as I understand it, through developing this type of structure, that rights would be protected.

Prof. KADEN: Governor Babbitt, should the courts, and particularly the Supreme Court, play a role in protecting your independence against the federal government?

Gov. BABBITT: The idea of the Supreme Court as a referee in a striped shirt at the 50-yard line between the contending forces of federal and state government, I think, has a lot of appeal. I read the cases as saying that the Supreme Court has pretty much walked off the field; that the referee has deserted us and said the federal government can win this ballgame, carry the ball, dictate the rules, and do whatever it wants. I'd love to see that Supreme Court justice back on the 50-yard line in a striped shirt.

Prof. KADEN: You'd like the Court to play more of a role in protecting you? Why?

Gov. BABBITT: Yes. Somehow, the structural values that Judge Wallace has talked about have sort of been set aside in kind of a rush to Washington, and I'll take any allies I can to sort of get back to mid-field.

Prof. KADEN: Governor Thornburgh, do you agree with that?

Gov. THORNBURGH: I think what Governor Alexander has said about what the average American thinks about the degree of control that various levels ought to have over essentials in his government as relating to education applies to a whole variety of other fields, and I think that it's up to those of us who are involved in the political process to state that case as strongly and firmly and as often as we can, to revitalize the notion that there's something more to the American federal system than just a federal government; that it is a system that involves states and localities as well.

Prof. KADEN: Governor Matheson, what's important about state governments?

Gov. MATHESON: I think the most important thing is the fact that states have matured, and I think that states are now prepared to reassume the responsibility which Madison intended we have. I differ just a little with Governor Babbitt about the intervention of the court. That's the last stage that I would like to see public policy settled. It seems to me that we ought to be able to address those problems more effectively by getting the players together and all recognizing we want to solve that problem.

Prof. KADEN: If we come to the last resort, Mr. Abrams, and you were representing these four governors, how would you persuade the Supreme Court that the Court had a role to protect them against Mr. Brademas or Senator Hatch?

FLOYD ABRAMS, attorney, Cahill, Gordon and Reindel: Our whole system of government, when we started and from that point of time to today, is based on a notion of federalism, which means division of responsibility between the states and the federal government. And what I'd say is all we're really saying is that there has to be some point, some line, over which Congress and the president can't go, and that when you get into an area so historically local as education and educational qualification, and the content of education, that that's well over the line.

Prof. KADEN: Mr. Cutler, one of the questions people ask in debates like this is what happened in our country that caused Madison to be so wrong?

Mr. CUTLER: What's happened is 200 years of history; of the growth of nation-states; of the growth of a world community in which you can only operate as a nation. The states, in a very true sense, have lost their sovereignty, and they are now useful elements of regional and local government.

Prof. KADEN: Senator Hatch, does it matter to the average family, to an individual in this country—

Sen. HATCH: Well, I think it really does.

Prof. KADEN:—how this comes out?

Sen. HATCH: I think it does. I think that since the federal government has intruded—it pays about 10 percent of the costs of education in this country. In other areas, I have to admit, with all due respect to Justice Stewart, and I think I can respect him in his decisions, but the Supreme Court has expanded the commerce clause and the general welfare clauses of the Constitution to embrace almost everything. The Supreme Court has done more to take away the rights of the states than any entity of government in existence today. And maybe that's rightly so in some of these instances like civil rights, where the states were not, are not and perhaps will not be doing what they should be doing in those areas, but I see in education a continual intrusion with a very small donation and a continual dictation of policies from people who literally may be captive of very strong special interest groups.

Prof. KADEN: Senator Moynihan? If Hamilton and Madison and Jefferson had been able to watch this debate or others like it, about the way power is distributed in this country between the nation and the states in the 1980s, what do you think their reaction would be?

Sen. MOYNIHAN: Mr. President, if Hamilton and Jefferson and Madison had heard this debate they would wonder had people forgotten altogether about the Northwest Ordinance of 1787, which even the Continental Congress managed to pass, and was the first educational statute in the United States. It took 50 years before any state started talking about compulsory education, and not even that.

Prof. KADEN: Judge Wald? Do you have any thoughts about that?

Judge PATRICIA WALD, U.S. Court of Appeals: It looks to me . . . yes. It looks to me

like every decade or so, you go through a new federalism, a renewed federalism, an old federalism; you redefine the relationships, and I think the real problems of federalism are in those.

Prof. KADEN: But what does that kind of federalism mean to us? I mean, if you had to explain it to a child.

Judge WALD: It means that we've been able to retain, basically, I think, the same kind of government that Hamilton, Jefferson and *The Federalist Papers* talked about; that each one of those entities is carrying on very traditional functions, but I don't think there's a single state in the Union that doesn't see itself and its people—don't see itself as a very distinct entity with its own tradition, with its own peculiar aura, as it were; in that sense, federalism is still with us.

Prof. KADEN: Mr. Graham, we started with you and Andrew and we'll end with you. Is the media doing what it can to explain what Justice Black called our federalism, that you've heard discussed here today?

Mr. GRAHAM: When I got into journalism, my first stories were the civil rights revolution in the deep South, and the massive resistance that was occurring across there, and the violence. And what was wrong with federalism then was that a lot of our governors were not the quality people they should have been; certainly our state supreme court justices were not—they'd abdicated their responsibility—a lot of our legislatures were malapportioned and were not what they should have been; and what's happened is that, as we've seen with the governors here today, and others that we know, the quality of state leadership is so much better now than it was in those days, that the situation is righting itself. It's all a part of a very complex thing. So, as we cover what's happening in the United States, we're reflecting a much stronger federalism; a much stronger balance.

Prof. KADEN: Perhaps that sums it up. If Madison and Hamilton and Jefferson were sitting up in the balcony, they might well be pleased with the little document that they created, that gives rise to some of the issues we discussed here today.

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Mr. FRIENDLY: Justice Stewart, on the way to this seminar, I asked all my friends, and every judge and lawyer I saw, what the Tenth Amendment to the Constitution was. And I've got to tell you that almost none of them knew. Yet, Thomas Jefferson called the Tenth Amendment the bedrock of the Constitution. Tell us what it says and why it's there.

Justice STEWART: Well, the Tenth Amendment makes clear that the government of the United States is a limited government with specific powers, and it provides that the powers not expressly delegated to the federal government nor prohibited to the states under the new Constitution are reserved to the states or to the people.

Mr. FRIENDLY: But if Thomas Jefferson said it was the bedrock, and people don't even know what it is today, what does that say about what's happened to the country?

Justice STEWART: Well, I think there's been a movement over 200 years of history toward the central government.

Mr. FRIENDLY: Why?

Justice STEWART: Well, because the United States is a power in a world, now, and has to speak with one voice, not as 50 separate governments, which they were, you know. The individual states had individually fought and won their freedom from the mother country. Great Britain, in the 18th Century, and they were 13 independent nations.

Mr. FRIENDLY: We really are one nation now, and the Constitution seems relevant on some things, the Bill of Rights particularly, but not so relevant on others.

Justice STEWART: Well, I think it is relevant to historically understand that, that the states were here as independent nations long before the federal government was here, and that the government, the federal government, is a government of limited and express and specific powers.

Mr. FRIENDLY: So that Mr. Jefferson might say that the Tenth Amendment being the bedrock still lives?

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Justice STEWART: I would think so.

Mr. FRIENDLY: Thank you, Justice Stewart.

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Mr. FRIENDLY: This is the 13th and final broadcast in our series, "The Constitution: That Delicate Balance," and its spirit is well summed-up with these words of hope, written almost 200 years ago: "Permit me, my fellow citizens, to close by remarking that there is no spirit of arrogance in the new federal Constitution. It addresses you with becoming modesty, admitting that it may contain errors. Let us give it a trial, and when experience has taught us its mistakes, the people whom it preserves, absolutely all powerful, can reform and amend them."

Those words were written in 1788 by Tench Coxe, a Philadelphia pamphleteer and member of the Continental Congress. His name is not exactly a household word in American history, and yet this plea for patience and fortitude and for hope and faith in a bold experiment is a poignant benediction for "The Constitution: That Delicate Balance."

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