The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment

Ralph A. Rossum

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol36/iss3/3

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment

RALPH A. ROSSUM*

TABLE OF CONTENTS

I. INTRODUCTION ...................................................................................................672
II. THE FOUNDERS' UNDERSTANDING ....................................................................674
   A. The Mode of Electing the Senate as a Means of Protecting the States as States ..................................................674
   B. The Mode of Electing the Senate as a Means of Partitioning Federal and State Powers ........................................680
   C. The Supreme Court to Play No Role inPreserving the Original Federal Design ..................................................682
III. THREE EXAMPLES FROM THE FIRST CONGRESS IN WHICH THE FOUNDERS' UNDERSTANDING IS PLAYED OUT IN PRACTICE ........................................................................688
   A. The Adoption of the Bill of Rights ........................................................................688
   B. The Judiciary Act of 1789....................................................................................690
   C. The First Bank Act............................................................................................694

* Henry Salvatori Professor of American Constitutionalism, Department of Government, Claremont McKenna College, and member of the Graduate Faculty, Claremont Graduate University. Ph.D. 1973, University of Chicago; M.A. 1971, University of Chicago; B.A. 1968, Concordia College. The appointment as a Visiting Scholar at the Liberty Fund, Inc., Indianapolis, Indiana, provided me the time and resources to undertake this and other projects. I also wish to thank Judge Susan A. Ehrlich of the Arizona Court of Appeals, George W. Carey of Georgetown University, Charles A. Lofgren of Claremont McKenna College, and James McClellan of the Institute of United States Studies at the University of London for providing valuable and much-appreciated comments on earlier drafts.
I. INTRODUCTION

The thesis of this Article can be stated briefly: The founding generation clearly understood that federalism would be protected primarily by the mode of electing the United States Senate. The adoption and ratification of the Seventeenth Amendment, providing for direct election of the Senate,\(^1\) changed all that. The Seventeenth Amendment was ultimately approved by the United States Congress and ratified by the states to make the Constitution more democratic. Progressives argued forcefully, persistently, and successfully that the democratic principle required the Senate to be elected directly by the people rather than indirectly through their state legislatures. The consequences of the ratification of the Seventeenth Amendment on federalism, however, went completely unexplored, and the people, in their desire to make the Constitution more democratic, inattentively abandoned what the Founders regarded as the crucial constitutional means for protecting the federal/state balance and the interests of the states as states.\(^2\)

1. The text of the Seventeenth Amendment is as follows:
   The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
   When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
   This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.
   U.S. CONST. amend. XVII.

2. The phrase, "the interests of the states as states," refers to their interests as political rather than merely geographical entities. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 454, at 441 (Boston, Hilliard, Gray & Co. 1833)
Following ratification of the Seventeenth Amendment, there was a rapid growth of the power of the national government, with the Congress enacting measures that adversely affected the states as states—measures that the Senate would never have approved previously. Initially, i.e., during the period from the amendment’s ratification in 1913 to NLRB v. Jones & Laughlin Steel Corp.\(^3\) in 1937, and then again since National League of Cities v. Usery\(^4\) in 1976, the United States Supreme Court’s frequent reaction to this congressional expansion of national power at the expense of the states was and has been to attempt to fill the gap created by the ratification of the Seventeenth Amendment and to protect federalism. It has done so by invalidating these congressional measures on the grounds that they violate the principles of dual federalism, go beyond the Court’s narrow construction of the commerce clause, or “commandeer” state officials to carry out certain federal mandates. In so doing, the Court has demonstrated its repeated failure to appreciate that the Seventeenth Amendment not only eliminated the primary structural support for federalism but, in so doing, altered the very meaning of federalism itself.

There is irony in all of this: An amendment, intended to promote democracy, even at the expense of federalism, has been undermined by an activist Court, intent on protecting federalism even at the expense of the democratic principle. The irony is heightened when it is recalled that federalism was originally protected both structurally and democratically—the Senate, after all, was elected by popularly-elected state legislatures. Today, federalism is protected neither structurally nor democratically—the ratification of the Seventeenth Amendment means that the fate of traditional state prerogatives depends entirely on either congressional sufferance or whether an occasional Court majority can be mustered.

Part II of this article explores how the Founders understood that the mode of electing the Senate (rather than reliance on the Supreme Court) would be the principal means not only for protecting the interests of the states as states but also for identifying the line demarcating federal from state powers. Part III provides three examples from the First Congress that illustrate how well the Founders’ reliance on the election of the Senate by state legislatures to protect the federal/state balance played out in practice.

---

(citing JAMES MADISON, VIRGINIA REPORT (1800)). See also Jay S. Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment, 91 Nw. U. L. Rev. 500, 547 (1996-97).

3. 301 U.S. 1 (1937).
Part IV shows how fully Chief Justice John Marshall appreciated the Founders' understanding that federalism was to be protected structurally and not judicially; he could construe Congress's enumerated powers broadly because he trusted that the Senate would be vigilant and not approve legislation that adversely affected the states as such. Part V examines the political forces that led to the adoption and ratification of the Seventeenth Amendment. Part VI reviews the subsequent congressional expansion of national power at the expense of the states, as well as the Court's sporadic attempts to fill the gap created by the Seventeenth Amendment and to protect "the original federal design." Part VII concludes with a brief consideration of the Supreme Court's recent and most blatant example of protecting a pre-Seventeenth Amendment understanding of federalism at the expense of the people's post-Seventeenth Amendment commitment to democracy: In City of Boerne v. Flores, the Supreme Court, in the name of protecting the "federal balance," struck down the Religious Freedom Restoration Act of 1993, passed unanimously by the United States House of Representatives and by a vote of ninety seven to three in the Senate, and enthusiastically signed into law by the President.

II. THE FOUNDERS' UNDERSTANDING

A. The Mode of Electing the Senate as a Means of Protecting the States as States

The Founders understood that federalism would be protected by the composition and manner of election of the Senate. On May 31, 1787, very early in the Constitutional Convention, the delegates rejected Resolution 5 of the Virginia Plan that proposed that the "second branch of the national legislature ought to be elected by those of the first," doing so by a vote of

6. By composition, I mean, in the words of Oliver Elsworth, "that in the second branch each state have an equal vote," resulting thereby in a "general government partly federal and partly national." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 474 (Max Farrand ed., 2d ed. 1937) [hereinafter RECORDS]. This, of course, is the description James Madison would apply to the new federal structure created by the Constitutional Convention in Federalist No. 39. See THE FEDERALIST No. 39 (James Madison). See also Todd J. Zywicki, Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals, 45 CLEV. ST. L. REV. 165, 176-79 (1997), for an excellent discussion of how bicameralism served to preserve the interests of the states as states. The focus of this Article is not on the composition of the Senate (or on how equal representation of the states and bicameralism advance the interests of federalism) but only on the manner by which the Senate is elected.
7. 1 RECORDS, supra note 6, at 61.
seven states "no," three states "yes." Instead on June 7, they accepted by a vote of ten states "yes," zero states "no," a motion by John Dickinson and seconded by Roger Sherman providing for the appointment of the Senate by the state legislatures. They were apparently persuaded by Dickinson's argument that the "sense of the States would be better collected through their Governments; than immediately from the people at large," and by George Mason's observation that election of the Senate by state legislatures would provide the states with "some means of defending themselves [against] encroachments of the [National Government]. In every other department we have studiously endeavored to provide for its self-defen[s]. Shall we leave the States alone unprovided with the means for this purpose?" Even when the delegates subsequently agreed on June 11 to some form of proportional representation in the Senate, they still remained firmly committed to the election of the Senate by the state legislatures.

On June 20, James Wilson, a passionate nationalist, warned his fellow delegates that "a jealousy would exist between the State Legislatures [and] the General Legislature." He observed

that the members of the former would have views [and] feelings very distinct in this respect from their constituents. A private citizen of a State is indifferent whether power be exercised by the [General] or State Legislatures, provided it be exercised most for his happiness. His representative has an interest in its

8. See 1 id.
9. See 1 id. at 156.
10. 1 id. at 150. See also Sherman's argument: "[T]he particular States would thus become interested in supporting the National [Government] and . . . a due harmony between the two Governments would be maintained." Id.
11. 1 id. at 155-56. In "Yates's Notes" for the same day, Mason is reported as saying: "[T]he second branch of the national legislature should flow from the legislature of each state, to prevent the encroachments on each other and to harmonize the whole." 1 id. at 157. Unavailing were Edmund Randolph's objection that state legislatures were marked by "the turbulence and follies of democracy" and Madison's animadversions that election by state legislatures was not "the best choice" because "[t]he great evils complained of were that the State Legislatures run into schemes of paper money . . . whenever solicited by the people, [and] sometimes without even the sanction of the people." 1 id. at 51, 154.
12. See 1 id. at 202. This decision was, of course, subsequently overturned on July 16 when the Convention accepted what is often called either the "Great Compromise" or the "Connecticut Compromise" and agreed that the states would be proportionately represented in the House of Representatives (based on population) and equally represented in the Senate (with each state having two senators). See 2 id. at 15-16.
14. 1 RECORDS, supra note 6, at 343-44.
On June 25, he continued his attack on the election of the Senate by state legislatures, charging that “the election of the [second] branch by the Legislatures, will introduce [and] cherish local interests [and] local prejudices.” Wilson’s attack, however, utterly failed, not because the delegates disputed his analysis but because they approved the outcome. They found persuasive Mason’s assertions that the states would need the “power of self-defen[s]e” and that “the only mode left of giving it to them, was by allowing them to appoint the [second] branch of the [National] Legislature” because they were committed to preserving the

15. 1 id. at 344.
16. 1 id. at 406.
18. 1 RECORDS, supra note 6, at 407. Roger Sherman had already made much the same argument on June 6: “If it were in view to abolish the State [Governments] the elections ought to be by the people. If the State [Governments] are to be continued, it is necessary in order to preserve harmony between the national [and] State [Governments] that the elections to the former [should] be made by the latter.” 1 id. at 133.
19. 1 id. at 407. It must be noted that other “modes” of self-defense were available as well; the three most important were the requirement that the Senate delegation from a state vote as a block, the requirement of rotation in office, and explicit provision for the instruction of senators by state legislatures. See ELAINE K. SWIFT, THE MAKING OF AN AMERICAN SENATE: RECONSTITUTIVE CHANGE IN CONGRESS, 1787-1841, at 39-45 (1996). As Bybee also points out, the Framers had persuasive reasons for rejecting these other modes. See Bybee, supra note 2, at 500. Concerning their rejection of block voting, Bybee notes that:

The reasons for approving per capita voting may have had more to do with the delegates’ practical experience than with a desire to undermine state representation. The Founders had a great deal of experience with divided caucuses, and even with caucuses that went unrepresented because of evenly divided votes. Per capita voting ensured that states would be represented, even if they were not represented consistently. It also helped assure that divided delegations would not abstain and frustrate action by the Senate at all. Id. at 514 (footnote omitted).

Moreover, the Founders may have assumed that per capitas voting would represent the states better, even if a state’s senators were divided. Since their elections were staggered, “they would represent different moods or political sentiments. Senators elected by shifting majorities in the state legislatures would accurately reflect the shifting political sentiments of the people.” Id.

Concerning recall, the Framers’ refusal to embrace this mode “reaffirmed their commitment to the six-year term. Had the Constitution granted states the recall power, then each succeeding legislature might select its own delegate to the Senate, perhaps making the Senate as subject to the winds of political change as the House.” Id. at 530.

And concerning instructions, “the right of instruction was mentioned frequently and was assumed always to exist.” Id. at 520. It did not require explicit authorization. As Rufus King declared in the Massachusetts State Ratifying Convention, “state legislatures, if they find their [senators] erring, can and will instruct them.” 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN

676
Constitutional Democracy
SAN DIEGO LAW REVIEW

states as political entities. Accordingly, on that day, the Convention reaffirmed its previous decision to elect the Senate by state legislatures by a vote of nine states "yes," two states "no."\textsuperscript{20}

The service rendered to federalism by the mode of electing the Senate was also repeatedly acknowledged and proclaimed during the ratification debates. Examples abound and are listed here in chronological order. In \textit{An Examination of the Constitution of the United States}, Tench Coxe, writing under the pseudonym of "An American Citizen" in Philadelphia's \textit{Independent Gazetteer} noted that the members of the Senate will "feel a considerable check from the constitutional powers of the state legislatures, whose rights they will not be disposed to infringe, since they are the bodies to which they owe their existence."\textsuperscript{21} In the Massachusetts Ratifying Convention, Fisher Ames described senators elected by their state legislatures as "ambassadors of the states,"\textsuperscript{22} and Rufus King declared that "[t]he senators . . . will have a powerful check in those men [i.e., those state legislators] who wish for their seats, who will watch their whole conduct in

\begin{footnotes}
\item 1787, at 47 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888) [hereinafter ELLIOT'S DEBATES]. Likewise, as Alexander Hamilton declared in the New York State Ratifying Convention, the people "have it in their power to instruct their representatives; and the state legislatures, which appoint the senators, may enjoin it also upon them." \textit{Id.} at 252. And, as Bybee details, state legislatures not only were assumed to have the power to instruct their senators, but immediately began to exercise that power as well: State legislatures instructed their senators, inter alia, to conduct the Senate's business in public (Virginia); repeal the Sedition Act (Kentucky), and recharter the Bank of the United States (Pennsylvania and Virginia). They also issued instructions on the compensation of members of Congress (Massachusetts), the construction of bridges (Ohio and Pennsylvania), cod fishing and whaling (Massachusetts), pensions (Massachusetts), futures (Mississippi), free coinage of silver (Mississippi), the admission of Kansas, California, West Virginia, and New Mexico as states (Virginia, Tennessee, Vermont), slavery (Vermont), presidential censure (Maine, New Jersey, and Ohio), and the Eleventh and Twelfth Amendments (Vermont, Massachusetts, and Virginia). \textit{See} Bybee, \textit{supra} note 2, at 524-26.

\item 20. \textit{See} 1 RECORDS, \textit{supra} note 6, at 408. The importance of having the state legislatures elect the Senate appears, in fact, to have motivated some delegates ultimately to favor equal representation of the states in the Senate. \textit{See} 1 id. at 487-88.


\item 22. 2 ELLIOT'S DEBATES, \textit{supra} note 19, at 46. Interestingly enough, certain members of the House of Representatives were still using similar language as late as 1888: The states as "sovereigns [are] . . . entitled . . . to have a separate branch of Congress to which they could . . . send their ambassadors." \textit{H.R. Rep. No.} 1456, at 4 (1888).
\end{footnotes}
the general government, and will give the alarm in case of misbehavior.”

In *Federalist No. 45*, Madison declared that, because “[t]he Senate will be elected absolutely and exclusively by the State Legislatures,” it “will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which [he insisted] is much more likely to beget a disposition too obsequious, than too overbearing towards them.”

In *Federalist No. 46*, he further noted that, if the House of Representatives were to sponsor legislation that encroached on the authority of the states, “A few representatives of the people, would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.” The Senate, he assured his readers, would be “disinclined to invade the rights of the individual States, or the prerogatives of their governments.”

In *Federalist No. 59*, Alexander Hamilton likewise emphasized that the appointment of senators by state legislatures secured “a place in the organization of the National Government” for the “States, in their political capacities.” He continued:

So far as [the mode of electing the Senate]... may expose the Union to the possibility of injury from the State Legislatures, it is an evil; but it is an evil, which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the National Government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard, which they will enjoy under this provision.

Finally, in *Federalist No. 62*, Madison praised “the appointment of senators by state legislatures” as not only “the most congenial with the public opinion” but also “giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former.”

During the New York Ratifying Convention, Hamilton explicitly connected the mode of electing the Senate with the protection of the interests of the states as states.

[When you take a view of all the circumstances which have been recited, you will certainly see that the senators will constantly look up to the state

---

23. Id. at 47.
26. Id. at 319.
28. Id. at 400-01.
governments with an eye of dependence and affection. If they are ambitious to continue in office, they will make every prudent arrangement for this purpose, and, whatever may be their private sentiments or politics, they will be convinced that the surest means of obtaining a reélection will be a uniform attachment to the interests of their several states.

He also declared: "Sir, the senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states. Will not this form a powerful check?" Finally, in the North Carolina Ratifying Convention, James Iredell also noted,

"The manner in which our Senate is to be chosen gives us an additional security. . . . There is every probability that men elected in this manner will, in general, do their duty faithfully. It may be expected, therefore, that they will coöperate in every laudable act, but strenuously resist those of a contrary nature."

This same argument was also made repeatedly in the early days of the new republic. For example, in a July 1789 letter to John Adams, Roger Sherman emphasized that "[t]he senators being eligible by the legislatures of the several states, and dependent on them for reélection, will be vigilant in supporting their rights against infringement by the legislative or executive of the United States." In his 1803 edition of Blackstone's Commentaries, St. George Tucker declared that if a senator abuses the confidence of "the individual state which he represents," he "will be sure to be displaced." James Kent, in his Commentaries on American Law, noted that "[t]he election of the senate by the state legislatures, is also a

30. 2 ELLIOT'S DEBATES, supra note 19, at 306.
31. Id. at 317-18.
32. Id. at 40. See also James Iredell, Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention, in Pamphlets on the Constitution of the United States (Paul Leicester Ford ed., 1888), in which Iredell states:

They [Senators] have no permanent interest as a body to detach them from the general welfare, since six years is the utmost period of their existence, unless their respective legislatures are sufficiently pleased with their conduct to re-elect them. This power of re-election is itself a great check upon abuse, because if they have ambition to continue [as] members of the Senate they can only gratify this ambition by acting agreeably to the opinion of their constituents.

Id. at 340.
33. 2 THE FOUNDERS' CONSTITUTION 232 (Philip B. Kurland & Ralph Lerner eds., 1987).
recognition of their separate and independent existence, and renders them absolutely essential to the operation of the national government."35 And Joseph Story, in his Commentaries on the Constitution of the United States, observed that one of the “main grounds” for the mode of appointing the Senate was that it “would introduce a powerful check upon rash legislation” and “would increase public confidence by securing the national government from undue encroachments on the powers of the states.”36

B. The Mode of Electing the Senate as a Means of Partitioning Federal and State Powers

The Founders favored election of the Senate by state legislatures not simply because it was, as Madison put it in Federalist No. 62, “the most congenial with the public opinion”37 and not simply because it provided, in Hamilton’s words from Federalist No. 59, incentives for senators to remain vigilant in their protection of the states in their political capacities.38 They also favored this mode of election because it helped them sidestep what Madison described in Federalist No. 37 as the “arduous” task of “marking the proper line of partition, between the authority of the general, and that of the State Governments.”39

An episode at the very outset of the Convention is most telling on this point. On May 31, the Convention, meeting as a committee of the whole, had just taken up Resolution 6 of the Virginia Plan that proposed, inter alia, that “the National Legislature ought . . . [to be empowered to] legislate in all cases to which the separate States were incompetent.”40 Charles Pinckney and John Rutledge “objected to the vagueness of the term incompetent, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition.”41 While Edmund Randolph quickly “disclaimed any intention to give indefinite powers to the national Legislature,”42 Madison took a different tack—one he would repeat in The Federalist. He expressed his “doubts concerning [the] practicability” of “an enumeration and definition of the powers necessary to be exercised by

---

35. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 225 (New York, 3d ed. 1826).
36. 2 STORY, supra note 2, § 702, at 183.
40. 1 RECORDS, supra note 6, at 21.
41. 1 id. at 53.
42. 1 id.
the national Legislature." Despite coming into the Convention with a "strong bias in favor of an enumeration," he owned that, during the weeks before a quorum gathered in Philadelphia (during which he and his fellow Virginia delegates drafted the Virginia Plan, including the language in Resolution 6), "his doubts had become stronger." He declared that he would "shrink from nothing," including, he implied, abandoning any attempt to enumerate the specific powers of the national government, "which should be found essential to such a form of [Government] as would provide for the safety, liberty, and happiness of the Community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to." Madison would later elaborate on this same "means-ends" argument in Federalist No. 41, when he declared that "[i]t is vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." On May 31, Madison merely foreshadowed the argument he would later develop more fully in Federalist No. 51, viz., that the power of the new federal government was to be controlled, not through an exact

43. 1 id.
44. 1 id.
45. 1 id. Madison appreciated the difficulty of attempting to put into words a precise enumeration. As he argued in Federalist No. 37:

Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment. . . . Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.

See also Alexander Hamilton's similar statements in Federalist No. 31, in which he describes as "maxims in ethics and politics . . . that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; [and] that there ought to be no limitation of a power destined to effect a purpose, which is itself incapable of limitation." THE FEDERALIST No. 31, at 194 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
enumeration, i.e., through the use of "parchment barriers," but "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Nonetheless, his words were obviously reassuring, for the Convention voted at the conclusion of his speech to accept that portion of Resolution 6 by a vote of nine states "yes," one state "divided."

The Convention apparently shared Madison's doubts about the "practicality" of partitioning power between the federal government and the states through an enumeration of the powers of the former. Spending almost no time debating what specific powers the federal government should have, it focused instead and almost exclusively on the question of constitutional structure. Not even when the Committee of Detail created out of whole cloth what ultimately became Article I, Section 8, did the Convention systematically scrutinize the powers enumerated therein; it did not even object to the proposed Necessary and Proper Clause. The conclusion is clear: Rather than attempt to draw precise lines between the powers of the federal and state governments, the Founders preferred to rely instead on such structural arrangements as the election of the Senate by the state legislatures to ensure that the vast powers they provided to the national government would not be abused and that the federal design would be preserved.

C. The Supreme Court to Play No Role in Preserving the Original Federal Design

The Founders drafted a Constitution that protected the interests of the
states as states both structurally and democratically. They clearly did not intend the Supreme Court to protect the original federal design or to interfere with Congress's decision of where to draw the line between federal and state powers.\textsuperscript{52}

Just how modest were their designs for the federal judiciary on this matter (or on any other as well) can be appreciated by simply noting the placement, brevity, and generality of the judicial article. To begin with, Article III, establishing the federal judiciary, follows Article I, establishing the legislative branch, and Article II, establishing the executive branch. By so arranging the articles, the Framers addressed each branch, in the words of James Wilson, a member of the Constitutional Convention and an original justice on the Supreme Court, "as its greatness deserves to be considered."\textsuperscript{53} Further, Article III is only about a sixth as long as the legislative article, and only about a third as long as the executive article. Moreover, Article I specifies in great detail the qualifications of representatives and senators (including age and citizenship requirements), the sizes of the two houses of Congress, the procedures they must follow, and the powers they are authorized or prohibited to exercise. Article II is likewise quite detailed in its discussion of the president's qualifications, mode of appointment, powers, and responsibilities. By contrast, Article III merely vests the judicial power of the United States in one Supreme Court of unspecified size and in "such inferior Courts as the Congress may from time to time ordain and establish."\textsuperscript{54} Article III outlines no procedures the courts are obliged to follow, and it imposes no qualifications on judges, not even the requirement of citizenship.\textsuperscript{55}

More specific evidence that the Founders did not expect the Court to protect federalism is also available. Thus, the Framers left it up to Congress itself to put, as it were, flesh on the bare bones of the judicial article. Under Article III, it would have been possible for Congress to have limited the entire federal judiciary to a Supreme Court consisting only of a Chief Justice\textsuperscript{56} and possessing only original jurisdiction, i.e., jurisdiction in

\begin{footnotes}
\item[52] See Brooks, supra note 17, at 197-98.
\item[54] U.S. Const. art. III, § 1.
\item[56] See U.S. Const. art. I, §3, cl. 6 (requiring the Chief Justice to preside in the Senate in cases of the impeachment of the President).
\end{footnotes}
“cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”

If the Framers had seriously contemplated using the Court as a means of protecting the “residuary sovereignty” of the states from congressional encroachments, it is highly unlikely that they would have put “the fox in charge of the henhouse”; put another way, it is highly unlikely that they would have given Congress such a free hand in creating and shaping the very body that was thereafter to hold it in check.

Additionally, the Framers understood that drawing a line between federal and state powers involved prudential considerations beyond the Court’s legal capacity to pass judgment. They understood that, to the extent that the Constitution authorized the Court to exercise the power of judicial review, it was only in those cases in which the popular branches had acted, in the words of Federalist No. 78, “contrary to the manifest tenor of the constitution.” The Court was not to invalidate congressional measures in close cases. As James Wilson, a vigorous defender of judicial review, acknowledged in the Constitutional Convention: “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”

57. U.S. CONST. art. III, §2, cl. 2.
58. Several delegates to the Convention clearly believed that the Court should have the power of judicial review. [Governor] Morris, for one, observed that the judiciary should not “be bound to say that a direct violation of the Constitution was law.” 2 RECORDS, supra note 6, at 299. Luther Martin, for another, argued against a proposed Council of Revision on the grounds that “the Constitutionality of laws... will come before the Judges in their proper official character. In this character they have a negative on the laws.” 2 id. at 76. See also 2 id. at 78 (reporting Gerry’s comments). The problem with these statements, however, is that they imply neither a general power to expound the Constitution nor an obligation on the part of the other branches to regard a judicial decision on the constitutionality of their actions as binding. Moreover, statements were also made by other Convention delegates unequivocally rejecting judicial review. Thus, for example, John Mercer “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontro[ll]able.” 2 id. at 298. So, too, did Dickinson, who argued that, “as to the power of the Judges to set aside the law... no such power ought to exist.” 2 id. at 299. See also GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 47-48 (1989) (concluding, by proceeding “section by section” through the Constitution, that the Constitution tends toward legislative supremacy and that judicial review is highly suspect; and noting the “complete silence in the Constitution about judicial review,” wondering if it is “likely... that judicial review was indeed anticipated, when nothing was said about it, considering the care with which [for example] executive review was provided for.”). See generally Ralph A. Rossum, The Least Dangerous Branch?, in THE AMERICAN EXPERIMENT: ESSAYS ON THE THEORY AND PRACTICE OF LIBERTY 241-58 (Peter Augustine Lawler & Robert Martin Schaefer eds., 1994).
60. See Rossum, supra note 13, at 133-34.
61. 2 RECORDS, supra note 6, at 73.
Rather, as Hamilton makes clear in *Federalist No. 78*, the Court was to invalidate measures only in cases in which Congress’s disregard for “certain specified exceptions to the legislative authority” was akin to its passage of a bill of attainder or an ex post facto law. Decisions by Congress regarding where federal power ends and state power begins were of a different character; they did not implicate “specified exceptions” to Congress’s legislative authority but rather merely involved prudential judgments, agreed to by a Senate elected by state legislatures, concerning the outer reaches of delegated congressional powers. As a consequence, these decisions could never be held unconstitutional by the Court, because they never could be regarded as clearly contrary to the Constitution’s “manifest tenor.” Hamilton’s discussion in *Federalist No. 33* of the Necessary and Proper Clause, regarded by many Anti-Federalists as a source of unlimited power for Congress, is most instructive in this regard, as he did not so much as allude to the Supreme Court when he answered his own question of “who is to judge the necessity and propriety of the laws to be passed for executing the powers of the Union?” For Hamilton, Congress was to judge “in the first instance of the proper exercise of its powers; and its constituents [and for the Senate, that meant the state legislatures] in the last.” If Congress were to use the Necessary and Proper Clause to “overpass the just bounds of its authority, and make a tyrannical use of its powers,” Hamilton argued that “the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.” Again, he made no reference to the Supreme Court exercising judicial review to negate such congressional actions.

Finally, the Framers did not intend to allow the Supreme Court to

---

63. U.S. CONST. art. I, §8, cl. 18. “Congress shall have power... [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.” *Id.*
65. *Id.*
66. *Id.* As Hamilton made clear in both *Federalist No. 59* and during the New York Ratifying Convention, one way the people could redress the injury caused by congressional infringement on the residuary sovereignty of the States was by electing state legislators who would hold senators responsible for this infringement. *See The Federalist No. 59* (Alexander Hamilton); 2 Elliot’s Debates, *supra* note 19, at 306, 317-18.
interfere with the Congress’s decision of where to draw the line between federal and state powers because they wanted the people to have maximum flexibility to draw the line where they wished. They recognized, as Madison argued in Federalist No. 46, that the people might “in [the] future become more partial to the federal than to the State governments . . . . [a]nd in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”

They were confident that such a “change [could] only result from such manifest and irresistible proofs of a better administration [by the federal government], as will overcome all [the people’s] antecedent propensities,” nevertheless, if such a change of public attitude did come about, they wanted to accommodate the people’s wishes to draw the line between federal and state power where their direct representatives in the House and indirect representatives in the Senate wanted them, not where the Supreme Court might determine.

The likelihood that the Court would constitute much of a check on federal encroachment of state sovereignty was, of course, never great. As the Anti-Federalist Brutus observed:

> Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the

---


68. Id. But see Federalist No. 39, in which Madison seems to argue to the contrary. He speaks there of a “tribunal” that is to resolve “controversies relating to the boundary between the two jurisdictions.” THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961). He argues that the proposed Government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

Id. at 256-57. It is not at all clear, however, that the “tribunal” to which Madison was referring was not the Senate. See George W. Carey, in Defense of the Constitution 104-05 (1995) (arguing that “Madison looked upon the disputes surrounding state-national relations as primarily political issues to be settled through distinctly political, not judicial . . . processes.”)
courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.

Nonetheless, as the Framers repeatedly emphasized, if the Court were ever to interfere with where the political process drew the line between federal and state powers, the Constitution provided the Congress with "ample authority to make such exceptions [to the Court's appellate jurisdiction] and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." 70


70. THE FEDERALIST NO. 80, at 541 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted). Article III, Section 2, Clause 2 of the Constitution placed the Court's appellate jurisdiction under the complete control of the Congress. Therefore, as Hamilton declared, "If some partial inconveniences should appear to be connected with the incorporation of any of [the powers of the judiciary] into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." Id. Also see Hamilton's argument in Federalist No. 81 at 552:

To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

THE FEDERALIST NO. 81, at 552 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In the Virginia Ratifying Convention, John Marshall, later the author of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), made very much the same argument: "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 Elliot's Debates, supra note 19, at 560. In the Pennsylvania Ratifying Convention, the only other convention in which the Exceptions Clause was specifically discussed, Wilson, chairman of the Federal Convention's Committee of Detail, likewise noted that if the Court's powers under its appellate jurisdiction "shall be attended with inconvenience, the Congress can alter them as soon as discovered." 1 PENNSYLVANIA AND THE FEDERAL CONSTITUTION 359 (John Bach McMaster & Frederick D. Stone eds., Da Capo Press 1970) (1888). See RALPH ROSSUM, CONGRESSIONAL CONTROL OF THE JUDICIARY: THE ARTICLE III OPTION (1988); Ralph Rossum, Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause, 24 WM. & MARY L. REV. 385 (1983).
Three examples from the First Congress illustrate well how the Founders’ expectation that the election of the Senate by state legislatures would protect the federal/state balance played out in practice. They involve the adoption of the Bill of Rights, the passage of the Judiciary Act of 1789, and the passage of the act chartering the first Bank of the United States.

A. The Adoption of the Bill of Rights

On June 8, 1789, James Madison proposed to the House of Representatives a series of amendments to the Constitution, many of which eventually became part of what we call the Bill of Rights. One of the very few of his proposed amendments that was ultimately rejected by the Congress provided that “[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” During the debate on this provision, Representative Thomas Tudor Tucker, an Anti-Federalist from South Carolina, argued for its defeat; he observed that, while it was offered as an amendment to the Constitution, “it goes only to the alteration of the constitutions of particular states.” He argued that “it will be much better... to leave the state governments to themselves, and not to interfere with them more than we already do, and that is thought by many to be rather too much.” He therefore moved “to strike out these words.” Madison defended his proposal, declaring that he “[c]onceived this to be the most valuable amendment on the whole list; if there was any reason to restrain the government of the United States from infringing on these essential rights, it was equally necessary that they should be secured against the state governments.” By a voice vote, Tucker’s motion was rejected, and Madison’s limitation of state governments made its way into the House Resolution and Articles of Amendment, which were approved on August

---

71. See generally ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).
73. Id. at 188.
74. Id.
75. Id.
76. Id. at 188-89. In truth, given his “extended republic” argument in Federalist No. 10, Madison should have said that it was even more necessary that these rights should be secured against the States. See generally THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed. 1961).
24 and thereafter transmitted to the Senate for its consideration.\textsuperscript{77}

Madison's proposed amendment easily passed the House, but it was defeated in the Senate. While no Senate debates exist because the Senate met in secret,\textsuperscript{78} we do know that the Senate "disagreed" to this particular provision on September 7.\textsuperscript{79} In a letter to Patrick Henry, Senator William Grayson of Virginia suggested that this was because "this disgusted the Senate."\textsuperscript{80} In short, the Senate acted to protect the interests of the states as states.\textsuperscript{81} Madison bitterly complained to Edmund Pendleton that the Senate's action struck at one of "the most salutary articles."\textsuperscript{82} Madison's disappointment that the Senate seemed interested only in protecting the interests of the states as political entities was possibly assuaged, however, by his gratitude for what the Senate also rejected. While it refused to assent to his proposed amendment that would have altered the constitutions of the individual states, it also refused to assent to amendments that would have altered the very structure of the Constitution itself. It rejected, for example, proposed Anti-Federalist amendments that would have required that any treaty "ceding, contracting, restraining or suspending the territorial rights or claims of the United States, or any of them or their, or any of their rights or claims to fishing in the American Seas, or navigating the

\textsuperscript{77}. See \textit{Creating the Bill of Rights, supra} note 72, at 37-41.
\textsuperscript{78}. See \textit{id.} at xix.
\textsuperscript{79}. See \textit{id.} at 41 n.19.
\textsuperscript{80}. \textit{Id.} at 300.
\textsuperscript{81}. See \textit{George Anastaplo, The Constitutionalist: Notes on the First Amendment} (1971). The author states:

The Senate's constitutional function, then, is to insist upon protecting state sovereignty and power, even against demands that that power be sacrificed to what is declared to be a good cause. This function was performed (with the good effects and results I have suggested) when the Senate refused to accept the amendment limiting the states. We cannot claim, the Founders would concede, that all these particular effects were foreseen; but we did foresee and plan that such effects would result, and we left it to the working of self-interest to contribute to the achievement of the desirable results.
\textit{Id.} at 174.
\textsuperscript{82}. \textit{Creating the Bill of Rights, supra} note 72, at 296. Fisher Ames wrote that "[t]he Amendments too have been amended by the Senate, [and] many in our house, Mr. Madison, in particular, thinks, that they have lost much of their sedative Virtue by the alteration." \textit{Id.} at 297 (letter from Fisher Ames to Caleb Strong, Sept. 15, 1789). Senator Payne Wingate wrote that "[a]s to amendments to the Constitution Madison says he had rather have none than those agreed to by the Senate." \textit{Id.} (letter from Paine Wingate to John Landgon, Sept. 17, 1789). Not all Federalist House members were disappointed with the Senate's actions. Roger Sherman thought the Senate had "altered for the Better" the House's proposals. \textit{Id.} (letter from Roger Sherman to Samuel Huntington, Sept. 17, 1789).
American Rivers” be approved by “three fourths of the whole number of the members of both Houses” and that would have required that any navigation law or law regulating commerce be passed by “two thirds of the members present in both Houses.” In short, the Senate acted to preserve the original federal/state balance, neither agreeing to further restrictions on the states’ “residuary sovereignty” nor embracing measures that would have weakened the federal government.

B. The Judiciary Act of 1789

The passage of the Judiciary Act of 1789 also demonstrates that the Founders’ faith that the mode of electing the Senate would protect the original federal design was not misplaced. While Article III of the Constitution vested the judicial power of the United States in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” provided that federal judges should hold their offices during good behavior, and outlined the kinds of jurisdiction the federal courts could entertain, it was not “self-executing” and needed “legislation to bring it to life.” That legislation was the Judiciary Act of 1789, which, interestingly, was crafted almost exclusively by the Senate. On April 7, 1789, just one day after the first Senate had a quorum to organize itself, it created a committee “to bring in a bill for organizing the Judiciary of the United States.” Under the leadership of Oliver Ellsworth that committee completed a detailed draft of the proposed

83. Id. at 44.
85. See id.
86. See U.S. CONST. art. III, § 2.
88. As Wilfred J. Ritz writes:
By a decision process that is unknown, the new Senate undertook as its first order of business the formidable task of constructing an act that would establish the third branch of government, the judiciary. This division of labor was apparently agreeable to the House of Representatives, but we do not know how this agreement was negotiated.

90. Wythe Holt states: Ellsworth clearly deserves the encomiums he has received as the father of
legislation by late May, which was readily approved at the committee level on June 12 and by the full Senate on July 17.91 The House thereupon overwhelmingly approved the Senate bill with "no material alterations"92 on September 17 and President George Washington signed it into law on September 24.

What the Senate proposed, and the House readily accepted, was the following: There would be a Supreme Court—consisting of a Chief Justice and five Associate Justices—with power, under section 25, to hear appeals whenever the highest state court having jurisdiction of the case ruled against the constitutionality of a federal law or treaty, in favor of the validity of a state act that had been challenged as contrary to the Constitution or federal law, or against a right or privilege claimed under the Constitution or federal law.

The Senate also exercised the Congress's constitutional option to establish a system of inferior federal courts. As Paul Bator notes, it did so principally because it believed an effective maritime commerce (essential to the new nation) needed a dependable body of admiralty and maritime law93 and that the most reliable method to assure its development would be
to entrust it to a new set of federal courts. It also did so because at least one state, Virginia, had adopted legislation prohibiting its judges from executing federal functions. As Senator Caleb Strong noted:

"[T]he State of Virginia by a Law passed since their Adoption of the Constitution, have prohibited their Officers from holding Offices under the United States, and their Courts from having Jurisdiction of Causes arising under the Laws of the Union; by such Laws every State would be able to defeat the Provisions of Congress if the Judiciary powers of the [General] Government were directed to be exercised by the State Courts."

Thus, the Senate proposed the creation of a federal district court with one judge in each state; however, attentive not only to the needs of the "[General] Government" but also to the interests of the states; it also proposed to limit the jurisdiction of these federal district courts to admiralty cases, petty criminal offenses, and revenue collection, i.e., "to areas where the state courts had never had jurisdiction or could not appropriately take jurisdiction," and to allow state courts to have jurisdiction over many areas of potential federal jurisdiction, including most cases arising under the Constitution, federal laws, and treaties.

To avoid the need to create a strong federal district court with broad jurisdiction in each state, the Senate also proposed the creation of circuit courts that would hear cases in the three circuits into which the country would be divided. The circuit courts, consisting of two Supreme Court justices who literally would ride the circuit and the district judge of the district where they were sitting, would have some appellate jurisdiction over the district courts, thus making them "traveling miniature Supreme Court[s]." They would also have original jurisdiction over all federal crimes, over cases between foreign parties and citizens, or between citizens of different states. With greater jurisdiction, territorial reach, and prestige than the district courts, they would bring federal judicial power into all of

---

Even those opposed to federal district courts in general conceded the need for district courts with admiralty jurisdiction. The important concession of the need for federal trial courts to hear at least admiralty cases opened the door for somewhat broader jurisdiction, since it effectively surrendered the argument over the expense of federal district courts.

Id. (footnote omitted).

94. They recognized that admiralty jurisdiction had international ramifications and that uncontrolled state admiralty courts hearing prize disputes had already generated interstate and international resentment. See Holt, supra note 88, at 1427-30.

95. 4 Documentary History of the Supreme Court of the United States, 1789-1800: Organizing the Federal Judiciary 395-96 (Maeva Marcus et al. eds., 1992) (footnote omitted) [hereinafter Documentary History of the Supreme Court].

96. Bourguignon, supra note 89, at 679.

97. As Henry Bourguignon has put it, "Federal district court jurisdiction, therefore, consisted of precisely charted islands in the vast sea of state court jurisdiction." Id. at 682.

98. Id. at 669.
the states. In deference to the states, the Senate also provided in section 34—what has come to be known as the Rules of Decision Act—that "[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." In a further nod to the states, the Senate included a $500 jurisdictional minimum for the circuit court’s diversity jurisdiction, thus leaving most cases in state courts. Finally, the Senate limited appeals from the circuit courts to the Supreme Court to legal issues only (the sole mode of appeal it provided was the writ of error, which prevented issues of fact resolved by juries from being re-examined), and it subjected even those issues to a $2000 jurisdictional minimum.

Much of what the Senate proposed in the Judiciary Act of 1789 was intended to avoid offending state sensibilities. Ellsworth summed it up this way in a letter to Richard Law once the Senate had completed its work:

To annex to State Courts jurisdictions which they had not before, as of admiralty cases, [and] perhaps of offen[s]es against the United States, would be constituting the Judges of them, [pro tanto], federal Judges, [and] of course they would continue such during good behavi[or] [and] on fixed sal[a]ries, which in many cases, would ill[ ] comporte with their present tenures of office. Besides if the State Courts as such could take cognizance of those offen[s]es, it might not be safe for the general[] government to put the trial [and] punishment of them entirely out of its own hands. One federal Judge at least, resident in each State, appears unavoidable. And, without creating any more, or much enhancing the expen[s]e, there may be circuit courts, which would give system to the department, uniformity to the proceedings, settle many cases in the States that would otherwise go to the Supreme Court, [and] provide for the higher grade of offen[s]es. Without this arrangement there must be many appeals or writs of error from the supreme courts of the States, which by placing them in a Subordinate s[]ituation, [and] [s]ubjecting their decis[]ions to frequent reversals, would probably more hurt their feelings [and] their influence, than to divide the ground with them at first [and] leave it optional with the parties entitled to federal Jurisdiction, where the causes are of considerable magnitude to take their remedy in which line of courts they pleased.

Henry Bourguignon has written that "[t]he principles of federalism permeated the Judiciary Act of 1789." He is entirely correct. The Senate went out of its way to protect the original federal design and the interests of the states as states. Senator Richard Henry Lee, an Anti-Federalist from

99. 1 Stat. 92 (1789).
100. 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 495 (letter from Oliver Ellsworth to Richard Law, Aug. 4, 1789).
101. Bourguignon, supra note 89, at 700.
Virginia, was able to write to Patrick Henry that, "So far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out free from those vexations and abuses that might have been warranted by the terms of the constitution." This accommodation, however, infuriated James Madison. Madison, whose bid to use the Bill of Rights to improve state constitutions was frustrated by the Senate when it rejected his proposed amendment mandating the states to protect rights of conscience, free press, and trial by jury, was again frustrated by the Senate’s solicitous regard for the states. He complained in a letter to Edmund Pendleton that the Judiciary Act was “defective both in its general structure, and many of its particular regulations.”

C. The First Bank Act

The third example, the passage of the act chartering the first Bank of the United States, also shows the founding generation’s appreciation for the way in which the mode of electing the Senate protected state interests. On December 14, 1790, Secretary of the Treasury Alexander Hamilton transmitted a report to the House of Representatives proposing the creation of a National Bank, describing it as “an institution of primary importance to the prosperous administration of the [new nation’s] finances.” Hamilton’s report was a response to a House order that he detail “such further provision as may, in his opinion, be necessary for establishing the public credit.” Hamilton’s report focused on what he called “[c]onsiderations of public advantage.” In it, he reviewed the “principal advantages of a bank,” addressed its

---


105. Id.

106. Id. at 29.

107. Id. at 16.
“disadvantages, real or supposed,” discussed the relation of the proposed bank to the three banks then in existence in the United States (the Bank of North America, originally established by Congress under the Articles of Confederation but subsequently chartered by Pennsylvania, the Bank of New York, and the Bank of Massachusetts), outlined “the principles upon which a national bank ought to be organized,” and spelled out twenty-four specific provisions for its operation. Hamilton's report was devoid of any constitutional arguments addressing Congress's power under the Constitution to charter such a bank. It may well be, however, that he thought it obvious that Congress had this power. This was the view of Congressman John Laurance, a Federalist from New York, who would later argue on the floor of the House: “Under the late confederation,... the Bank of North America[] was instituted. He presumed that it would not be controverted, that the present government is vested with powers equal to those of the late confederation.”

On December 23, the House delivered a copy of Hamilton's report to the Senate, which took the lead and quickly passed a bill incorporating the Bank of the United States on January 20, 1791, by a vote of sixteen to six. While the Senate deliberations were not open to the public, its journals reveal that most of the Senate debate centered on the length of the term of the Bank's incorporation, an issue that Hamilton had not addressed. Motions to limit its term of incorporation to seven or ten years were rejected; so, too, was a motion to extend it all the way to 1815. Ultimately, the Senate agreed to a twenty-year term, with the Bank's charter set to expire on March 4, 1811.

On January 21, the bill was referred to the House, which began its consideration of the Bank on February 1. On February 8, the House likewise approved the measure but only after a heated debate, led by James Madison, over its constitutionality. Madison denied that the

108. Id. at 18.
110. Id. at 28.
111. See id. at 28-33.
112. Id. at 38.
113. See id. at 36.
114. See id.
115. See id. at 36-37.
116. See id. at 39-45, 82-85. Much speculation has arisen as to Madison's opposition to the Bank of the United States. His opposition, after all, seems inconsistent with his views on the Bill of Rights and the Judiciary Act. See CAREY, supra note 68, at
Necessary and Proper Clause could be read so broadly as to justify incorporating the Bank.

The doctrine of implication is always a tender one. The danger of it has been felt in other Governments. The delicacy was felt in the adoption of our own; the danger may also be felt, if we do not keep close to our chartered authorities.

Mark the reasoning on which the validity of the bill depends. To borrow money is made the end, and the accumulation of capital implied as the means. The accumulation of capital is, then, the end, and a bank implied as the means. The bank is then the end, and a charter of incorporation . . . implied as the means.

Supporters of the Bank Act responded to Madison in several different ways. Several members quoted the Preamble of the Constitution and defended the Bank as a means for achieving the "common defense and general welfare."

Fisher Ames argued that the Bank was constitutional even under Madison's narrow reading of the Necessary and Proper Clause. "The most orderly governments in Europe have banks. They are considered as indispensably necessary; these examples are not to be supposed to have been unnoticed."

Congressman William Loughton Smith of South Carolina made an especially interesting argument.

It would be a deplorable thing . . . if this Government should enact a law subversive of the constitution, or that so enlightened a body as the Senate of the United States should, by so great a majority as were in favor of this bill, pass a law so hostile to the liberties of this country, as the opposition to this measure have suggested the bank system to be . . .

Smith's argument showed keen insight. The Senate, whose mode of election ensured the protection of the interests of the states as states, did not regard the passage of the Bank Act as a threat to the residuary sovereignty of the states; rather, it considered the Bank as necessary and proper for carrying into execution the enumerated powers of Article I, Section 8 and for achieving the great objects spelled out in the Preamble.

Elbridge Gerry would build on Smith's argument.

The interpretation of the constitution, like the prerogative of a sovereign, may be abused, but from hence the disuse of either cannot be inferred. In the exercise of prerogative, the minister is responsible for his advice to his sovereign, and the members of either House are responsible to their constituents for their conduct in construing the constitution. We act at our peril: if our conduct is directed to the attainment of the great objects of Government, it will

91-94 (providing an excellent discussion of what might have "caused Madison's change of heart").

117. BANK OF THE UNITED STATES, supra note 104, at 42.

118. See id. at 49, 58, 65, 76 (reporting speeches of Ames, Stone, and Gerry).

119. Id. at 47 (emphasis added).

120. Id. at 63.
be approved... 121

The state legislatures were the constituents of the Senate, and it was
for them to judge whether the Senate was serving the great objects of
government or jeopardizing the original federal design.

Madison's arguments that the Congress lacked the power to charter the
Bank of the United States and that it was invading the reserved powers of
the states were unavailing in the House, which approved the Bank Act by a
vote of thirty-nine to twenty. 122 They did, however, sufficiently concern
President Washington that, when the measure was sent to him for approval,
he referred it to Attorney General Edmund Randolph 123 and Secretary of
State Thomas Jefferson for their opinions. 124 In brief statements, both
agreed that the bank bill was contrary to the Constitution 125 and urged
Washington to veto it. 126

Randolph argued that the implied powers argument of the Bank's
supporters "would beget a doctrine so indefinite as to grasp every power" 127
and would "stretch the arm of Congress into the whole circle of State
legislation." 128 Concerning the Necessary and Proper Clause, after initially
insisting that it "does not enlarge the powers of Congress, but rather
restricts them," he subsequently abandoned that view and concluded that
"as the friends of the bill ought not to claim any advantage from this
clause, so ought not the enemies to it, to quote the clause as having a
restrictive effect. Both ought to consider it among the surplusage which as
often proceeds from inattention as caution." 129 Jefferson argued that the
Bank Act went beyond the boundaries "specifically drawn around the
powers of Congress" and took "possession of a boundless field of power,
no longer susceptible of any definition." 130 He insisted that the Necessary
and Proper Clause limited the Congress to "those means, without which
the grant of power would be nugatory." 131

121. Id. at 78.
122. See id. at 85.
123. See Walter Dellinger & H. Jefferson Powell, The Constitutionality of the Bank
Bill: The Attorney General's First Constitutional Law Opinions, 44 Duke L.J. 110, 112
(1994).
124. See id. at 112.
125. See BANK OF THE UNITED STATES, supra note 104, at 89, 91.
126. See id. at 94.
127. Id. at 86.
128. Id. at 89.
129. Id.
130. Id. at 91.
131. Id. at 93.
These opinions thereupon prompted Washington to ask Hamilton for his sentiments on the validity and propriety of the Act. Hamilton’s opinion was lengthy and detailed. In it, he advanced a powerful “means-ends” argument much like Madison himself had made during the Constitutional Convention (when he “doub[ed]” the “practicability” of enumerating the powers of the federal government)133 and that Hamilton himself had made in Federalist No. 31.134 Hamilton declared that

> every power vested in a government, is, in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable, to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society.

Washington was ultimately persuaded by Hamilton’s argument, and, rather than deliver the veto message he had asked Madison to prepare, he signed the act incorporating the Bank on February 25, 1791.135

IV. MARSHALL’S APPRECIATION OF THE FOUNDERS’ UNDERSTANDING

The Founders’ understanding that federalism would be protected structurally, i.e., by the manner of electing the Senate, was borne out in the First Congress. Their understanding also appears to have been fully appreciated by Chief Justice John Marshall when he read expansively the Necessary and Proper Clause in McCulloch v. Maryland137 and the Commerce Clause in Gibbons v. Ogden.138 He did not fear that his broad construction of Congress’s enumerated powers would destroy federalism, because he understood that the Senate would not approve of legislation that adversely affected the states as such. The Court was to be appropriately restrained in its review of congressional measures because the Senate could be trusted to be vigilant.

---

132. Hamilton’s opinion was over 15,000 words in length, compared to Randolph’s two opinions totaling approximately 4500 words and Jefferson’s opinion totaling approximately 2500 words.
133. 1 RECORDS, supra note 6, at 53.
134. In Federalist No. 31, Hamilton described as “maxims in ethics and politics . . . that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; [and] that there ought to be no limitation of a power destined to effect a purpose, which is itself incapable of limitation.” THE FEDERALIST No. 31, at 194 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
135. BANK OF THE UNITED STATES, supra note 104, at 95 (emphasis omitted).
136. See 1 Stat. 191 (1791).
137. 17 U.S. (4 Wheat.) 316 (1819).
A. McCulloch v. Maryland

In *McCulloch v. Maryland*, the Supreme Court recognized Congress's power to charter the second Bank of the United States and invalidated a Maryland tax on that bank. The first Bank, chartered for a period of twenty years, expired in 1811 when legislation to reauthorize it failed by one vote in each house. The disorganization of the country’s finances during the War of 1812, however, prompted Madison, now serving as President, to take a very different view from what he had in the past and to propose a second Bank of the United States, which, after several false starts, was agreed to by Congress and signed into law by Madison on April 10, 1816.

When Maryland thereupon adopted in 1818 a “practically annihilatory tax” on the Maryland branch of the Bank, John Marshall was given the opportunity to address the question of the reach of Congress’s powers under Article I, Section 8. His answer can be summarized as follows: What Congress can do under its enumerated powers— i.e., what is delegated to it as opposed to what is reserved to the states—is a question for Congress alone to decide.

Marshall began by observing that Congress’s power to incorporate a

---

140. See Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* 222 (1957).
141. In his Seventh Annual Message to Congress on December 5, 1815, Madison declared:
   
   It is, however, essential to every modification of the finances that the benefits of a uniform national currency should be restored to the community. The absence of the precious metals will, it is believed, be a temporary evil, but until they can again be rendered the general medium of exchange it devolves on the wisdom of Congress to provide a substitute which shall equally engage the confidence and accommodate the wants of the citizens throughout the Union. If the operation of the State banks can not produce this result, the probable operation of a national bank will merit consideration ....

2 A Compilation of the Messages and Papers of the Presidents 1789-1897, at 550-51 (James D. Richardson ed., 1897). Regarding his earlier arguments that the Bank was unconstitutional, Madison declared that they were “precluded ... by repeated recognitions, under varied circumstances, of the validity of such an institution, in acts of the legislative, executive, and judicial branches of the government, accompanied by indications in different modes of a concurrence of the general will of the nation.” Hammond, supra note 140, at 233-34.

142. The Senate approved the second Bank bill by a vote of 22 to 12, the House by a vote of 90 to 61. See Hammond, supra note 140, at 240.
143. Id. at 263. Tennessee, Georgia, North Carolina, Kentucky, and Ohio had all imposed confiscatory taxes on the Bank, and others were considering doing so. See id.
144. See Graglia, supra note 69, at 725.
bank could scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

He acknowledged that “a bold and daring usurpation” would surely have to be resisted even “after an acquiescence still longer and more complete than this.” Nonetheless, he continued, federalism questions posed no danger of such a usurpation as they “are not concerned” with “the great principles of liberty” but only with how “the respective powers of those who are equally the representatives of the people, are to be adjusted.” Consequently, on these matters, the Court would have to defer to congressional practice. As Marshall had noted in his earlier discussion of the Necessary and Proper Clause in United States v. Fisher, if Congress’s “election” of where to draw the line between its powers and those of the states “interferes with the right of the state sovereignties,” it “is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends,” and any objection to this outcome should not be directed to the Court but should be understood to be “an objection to the constitution itself.”

Marshall reminded the parties that “[t]he power now contested was exercised by the first Congress elected under the present constitution.” And he stressed that the question of the first Bank’s constitutionality was fully debated at the time:

The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet,

146. Id.
147. Id. (emphasis added).
148. 6 U.S. (2 Cranch) 358 (1805).
149. Id. at 397. Fisher was the Supreme Court’s first consideration of the Necessary and Proper Clause. See 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 341 (3d ed. 1999). Marshall does not cite Fisher in his McCulloch opinion, but, as David P. Currie notes, It was typical of Marshall not to cite even his own opinions although they squarely supported him. . . . So far as the report reveals, counsel [in McCulloch] had not invoked Fisher, and maybe nobody remembered it. That decision had not raised much dust in 1805; that was a long time before McCulloch, and the indexing of cases was not what it is today. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 163 (1985) (footnotes omitted).
with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.

Marshall then turned to the Bank’s more recent history. While “[t]he original act was permitted to expire . . . a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law,” all of this prompted him to remark that “[i]t 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.”

Marshall made it clear that, when the “respective powers” of the federal and state governments were involved, the Court would defer to the Congress. The House and the Senate were, as he pointed out, as “equally” representative of the people, and therefore of the states, as the state legislatures themselves. Thus, so long as Congress did not engage in “a bold and daring usurpation” by trenching on “the great principles of liberty” as they were practiced in the states, something highly unlikely given the composition and mode of electing the Senate, the Court would not “tread on legislative ground.” Marshall repeated the same “means-ends” argument that Madison made in the Convention and that Hamilton offered in his defense of the Bank bill when he proclaimed that the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to

151. Id. at 402.
152. Id.
153. Id.
155. For Marshall, “adjust[ing]” the “respective powers” of the federal and state governments was different from preserving the separation of powers within the federal government itself. McCulloch, 17 U.S. (4 Wheat.) at 401. In Marbury v. Madison, Marshall insisted that “[i]t is, emphatically, the province and duty of the judicial department, to say what the law is;” and, on that basis, struck down, on behalf of a unanimous Court, an offending provision of section 13 of the Judiciary Act of 1789. 5 U.S. (1 Cranch) at 177.
157. Id.
be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

Here again, he was merely repeating his earlier words from *Fisher*: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." In *Fisher*, Marshall had rejected a narrow construction of the Necessary and Proper Clause: "In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power." In *McCulloch*, he was able to construe the Clause affirmatively and broadly, to declare that it authorized the Congress to adopt all measures that are "convenient or useful" for carrying into execution its enumerated powers, and to proclaim that for the Court to "inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department." Marshall concluded with what is probably the most famous rule of constitutional interpretation ever uttered by a Supreme Court Justice: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." For Marshall, "Congress alone can make the election of where "the respective powers" of the federal government end and the states begin."
The Court, he insisted, "disclaims all pretensions to such a power" and appropriately so, for the mode of selecting senators would ensure that Congress's "election" of where to draw the line would be protective of the interests of both.

B. Gibbons v. Ogden

In *Gibbons v. Ogden*, the Supreme Court held that Congress's power to regulate commerce extended to the regulation of navigation and that the laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that state collided with and therefore had to yield to a 1793 federal law regulating the coastal trade, which, being made in pursuance of the Constitution's delegation to the Congress of the power to regulate commerce among the several states, was supreme. Marshall's argument for the Court in *Gibbons* paralleled his argument in *McCulloch*. He began by employing a similar "means-ends" argument and by asserting that, with respect to the extent of any given power (in this case, the Congress's power to regulate interstate commerce), "it is a well settled rule, that the objects for which it was given, especially, when those objects are expressed in the instrument itself, should have great influence in the construction." He saw no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose.

The "object" of the Commerce Clause, Marshall continued, was to empower Congress to regulate not merely buying and selling but all "commercial intercourse between nations, and parts of nations, in all its branches;" clearly, therefore, the Commerce Clause extended to navigation. As Marshall declared,

The mind can scarcely conceive a system for regulating commerce between
nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Marshall then proceeded to observe, again in a manner reminiscent of his McCulloch opinion, that the Congress's exercise of the power to regulate navigation under the Commerce Clause was longstanding. It was "exercised from the commencement of the government" and "with the consent of all." And finally, Marshall argued that it was up to the Congress, not the Court, to draw the line between what the federal government could regulate and what was reserved for state control. The Commerce Clause is an "investment of power for the general advantage" placed "in the hands of agents selected for that purpose," i.e., the members of the House and Senate, and Marshall had full confidence in these "agents."

The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

As Marshall well appreciated, the "constituents" of the Senate were the state legislatures, and, as Gerry had observed in the debate over the Bank Act in the First Congress, the senators would therefore feel their "influence" at re-election time and would disregard their interests only at their peril.179

V. ALTERING THE ORIGINAL FEDERAL DESIGN: THE ADOPTION AND RATIFICATION OF THE SEVENTEENTH AMENDMENT

The Founders' original understanding of how federalism would be protected succeeded admirably for the first century. The measures that

---

175. Id. at 190.
176. Id. Marshall pointed to the passage of federal laws "prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen." Id.
177. Id. at 189.
178. Id. at 197.
179. See supra note 121 and accompanying text.
180. See Zywicki, supra note 6. Zywicki states: Statistical and anecdotal evidence suggests that the Senate played an active role in preserving the sovereignty and independent sphere of action of state governments. Rather than delegating lawmaking authority to Washington, state legislators insisted on keeping authority close to home... As a result, the long term size of the federal government remained fairly stable and relatively small in scale during the pre-Seventeenth Amendment era. Although
the Congress passed were obviously understood, even by the Senate, as consistent with the original federal design and as serving those interests that prompted the adoption and ratification of the Constitution in the first place. With Dred Scott as the principal exception, they were so understood by the Supreme Court as well. Over time, however, the public became increasingly dissatisfied with the indirect election of the Senate and unappreciative of the protection it rendered to federalism. The first joint resolution aimed at direct election of the Senate was introduced in the House of Representatives on February 14, 1826. From then until May 13, 1912, when the Congress submitted to the states for their ratification a proposed constitutional amendment providing for direct election of senators, 187 joint resolutions of a similar nature were introduced before Congress. The House approved six of these proposals...
By proposing what became the Seventeenth Amendment, the Congress was yielding to well-nigh unanimous public opinion in favor of the direct election of the Senate. Several factors were at work undermining support for the status quo. One was legislative deadlock over the election of senators brought about when one party controlled the state assembly or house and another the state senate. Numerous examples of such deadlock could be found: In 1885, the Oregon legislature failed, after sixty-eight ballots, to elect a senator and eventually did so only in a special session. Two years later, West Virginia failed to elect anyone. In 1893, the legislatures in Montana, Washington, and Wyoming deadlocked and failed to elect senators, whereupon the governors of these states filled the vacancies by appointment, only to have the Senate deny them their seats on the grounds that only the state legislatures could elect senators. Deadlock was perhaps most evident and embarrassing in Delaware; it was represented by only one senator in three Congresses and by none at all from 1901 to 1908. From 1885 to 1912, there were seventy-one such

186. The House approved these proposals by a two-thirds voice vote on January 16, 1893; by a vote of 141 to 50 on July 21, 1894; by a vote of 183 to 11 on January 12, 1898; by a vote of 242 to 15 on April 13, 1900; by a two-thirds voice vote on January 21, 1902; and by a vote of 296 to 16 on April 13, 1911. See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 209 (1996); Hall, supra note 184, at 163-64.

187. But see Zywicki, supra note 6, at 201-19 (presenting a public choice analysis of the Seventeenth Amendment and arguing that it was not public opinion but the wish of "special interests" to "increase[e] the importance of [their] . . . money and organization in Senate elections" that led to the adoption and ratification of the Seventeenth Amendment (emphasis omitted)).

188. Zywicki persuasively argues that the real problem was not divided party government but a law which had been passed in 1866 which had required that Senators be elected by a majority of the state legislatures. Majority votes were difficult to come by in states with evenly-balanced party competition and third-parties who could prevent either of the dominant parties from receiving a majority in the state legislatures. Amending this 1866 statute to permit election by plurality or requiring run-offs would have solved the deadlock problem without the need for a constitutional amendment.

189. See KYVIG, supra note 186, at 209. See also 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 92 (1938); Hall, supra note 184, at 287-301. As Zywicki points out, however, despite these problems, Delaware affirmatively voted to reject the Seventeenth Amendment. See Zywicki, supra note 6, at 199.
legislative deadlocks, resulting in seventeen senate seats going unfilled for an entire legislative session or more. These protracted deadlocks not only deprived the affected states of representation in the Senate but also consumed a great deal of state legislative time that was therefore not spent on other important state matters.

A second factor undermining support for the election of senators by state legislatures was the scandal brought on by charges of bribery and corruption. Between 1866 and 1900, the Senate was called on nine times to investigate alleged bribery in Senate election cases. In the 58th Congress alone, a full ten percent of the Senate’s entire membership was put on trial or subjected to legislative investigation. Two of the most infamous cases involved the elections of Montana Senator William A. Clark in 1899 and Illinois Senator William Lorimer a decade later. Clark confessed to a “personal disbursement” of over $140,000 to the legislators of Montana and resigned his seat during floor deliberations of a unanimous Senate committee report recommending his expulsion. Lorimer, a dark-horse candidate acceptable to both parties, was elected by a bipartisan coalition, thereby breaking a protracted stalemate; however, a year later, the Chicago Tribune broke the story of how four state legislators were bribed to change their vote on his behalf, and in 1912, half-way through the completion of his term, Lorimer was expelled by the Senate.

---

190. See Hall, supra note 184, at 506-11 (providing a table of the date, state, ballots cast, senator elected (if ever), and citations to each of these 71 legislative deadlocks over the election of senators).

191. But see CHRISTOPHER H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 89 (1995) (arguing that “[a]lthough press accounts often gave the impression that these deadlocks brought all legislative business to a standstill, the truth was that most legislatures took one vote at the beginning of each day and continued with their normal affairs”).

192. See Zywicki, supra note 6, at 198-99. Zywicki downplays this problem, noting that only thirteen states deadlocked more than once and only six states twice or more. In most states, it took only one or two deadlocks for the legislature to learn not to repeat the process again. In addition, many of the states with repeated deadlocks were newly-admitted western states with inexperienced legislatures, weak party discipline, and successful third-party movements. As western legislators gained experience with Senate elections, deadlocks became less frequent.

Id. at 198-99 (footnotes omitted).

193. See 1 HAYNES, supra note 189, at 91.

194. See GEORGE H. HAYNES, THE ELECTION OF SENATORS 165 (1906).

195. Interestingly, however, Montana returned Senator Clark the following year.

See id. at 56.

196. See HOEBEKE, supra note 191, at 91-97; see also Hall, supra note 184, at 252-74.
A third factor, closely related to the second, was the growing strength of the populist movement and its deep-seated suspicion of wealth and influence. It presented the Senate as "an unrepresentative, unresponsive ‘millionaires club,’ high in partisanship but low in integrity.'" While populism quickly waned, progressivism waxed in its place, providing still a fourth factor: progressivism's belief in "the redemptive powers of direct democracy," i.e., its conviction that the solution to all the problems of democracy was more democracy.  

Election of senators by state legislatures came to be associated in the public mind with stalemate, corruption, plutocracy, and reaction; by contrast, direct election of senators was associated with reform, integrity, democracy, and progress. The public demanded change and repeatedly carried this message to the Congress itself through direct petitions. Beginning with a petition from the citizens of Kendall and LaSalle, Illinois, dated January 18, 1886, and continuing through the day the Seventeenth Amendment received congressional approval, the Congress received a total of 238 petitions from labor groups, farmers' associations, and other citizens' groups calling for direct election of the Senate.  

The politicians also demanded change. Beginning with the Nebraska Republican Party in 1872 and continuing until the ratification of the Seventeenth Amendment, a total of 239 party platforms called for direct election of the Senate, including 220 state party platforms and 19 national party platforms.  

Even the states themselves demanded change. Beginning with a memorial from the California State Legislature on February 18, 1874, and continuing through congressional adoption of the Seventeenth Amendment in 1912, the Congress received a total of 175 memorials from state legislatures urging adoption of direct election of the Senate. State legislatures did more, however, than merely demand change by sending memorials to the Congress; they took other steps as well to bring it about. Thus, by 1912, thirty-three states had introduced the use of direct primaries, and twelve states had adopted some form of what

---

197. KYVIG, supra note 186, at 209; see HOEBEKE, supra note 191, at 101.
198. Zywicki, supra note 6, at 185.
199. See HOEBEKE, supra note 191, at 18-24.
200. See Hall, supra note 184, at 457-81 (providing a table of the date and sponsoring group for each of these 238 petitions).
201. See id. at 490-505 (providing a table of the particulars of these 239 party platforms).
202. See id. at 512-27 (providing a table of the dates of and state legislatures responsible for these 175 state memorials).
203. See id. at 319. State direct primary laws fell into three classes:
(1) Laws giving to the party state committee the discretion of holding a
was known as the "Oregon system." 204

South Carolina was the first state to introduce the direct primary in 1888. 205 The direct primary democratized the election of senators in the same way that the election of the president had been democratized. As Alan Grimes explains,

> In the same fashion in which state members of the Electoral College cast their votes for the presidential candidate who had received the greatest popular vote in the state, so the state legislatures were asked to elect that candidate for senator who had received the greatest popular vote in a preferential primary.

The direct primary, however, shared the same problem as the democratized Electoral College: the faithless elector. State legislators were not legally bound to abide by the results of the primary and could

---

204. Hall, supra note 184, at 335. The twelve states were Oregon (1904), Idaho (1909), Nebraska (1909), Nevada (1909), Colorado (1910), California (1911), Kansas (1911), Minnesota (1911), New Jersey (1911), Ohio (1911), Montana (1912), and Arizona (1912). See id. at 334-35.

205. See Sara Brandes Crook, The Consequences of the Seventeenth Amendment: The Twentieth Century Senate 27 (1992) (unpublished Ph.D. dissertation, University of Nebraska (Lincoln)) (on file with University of Nebraska Dept. of Political Science). The direct primary was, of course, preceded by the public canvass, in which senatorial candidates would barnstorm the state seeking support for their parties in the state legislature in hopes of securing a governing majority there, which would determine who would be sent to Washington as senator. William Riker contends that the first public canvass occurred in Mississippi in 1834. See William Riker, The Senate and American Federalism, 49 AM. POL. SCI. REV. 452, 463 (1955). It did not become widespread, however, until the Lincoln-Douglas debates of 1858. See Brooks, supra note 17, at 207.

ignore the wishes of the voters. In an attempt to solve this problem, the State of Oregon passed by initiative in 1904 the “Oregon system.” Under this system, a general election runoff was held between the primary nominees for the Senate of the major parties, and candidates for the state legislature were “permitted” to include in their platform one of two statements regarding their views on the election of senators. “Statement No. 1” pledged the candidate to abide by the results of the general election and, regardless of party affiliation, to vote “for that candidate for United States Senator in Congress who has received the highest number of the people’s vote for that position at the general election.”207 “Statement No. 2” declared that the candidate would treat the results of the general election as nothing more than a recommendation and would vote according to his personal discretion.208

Eleven other states quickly imitated the “Oregon system,” with many going even further. Nebraska, for example, required that, after each candidate’s name on the primary ballot for the state legislature, the following words would appear: “Promises to vote for people’s choice for United States Senator” or “Will not promise to vote for people’s choice for United States Senator.”209

The states took another decisive step as well to bring about direct election of the Senate; they exercised their power under Section V of the Constitution and called for a convention to consider amending the Constitution to provide for direct election of the Senate. By 1910, twenty-seven of the thirty-one state legislatures then required to call a convention had formally petitioned the Congress. Arizona and New Mexico were about to become states and were expected to join the ranks of those supporting such an amendment, while Alabama and Wyoming had submitted resolutions supporting the idea of a convention but without formally calling for one.210 The fear of a “runaway” constitutional

207. Hall, supra note 184, at 330.

208. See Grimes, supra note 206, at 76; Allen H. Eaton, The Oregon System: The Story of Direct Legislation in Oregon 92-98 (1912). “By 1909, when Oregon’s Republican legislature elected a Democratic senator who had won the popular contest, the system’s effectiveness was demonstrated.” Kyvig, supra note 186, at 210.

209. As a consequence, when George Norris, the Republican Party primary nominee for the Senate, defeated his Democratic Party opponent in the 1912 general election, the Democratically-controlled Nebraska Legislature duly elected Norris and sent him to the Senate. See Crook, supra note 205, at 30.

210. See Hoebbeke, supra note 191, at 149-50. David Kyvig explains the origins of this strategy.

In 1900 a committee of the Pennsylvania legislature suggested a coordinated effort of states to demand a convention. The Senate would not act, the committee believed, until two-thirds of the states forced it to do so. Pennsylvania sent every other state a copy of its convention petition to encourage them likewise to submit one.

Kyvig, supra note 186, at 210.
convention, along with the fact that most senators represented states whose legislatures were on record favoring direct election of the Senate, proved decisive.211 Thus, on May 13, 1912, the 62nd Congress finally approved the Seventeenth Amendment by a vote in the Senate of 64 to 24 (with 3 not voting) and by a vote in the House of 238 to 39 (with 110 not voting).212 It was ratified by the requisite three-fourths of the state legislatures in less than eleven months and was declared to be a part of the Constitution in a proclamation of the Secretary of State dated May 31, 1913.213

What is particularly noteworthy of the lengthy debate over the adoption and ratification of the Seventeenth Amendment is the absence of any serious or systematic consideration of its potential impact on federalism.214 The consequences of the Seventeenth Amendment on federalism went unexplored. The popular press, the party platforms, the state memorials, the House and Senate debates, and the state legislative debates during ratification focused almost exclusively on expanding democracy, eliminating political corruption, defeating elitism, and freeing the states

211. See Bybee, supra note 2, at 537-38 (“The wake-up call to the Senate was apparently the defeat in 1910 of ten Republican senators who had opposed the proposed amendment.”).

212. See GRIMES, supra note 206, at 82. The large number of House members “not voting” reflected Southern disappointment with the decision to drop what was described as a race rider from the Amendment. That rider provided that “[t]he times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof” and was intended by its sponsors to nullify the effects of the Fifteenth Amendment. Id. at 77. Grimes describes the politics of this provision in detail. See id. at 76-82; see also KYVIG, supra note 186, at 212-13.

213. The dates of ratification were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Maine, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; and Connecticut, April 8, 1914. Ratification was thus completed on April 8, 1913. The Amendment was subsequently ratified by Louisiana on June 11, 1914. Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Rhode Island, South Carolina, and Virginia did not vote to ratify. Delaware and Utah affirmatively voted against its ratification. See Hall, supra note 184, at 617-19.

214. See Brooks, supra note 17, at 206 (“It may seem incredible that what seemed to the Framers the obvious and crucial anti-centralizing function of indirect election should pass almost unnoticed in 1911.”). See also Bybee, supra note 2, at 505, 538.
from what they had come to regard as an onerous and difficult responsibility. Almost no one (not even among the opposition) paused to weigh the consequences of the Amendment on federalism. 215

Only three exceptions are apparent in the voluminous record. One was Representative Franklin Bartlett, a Democrat from New York, who argued eloquently on the floor of the House on July 20, 1894, that the interests of the states as states should be preserved by keeping the senators as representatives of state governments. Bartlett quoted statements made by

---

215. The same can be said of those who have studied the history and consequences of the Seventeenth Amendment. Hall, for example, reports the beneficial effects of the amendment to be (1) the elimination of legislative deadlocks, (2) the separation of state and national issues in state political campaigns, and (3) the prevention of certain scandalous legislative elections. See Hall, supra note 184, at 438. He finds the baneful effects to be (1) increased costs to secure election to the Senate, (2) an accentuation of the time-consuming, non-legislative functions of senators, and (3) the encouragement of demagogy. See id. at 440. He also reports little or no change in such matters as age, length of service, or previous occupations of senators and notes that popularly-elected senators had less previous governmental service (although more were former governors) than their predecessors prior to 1913. See id. at 438-39. He offers, however, no commentary whatsoever on the impact of the Seventeenth Amendment on federalism.

Crook reports on the demographic, behavioral, and institutional consequences of the Seventeenth Amendment but likewise without ever mentioning federalism. See generally Crook, supra note 205. She finds, demographically, that popularly-elected senators have fewer family ties to Congress, are more likely to be born in the states they represent, are more likely to have an Ivy League education, and are likely to have had a higher level of prior governmental service. See id. at 184-85. She finds, behaviorally, that House members are now more likely to seek a senate seat and to do so with less tenure in the House. See id. at 187. And she finds, institutionally, that the states are now more likely to have split senate delegations, and that the Senate now more closely matches the partisan composition of the House. See id. at 190-91. In neither her conclusions nor her section on “Future Research” does she even hint at the consequences of the Amendment on the federal/state balance. See id. at 195-97; see also Sara Brandes Crook & John R. Hibbing, A Not-So-Distant Mirror: The 17th Amendment and Congressional Change, 91 AM. POL. SCI. REV. 845 (1997).

Hoebekke also ignores the federalism question in The Road to Mass Democracy. While the subtitle to his book is “Original Intent and the Seventeenth Amendment,” he sees the original intent of those who provided for the election of the Senate by state legislatures to be to check the excesses of popular government, not to protect the federal/state balance and the interest of the states as states. See HOEBEKKE, supra note 191, at 27.

Kyvig likewise presents the consequences of the Seventeenth Amendment in wholly democratic terms: It “altered political decisionmaking both substantially and symbolically as it replaced the Founders’ system of vesting power in an elite insulated from the masses with one that rendered the Senate more directly responsive to the public.” KYVIG, supra note 186, at 214. See id. at 478.

The only genuine exceptions to this characterization of the scholarship on the Seventeenth Amendment are Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 VAND. L. REV. 1347 (1996); Brooks, supra note 17; Bybee, supra note 2; Laura E. Little, An Excursion into the Uncharted Waters of the Seventeenth Amendment, 64 TEMP. L. REV. 629 (1991); Virginia M. Mclnerney, Federalism and the Seventeenth Amendment, 7 J. CHRISTIAN JURIS. 153 (1988); Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 OR. L. REV. 1007 (1994); Zywicki, supra note 6.
George Mason and John Dickinson during the Constitutional Convention and by James Madison in *Federalist No. 62* in support of his conclusion:

> It follows, therefore, that the framers of the Constitution, were they present in this House [today], would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance.

The other two exceptions were in the Senate: George F. Hoar, a Republican from Massachusetts, and Elihu Root, a Republican from New York. On the Senate floor in April of 1893, Senator Hoar defended indirect election of the Senate, declaring “[S]tate legislatures are the bodies of men most interested of all others to preserve State jurisdiction.... It is well that the members of one branch of the Legislature should look to them for their re-election, and it is a great security for the rights of the States.”

After quoting approvingly from Story’s *Commentaries on the Constitution of the United States* that election of the Senate by the state legislatures “would increase public confidence by securing the National Government from any encroachments on the powers of the States,” Hoar continued:

> The State legislatures will be made up of men whose duty will be the

---

216. 53 CONG. REC. 7774 (1894). To the extent that there was any response by the proponents of direct election to Bartlett’s concern, it was found in the majority report of the Senate Committee on Privileges and Elections, which declared:

The share of representation to be accorded each State in the Senate is one thing, and the mode or manner of selecting that representation, whatever it may be, is quite another and different thing. The one—the former—relates to the question that Senators are more particularly the representatives of the States in their political capacity; while the other relates only to what perhaps may by some be considered the more unimportant matter, as to how and by whom the States shall choose this representation, whether by their legislatures or by a direct vote of the people.

It is therefore made apparent to your committee that the question as to whether the Senate of the United States should be regarded as... the representative of the people of the States, was determined in so far as that question ever has been determined, not by the mode or manner in which Senators should be chosen;... but rather in the consideration and determination of the question as to the fixed ratio of representation that each State should have in respect to its sister States in the Senate of the United States.

S. REP. NO. 54-530, at 2, 4 (1896) (emphasis omitted).

217. S. DOC. NO. 59-232, at 21 (1906). Senator Hoar’s speech was printed as a Senate Document in 1906. See id.

218. Id. at 20 (quoting 2 STORY, supra note 2, § 702, at 183). See supra note 36 and accompanying text.
administration of the State authority of their several State interests and the framing of laws for the government of the State which they represent. The popular conventions, gathered for the political purpose of nominating Senators, may be quite otherwise composed or guided. Here, in the State legislature, is to be found the great security against the encroachment upon the rights of the States.

In 1911, Senator Root argued against direct election of the Senate on these very same grounds: “Let me tell the gentlemen who are solicitous for the preservation of the sovereignty of their States that there is but one way in which they can preserve that sovereignty, and that is by repudiating absolutely and forever the fundamental doctrine on which this resolution proceeds.” He also argued that depriving state legislatures of the opportunity to elect senators would rob them “of power, of dignity, of consequence” and would lead them to grow “less and less competent, less and less worthy of trust, and less and less efficient in the performance of their duties. You can never develop competent and trusted bodies of public servants by expressing distrust of them, by taking power away from them.” He worried aloud that, if the state legislatures were perceived as untrustworthy in the exercise of their power to elect senators, the result would be an expansion of the federal government. “If the State government is abandoned, if we recognize the fact that we can not have honest legislatures, sir, the tide that now sets toward the Federal Government will swell in volume and in power.” With state legislatures removed from the process, he predicted that “[t]he time will come when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States.” He warned that “we shall go through the cycle of concentration of power at the center while the States dwindle into insignificance.”

VI. THE SUPREME COURT’S ATTEMPT TO PROTECT THE ORIGINAL FEDERAL DESIGN

By ratifying the Seventeenth Amendment, the people in their pursuit of more democracy inattentively abandoned what the founders regarded as the primary constitutional means for the protection of the federal/state balance and the interests of the states as states. Senator Root

220. 61 Cong. Rec. 2243 (1911).
221. Id.
222. Id.
223. Id.
224. Id.
225. Bybee speculated that the people “preferred democracy to representation and were willing to shoulder the loss to constitutional federalism.” Bybee, supra note 2, at
accurately predicted what followed: a rapid expansion by Congress of the reach and power of the national government at the expense of the states. Since 1913, there has been a profound increase in the number and intrusiveness of congressional measures invading the "residuary sovereignty" of the states.226

Examples abound: The Federal Child Labor Act of 1916227 and the Federal Child Labor Tax Act of 1919228 were early examples; they trenched on the police power of the states to regulate the health, safety, and morals of the community by banning from interstate commerce or by taxing goods that, while themselves harmless, had been produced by child labor. The Adamson Act of 1916,229 imposing maximum hours and minimum wages on the railroads, was another.230

They were followed in due course by the New Deal231 and the passage of the Agricultural Adjustment Acts of 1933232 and 1938,233 regulating something as local as the amount of wheat farmers could grow for consumption on their own farms; the Railroad Retirement Act of 1934,234

538.

226. See infra notes 227-246 and accompanying text. Additionally, it must be understood that this is not a "cause and effect" argument; clearly, many factors account for the rapid expansion of the national government, with World War I, continued industrial growth, and breakthroughs in electronic communications being chief among them. Moreover, as Bybee acknowledges, it is "a maddeningly difficult proposition to prove" the exact effects of direct election of senators. Bybee, supra note 2, at 547. Nevertheless, it is clear that the ratification of the Seventeenth Amendment removed a previously-existing constitutional brake on these centralizing tendencies, and that federalism, as Zywicki has pointed out, has been reduced to "a pale imitation of its pre-Seventeenth Amendment vigor." Zywicki, supra note 6, at 212.

230. According to one scholar, "Conventional wisdom states that the New Deal commenced a radical shift in the scope of the federal government. In fact, the growth in the federal government began almost immediately after the passage of the Progressive Era amendments.... The New Deal simply confirmed the constitutional revolution which had already transpired." Zywicki, supra note 6, at 174-75.
231. Zywicki states that:
Roosevelt's New Deal would not have been possible without the institutional changes caused by the Progressive Era amendments. The Sixteenth Amendment allowed for the federal government to raise revenues on an unprecedented scale. At the same time, the Seventeenth Amendment destroyed the systems of federalism and bicameralism which had previously checked expansionist federal activity.
Id. at 233.
establishing a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act; the National Industrial Recovery Act of 1933\textsuperscript{235} and the Fair Labor Standards Act of 1938,\textsuperscript{236} regulating wages and hours for those engaged in interstate commerce; the Bituminous Coal Conservation Act of 1935,\textsuperscript{237} regulating production and labor in the coal industry; the National Labor Relations Act of 1935,\textsuperscript{238} protecting the rights of workers to form unions and to bargain collectively; the Social Security Act of 1935,\textsuperscript{239} establishing a retirement plan for persons over the age of sixty-five; and the National Housing Act of 1937,\textsuperscript{240} providing authority to lend money to local agencies for public housing.

There is no lack of more recent examples as well. They include the Fair Labor Standards Act Amendments of 1974,\textsuperscript{241} extending minimum wage/maximum hours requirements to the employees of states and their political subdivisions; the National Minimum Drinking Age Act of 1984,\textsuperscript{242} conditioning a state’s receipt of a portion of federal highway funding on whether it had raised the drinking age to twenty-one; the Low-Level Radioactive Waste Policy Amendments Act of 1985,\textsuperscript{243} mandating that the states themselves must take title to radioactive waste within their borders if they fail otherwise to provide for its disposition; the Brady Handgun Violence Prevention Act of 1993,\textsuperscript{244} mandating that state law-enforcement officers must conduct background checks for all individuals wishing to buy handguns; the Religious Freedom Restoration Act of 1993,\textsuperscript{245} barring all governments (federal, state, or local) from burdening free exercise of religion without a compelling state interest; the National Voter Registration Act of 1993,\textsuperscript{246} requiring state departments of motor vehicles to distribute voter registration forms to those applying for driver’s licenses or automobile registration; and, of course, scores of other equally intrusive but lower-profile federal mandates on the states and their political subdivisions.\textsuperscript{247}

\textsuperscript{236} Pub. L. No. 75-718, 52 Stat. 1060 (1938).
\textsuperscript{240} Pub. L. No. 75-412, 50 Stat. 888 (1937).
\textsuperscript{247} The Civil Rights Act of 1964, barring private discrimination in public accommodations, the Civil Rights Act of 1968, prohibiting discrimination in housing, and the Voting Rights Acts of 1965 and 1982 are not included as examples, because the Congress (including the pre-Seventeenth Amendment Senate) had demonstrated throughout the post-Civil War era a repeated willingness to use its enforcement powers
Not only have these post-Seventeenth Amendment congressional measures increased in number and intrusiveness, they have also become, in Theodore J. Lowi’s terms, more abstract, general, novel, discretionary, and prescriptive (in contrast to earlier pre-Seventeenth Amendment legislation that was more concrete, specific, traditional, rule-bound, and prescriptive). This development has led to what Lowi calls “policy without law” and has weakened not only the states but the Congress itself—after all, with the Senate no longer answerable to state legislatures, it has felt increasingly free to join the House in legislating on every social, economic, or political problem which it perceives as confronting the nation, even if the resulting measures are little more than blank checks of authority to the executive branch and the federal bureaucracy.

The Supreme Court’s initial reaction to this congressional expansion of national power at the expense of the states was to attempt to fill the gap created by the ratification of the Seventeenth Amendment and to protect federalism by invalidating congressional measures either on dual federalism grounds or through its narrow construction of the Commerce Clause. Using its power of judicial review in a manner never anticipated by the founding generation and never practiced or endorsed by the Marshall Court, it attempted to draw strict lines between federal and state power. These, however, were lines that the Founders denied could be drawn, saw no need to draw given the mode of electing the Senate, and neither intended nor authorized the Court to draw, identify, or enforce. Nonetheless, the Court came to regard its own analytical judgments concerning the limits of the powers of the federal government as an appropriate (and necessary) substitute for the now-displaced structural solution of the Founders. Perceiving the popularly-elected Senate as no longer able to protect federalism, the Court undertook to perform that task itself, and, during the period from the ratification of the Seventeenth Amendment in 1913 to its jurisprudential turnabout in the Jones & Laughlin Steel Corp. decision in 1937, it did exactly that, invalidating more federal statutes on federalism grounds during that quarter of a century than it invalidated for violating the Constitution under the Thirteenth, Fourteenth, and Fifteenth Amendments to enact legislation regulating what was once thought to be exclusively within the province of the states.

---

248. See Lowi, supra note 181, at 134-35.
249. Id. at 126.
250. For a lengthy discussion of the effect of the Seventeenth Amendment on the delegation of lawmaking authority, see Amar, supra note 215, at 1360-89.
century \textsuperscript{252} than it had during the entire period prior to the ratification of the Seventeenth Amendment. \textsuperscript{253}

The Supreme Court became a passionate defender of the original federal design. It seemed completely unaware, however, that the Seventeenth Amendment had fundamentally altered that original design by making the Constitution both much more democratic and much less federal. It made the Constitution much more democratic because the people would thereafter directly elect the Senate, and it made the Constitution much less federal because those senators would no longer represent the interests of the states as such but rather of the people who would elect them. \textsuperscript{254} By altering who the Senate represents and how federalism is protected, the Seventeenth Amendment altered the very meaning of federalism itself. The Supreme Court, however, refused to acknowledge this fact. While fond of quoting Chief Justice Marshall's words in \textit{Marbury v. Madison} \textsuperscript{255} that it is the duty of the courts to interpret the Constitution and to say what the law is, \textsuperscript{256} it curiously but steadfastly refused to allow the Seventeenth Amendment and its structural and democratic consequences to enter its interpretation of the Constitution. It refused to recognize that, after the Seventeenth Amendment, federalism had changed \textsuperscript{257} and the original federal design was no longer controlling; it was no more a part of the


\textsuperscript{253} During the entire period prior to the ratification of the Seventeenth Amendment, the Court invalidated seven congressional measures. \textit{See} Coyle v. Smith, 221 U.S. 559 (1911); Keller v. United States, 213 U.S. 138 (1909); Howard v. Illinois Cent. R. Co., 207 U.S. 463 (1908); \textit{In re Trade-Mark Cases}, 100 U.S. 82 (1879); United States v. Fox, 95 U.S. 670 (1878); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). An eighth statute considered in \textit{In re Heff}, 197 U.S. 488 (1905), could possibly be added here. However, the Court explicitly overturned \textit{In re Heff} in \textit{United States v. Nice}, 241 U.S. 591 (1916), and, consequently, it is not included in the totals. \textit{See infra} note 270 for a discussion of these cases.

\textsuperscript{254} \textit{See supra} note 15 and accompanying text.

In that connection, consider also the Sixteenth Amendment, which was ratified, as George Anastaplo has noted, "primarily in order to expand the power of the General Government... The Sixteenth Amendment is still another indication that citizens can be dealt with directly by the General Government, without any mediation by the States in any way." \textbf{GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY} 187 (1995).

\textsuperscript{255} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{256} \textit{See id.} at 176.

\textsuperscript{257} \textit{See infra} note 309 and accompanying text (arguing that federalism actually died with the ratification of the Seventeenth Amendment).
Constitution they were to interpret than was, after the ratification of the post-Civil War Amendments, the Constitution's original accommodation of slavery.

A. Dual Federalism

The Court's post-Seventeenth Amendment defense of the original federal design began with *Hammer v. Dagenhart*, in which it invalidated on dual-federalism grounds the Federal Child Labor Act of 1916. In that act, Congress had prohibited the shipment in interstate commerce of goods produced in factories that employed children under the age of fourteen or that permitted children under the age of sixteen to work at night or for more than eight hours a day. The Court asserted that the states were coequal sovereigns with the federal government, that each level of government was supreme within its own sphere, and that the federal government could not therefore undertake any action, even in the exercise of its enumerated powers, that touched upon those functions the Constitution had reserved to the states. According to Justice William Day in his majority opinion, the regulation of child labor was a "matter purely local in its character and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states." Therefore, he concluded, because control over child labor was vested in the states under their traditional police power, Congress could not employ its delegated power to regulate commerce among the several states to interfere in this matter. This conclusion was, of course, in striking contrast to the Court's unanimous, pre-Seventeenth Amendment opinion in *Hoke v. United States*, in which it held, harking back to *Gibbons*, that "Congress[']... power over transportation 'among the several States'... is complete in itself," and that rules adopted under the Commerce Clause "may have the quality of police regulations."

When Congress thereupon passed the Federal Child Labor Tax Law of 1919, banning the use of child labor by imposing a ten percent tax on the profits of all businesses engaged in interstate commerce that employed children, the Court again used dual federalism to invalidate the measure in *Bailey v. Drexel Furniture Co.* Chief Justice William Howard Taft

258. 247 U.S. 251 (1918).
259. *Id.* at 276.
260. 227 U.S. 308 (1913).
261. *Id.* at 323.
262. 259 U.S. 20 (1922) (commonly referred to as the Child Labor Tax Case).
reiterated Justice Day's point in *Hammer* that the regulation of child labor was "a purely state authority" and argued that, just as the first child labor act "was not in fact regulation of interstate commerce, but rather that of State concerns," so too, the second child labor act was not really a tax but a penalty to reach and regulate what the Constitution had reserved exclusively for state control.

These cases are well known; less well-known is *Hill v. Wallace*, in which the Court declared that *Bailey* "completely covers this case" and held unconstitutional a provision of the Future Trading Act of 1921 that imposed a tax "of 20 cents a bushel involved in every contract of sale of grain for future delivery [except] where such contracts are made by or through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market." Chief Justice Taft condemned the provision as "a complete regulation of [state] boards of trade" and therefore not "a valid exercise of the taxing power."

The Court's use of dual federalism in *Hammer*, *Bailey*, and *Hill* was unfortunate. Prior to these cases, its most notorious use of dual federalism was in Chief Justice Roger Taney's infamous majority opinion in *Dred Scott*, wherein he argued that Congress's attempt through the Missouri Compromise of 1820 to limit the spread of slavery in the territory of the United States unconstitutionally infringed on the states' reserved power to legislate on slavery. Taney made the bizarre argument that Congress's

---

265. *See id.*
266. 259 U.S. 44 (1922).
267. *Id.* at 67.
268. *Id.* at 64.
269. *Id.* at 66-67. The Court also held that Congress was attempting to regulate commerce that was wholly between persons contracting within the State of Illinois respecting the purchase or sale of grain which formed a part of the common property of that state and that it was therefore intrastate and not interstate. *See id.* at 68-69. Finally, it held that the Congress violated the Tenth Amendment by interfering with the right of Illinois to provide for and regulate the maintenance of grain exchanges within its borders upon which were conducted the making of contracts that were merely intrastate transactions. *See id.* at 67-68.
270. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* was the first and most notorious use of dual federalism, but there were four other cases prior to *Hammer* in which the Court also used dual-federalism premises to invalidate congressional measures. In *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870), the Court held that Congress's general prohibition under the Commerce Clause of the sale of naphtha for illuminating purposes if it were inflammable at a temperature of less than 110 degrees Fahrenheit was unconstitutional because "[s]tanding by itself, it is plainly a regulation of police." *Id.* at 44. In *United States v. Fox*, 95 U.S. 670 (1878), it held that a provision of the Bankruptcy Act of 1867, which penalized individuals who defrauded creditors by obtaining credit with the intention of thereafter commencing bankruptcy proceedings, was a police regulation not within the bankruptcy power of the Congress and was therefore unconstitutional. *See id.* at 672-73. In *In re Heff*, 197 U.S. 488
power under Article IV, Section 3 of the Constitution to regulate the
territory of the United States was, in fact, limited simply to that territory
which at the time the Constitution was ratified "belonged to, or was
claimed by, the United States... and can have no influence upon a
territory afterwards acquired from a foreign Government." The
Congress, Taney insisted, could acquire and regulate new territory only as
a "trustee" or "agent" of "the people of the several States" and could
exercise no power under the Constitution over the slave property of the
people "beyond what that instrument confers, nor lawfully deny any right
which it has reserved." Taney, therefore, held that Congress acted
unconstitutionally when it passed the Missouri Compromise and prohibited
the spread of slavery into that portion of the Louisiana Purchase north of
thirty-six degrees thirty minutes north latitude.

Taney's opinion in Dred Scott stands in stark contrast to Marshall's
opinion in McCulloch. Marshall began his opinion by acknowledging that
the question of the limits of Congress's delegated powers had to be
"decided peacefully" or it would "remain a source of hostile legislation,

(1905), it held that a federal statute regulating the sale of intoxicating liquor to
reservation Indians violated the principles of dual federalism as "the regulation of the
sale of intoxicating liquors... is within the domain of state jurisdiction." Id. at 505.
However, it expressly overturned Heff in United States v. Nice, 241 U.S. 591 (1916).
"As, therefore, these allottees remain tribal Indians and under national guardianship, the
power of Congress to regulate or prohibit the sale of intoxicating liquor to them... is
not debatable." Id. at 601. Finally, in Keller v. United States, 213 U.S. 138 (1909), it
held that a provision in the Immigration Act of 1907 that penalized "whoever shall keep,
maintain, control, support, or harbor in any house or other place, for the purpose of
prostitution... any alien woman or girl, within three years after she shall have entered
the United States" was an exercise of the state's reserved police power and not within the
control of Congress over immigration. Id. at 139 (emphasis omitted).

271. Dred Scott, 60 U.S. (19 How.) at 432. See Currie, supra note 149, at 269
(stating that "Taney's construction seems singularly unpersuasive; he might as
convincingly have argued that the ex post facto clause applied only to the thirteen
original states." (footnote omitted)).


273. Id. at 450.

274. Taney also invoked the Fifth Amendment and found the Missouri Compromise
unconstitutional on substantive due process grounds:

[A]n act of Congress which deprives a citizen of the United States of his
liberty or property, merely because he came himself or brought his property
into a particular Territory of the United States, and who had committed no
offense against the laws, could hardly be dignified with the name of due
process of law.

Id. Nothing in the Constitution, Taney added, "gives Congress a greater power over
slave property, or... entitles property of that kind to less protection than property of any
other description." Id. at 452.
perhaps of hostility of a still more serious nature." His answer to that question was to declare that, because the Congress was as "equally" representative of the people and the states as the state legislatures themselves, it was up to the "Congress alone . . . [to] make the election" of where "the respective powers" of the federal government ended and those of the states began. He adopted Madison's and Hamilton's "means-ends" approach to constitutional interpretation, emphasizing as well the importance of taking into consideration long-standing practice when considering the limits of congressional power. Taney, by contrast, employed the principle of dual federalism and flatly refused to allow Congress to "elect" what it considered to be appropriate means to the ends of the Constitution. He also totally ignored Congress's long-standing practice of regulating the Louisiana Purchase. By denying to Congress what Marshall fully granted, Taney and his dual-federalism premises helped bring about that very "hostility of a still more serious nature" Marshall feared.

Prudentially, it was not wise for Day or Taft to ground their findings of unconstitutionality on the logic of Dred Scott. Their failing, however, goes beyond a lack of prudence. Dual federalism, even prior to the ratification of the Seventeenth Amendment and its fundamental alteration of federalism, was vulnerable to one devastating objection, cogently expressed by Justice Oliver Wendell Holmes in his dissent in *Hammer*:

"If an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void."

In their efforts to overcome this objection, both Day and Taft were forced implicitly to rewrite the Commerce and Tax Clauses so that they would read: Congress shall have power to regulate commerce among the several states or to lay and collect taxes, unless these powers interfere with the domestic policies of a state. Justice Day felt compelled to go even further and explicitly rewrite the Tenth Amendment as well, declaring that "the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved." In so doing, he

---

276. Id. at 401, 424.
277. One scholar has noted that, "From a lawyer's viewpoint, *Scott* was a disreputable performance. The variety of feeble, poorly developed, and unnecessary constitutional arguments suggests, if nothing else, a determination to reach a predetermined conclusion at any price." *Currie, supra* note 149, at 272.
279. Id. at 275 (emphasis added).
denied the historical record; when the First Congress considered what would become the Tenth Amendment, it flatly rejected a proposal by Elbridge Gerry to insert into it the word “expressly.” He also ignored judicial precedent; in *McCulloch*, Marshall held that, because the word “expressly” had been intentionally omitted from the Amendment, the question of whether Congress could exercise a particular power was to be answered by “a fair construction of the whole instrument.”

Day appears to have been driven to these lengths because of his belief that the Court was the only defender of federalism.

The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

He failed to appreciate that the original federal design (which, of course, is what Day means when he speaks of “our system of government”) was, if not “destroyed,” then surely profoundly altered by the Seventeenth Amendment. Moreover, he seems wholly unaware that there is simply no historical evidence to suggest that the people who, in the name of democracy, ratified the Seventeenth Amendment, intended to transfer the power to protect that original federal design from the indirectly-elected Senate to an appointed Court so that it might invalidate the very measures now passed by their democratically-elected Senate.

280. *See Creating the Bill of Rights*, *supra* note 72, at 51, 199.
283. *See infra* note 309 and accompanying text.
284. Bybee states,

It is unclear that the Supreme Court should be responsible for guaranteeing the role of the states and protecting the people from themselves. The Seventeenth Amendment took the power to elect senators from state legislatures (which, after all, represent people) and gave it to the people (who would now represent themselves). It seems to me that states as political entities in a federal system were more aggressively represented in Congress through their legislatures, but since the Constitution now provides otherwise, the people cannot complain about the Court when the people demanded control of the Senate and then failed to exercise it with the same vigilance as their legislatures.

Bybee, *supra* note 2, at 568.

For a different understanding of the relationship between the Seventeenth Amendment and the Supreme Court, see Brooks, *supra* note 17, at 208-09.

Because the Seventeenth Amendment was not intended to reduce that zone of...
B. Narrow Construction of the Commerce Clause

The deficiencies of dual federalism quickly became apparent, and the Court no longer employed it to invalidate a congressional enactment after Trusler v. Crook in 1926. Rather, the Court shifted its ground and found offensive federal legislation unconstitutional based on its narrow reading of the Commerce Clause and its use of the “direct effects/indirect effects” test. It did so by abandoning Marshall’s expansive understanding of the Commerce Clause as he articulated it in Gibbons. "The word ‘commerce,’" the Court now insisted, "is the equivalent of the phrase ‘intercourse for the purposes of trade.’" On that basis, it denied that the Congress had plenary power under the Commerce Clause to regulate agriculture in United States v. Butler and mining in Carter v. Carter Coal Co.

state sovereignty, it did not lessen the pre-existing constitutional right of States to exercise their reserved sovereignty unhindered... As a result, the Supreme Court cannot properly excuse itself from judging whether a challenged federal law does violate that state sovereignty.

Id. 285. 269 U.S. 475 (1926). In Trusler, the Court invalidated Section 3 of the Future Trading Act of 1921, which imposed a tax of 20 cents per bushel on all options trading. The Court held that its purpose was not to raise revenue but rather was simply to ban, by penalty, the use of options altogether. See id. at 482.

286. The Court continued to make dual-federalism arguments in United States v. Butler, 297 U.S. 1 (1936), and Carter v. Carter Coal Co., 298 U.S. 238 (1936), but it did not base its conclusion that the underlying statutes at issue in these cases were unconstitutional on that basis. In fact, it did not officially repudiate the use of the principle of dual federalism in interpreting the Commerce Clause until United States v. Darby Lumber Co., 312 U.S. 100 (1941), when it explicitly overturned Hammer v. Dagenhart. It should be noted, moreover, that several members of the Court continued to employ dual-federalism principles in matters of taxation. See United States v. Kahriger, 345 U.S. 22 (1953), for example, where both the majority opinion by Justice Stanley Reed and the dissent by Justice Felix Frankfurter employed dual-federalism reasoning. Justice Frankfurter was quite emphatic in defending this form of reasoning.

[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.


287. Carter Coal, 298 U.S. at 303.
289. 298 U.S. 238 (1936). The Court stated:

[T]he word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade." Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of
These, of course, were not the first cases in which the Court had narrowed Marshall's expansive language in Gibbons. In United States v. E. C. Knight Co. in 1895, the Court asserted that "commerce succeeds to manufacture, and is not a part of it" and, on that basis, held that the Sherman Anti-Trust Act of 1890 could not be used against the American Sugar Refining Company and its monopoly control of the nation's sugar refining business. It was not, however, until the post-Seventeenth Amendment era that the Court began to declare federal statutes unconstitutional based on its narrow definition of commerce.

Unlike Marshall in Gibbons, the Court in the initial post-Seventeenth Amendment era was simply unwilling to trust "the wisdom and discretion of Congress" as "the sole restraints" to "secure" the people from congressional "abuse" of the commerce clause. It saw the very principle of federalism itself as hanging in the balance. As Justice George Sutherland noted in his majority opinion in Carter Coal Co.:

Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations, is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

Id. at 303-04. Also, see Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), in which the Court held that Congress's power to regulate interstate commerce did not extend to regulations related to the social welfare of the worker. These regulations were based on the theory that, by engendering contentment and a sense of personal security, they would induce more efficient service. See id. at 367.

290. 156 U.S. 1 (1895).
291. Id. at 12.
292. See id. at 16-18.
293. See Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936), in which the Court held that the infirmities of the Agricultural Adjustment Act of 1933, which were the bases for holding it unconstitutional in Butler, had not been cured by the Amendatory Act of August 24, 1935, as that act likewise was a means for effectuating the regulation of agricultural production and was not, therefore, a matter within the powers of Congress. See id. at 113.
been ratified.\textsuperscript{295} Sutherland seemed unaware that the people who ratified the Constitution feared no such danger, for they were secure in the knowledge that the mode of electing the Senate would ensure that the states would not be reduced to geographical subdivisions. The ratification of the Seventeenth Amendment removed that democratic and structural protection of federalism and apparently warranted, in the minds of the members of the Court majority in these cases, the Court's activist intervention. Since this judicial protection was neither democratically nor structurally based, it was destined to fail.

In \textit{E.C. Knight}, the Court acknowledged that, while sugar manufacturing was not commerce, it nevertheless could affect interstate commerce.\textsuperscript{296} It insisted, however, that the American Sugar Refining Company was not covered by the Sherman Anti-Trust Act, because its monopoly control of sugar refining affected commerce "only incidentally and indirectly."\textsuperscript{297} The Court thereby introduced a crucial distinction between intrastate activities having a "direct effect" on commerce (and therefore subject to congressional regulation) and intrastate activities having only an "indirect effect" on commerce (and therefore beyond Congress's reach). Again, however, it was not until after the Seventeenth Amendment was ratified that the Court began to use this "direct effects/indirect effects" test to invalidate, as opposed to merely limiting the reach of, a federal statute. It did this for the first time in 1935, when it held in \textit{A.L.A. Schechter Poultry Corp. v. United States}\textsuperscript{298} that the National Industrial Recovery Act of 1933 was unconstitutional because, inter alia, Congress was attempting to regulate

\textsuperscript{295} 298 U.S. at 295-96. \textit{See Hopkins Fed. Sav. & Loan Ass'n v. Cleary}, 296 U.S. 315 (1935); \textit{Ashton v. Cameron County Water Improvement Dist. No. One}, 298 U.S. 513 (1936). In \textit{Hopkins Federal Savings & Loan Ass'n}, the Court held that the provision of the Federal Home Owners' Loan Act of 1933 permitting a state building and loan association to convert itself into a federal savings and loan association without the consent of the state that created it was an unconstitutional encroachment upon the reserved powers of the states. \textit{See Hopkins Fed. Sav. & Loan}, 296 U.S. at 335. In \textit{Ashton}, it held that a 1934 amendment to the Bankruptcy Act permitting municipal corporations and other political subdivisions of the states unable to pay their debts as they matured to resort to the federal courts of bankruptcy to effect readjustment of obligations was likewise unconstitutional for it trenched on the reserved powers of the states. \textit{See Ashton}, 298 U.S. at 530. "If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them." \textit{Id.} at 531.

\textsuperscript{296} \textit{See E.C. Knight}, 156 U.S. at 12.

\textsuperscript{297} \textit{Id.} "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense." \textit{Id.}

\textsuperscript{298} 295 U.S. 495 (1935).
intrastate acts that only indirectly affected interstate commerce. The next year in *Carter Coal*, it again employed this test to find Congress’s efforts to regulate coal production unconstitutional.

In *Schechter*, Chief Justice Charles Evans Hughes confidently asserted that the distinction between a direct and an indirect effect was “clear in principle”; however, just one year later in *Carter Coal*, Justice Sutherland confessed that, “[w]hether the effect of a given activity or condition is direct or indirect is not always easy to determine.”

Struggling to articulate a distinction, he declared that “[t]he word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition.” And, he continued, “the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.”

He acknowledged that “[i]t is quite true that rules of law are sometimes qualified by considerations of degree,” but he insisted that “the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?”

Sutherland’s clarification was, of course, completely unhelpful, and it came as no surprise that, in *Jones & Laughlin*, decided during its next term, the Court totally abandoned the “direct effect/indirect effect” test and held that, if intrastate activities “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”

With its decision in *Jones & Laughlin*, the Court abandoned its defense of federalism; no longer would it attempt to draw lines that the Founders denied could be drawn and that they never intended the Court to try to
No longer would it attempt to define narrowly a congressional power that was, in fact, plenary. David Currie argues that with Jones & Laughlin, "constitutional federalism died." A better formulation still would have been to declare that federalism died in 1913, with the ratification of the Seventeenth Amendment, but that it took until 1937 for the Supreme Court to learn this lesson.

What it took the Court a quarter of a century to learn, it took it another thirty-nine years to forget. In 1976, in National League of Cities v. Usery, the Court attempted once again to breathe life into the corpse of federalism when it held that Congress could not exercise its power under the Commerce Clause "in a fashion that would impair the States' 'ability to function effectively in a federal system.'" Announcing for a bare majority that Congress lacked the power "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," Justice William Rehnquist declared unconstitutional the 1974 amendments to the Fair Labor Standards Act that extended maximum hours and minimum wage requirements to employees of states and their political subdivisions.

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

The federal design created by the Founders obliged the Court to rule as it did, or so Justice Rehnquist asserted: "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think

---

307. But see Brooks, supra note 17, at 210. Brooks argues that "[t]he Court certainly recognizes that a constitutional line between state and federal authority exists; it regularly strikes down state laws as encroaching on federal prerogatives." Id. See Zywicki, supra note 6, at 228. Brooks, however, refuses to recognize that, from the founding onward, it is the Congress and not the Court that is to draw the line between state and federal authority. He also fails to understand that, when the Court strikes down state laws that encroach on federal power, it is not drawing the line itself but merely enforcing, consistent with the Supremacy Clause of Article VI, the line Congress has drawn.


309. It is with the hope of resuscitating federalism that Bybee is led to propose that the Seventeenth Amendment be repealed. See Bybee, supra note 2, at 563. Zywicki agrees that this is a "good idea" but quickly concedes that "[t]he tide of democracy is generally difficult to contain, much less reverse." Zywicki, supra note 6, at 226.


311. Id. at 852 (citation omitted).

312. Id.

313. Id. at 845.
there would be little left of the States’ "separate and independent existence." \textsuperscript{314} The implication was clear. In the absence of the structural protection of federalism provided by the original mode of electing the Senate, Marshall’s arguments in \textit{Gibbons} were no longer valid, and Congress’s power under the Commerce Clause could no longer be considered “plenary”; \textsuperscript{315} rather, it must be understood as limited by the Court’s judgment concerning what “would impair the States’ ‘ability to function effectively in the federal system.’” \textsuperscript{316} It needs to be underscored, however, that Rehnquist was speaking about the federal system as originally designed, not as fundamentally altered by the adoption and ratification of the Seventeenth Amendment.

Eight years later, the Court again abandoned its efforts to defend federalism in \textit{Garcia v. San Antonio Metropolitan Transit Authority}; \textsuperscript{317} it explicitly overturned \textit{National League of Cities} and held that government-owned mass-transit systems were indeed subject to the obligations of the Fair Labor Standards Act. \textsuperscript{318} It confessed that it was unable to draw the line, on which the logic of \textit{National League of Cities} fundamentally depended, between “traditional” governmental functions that the Court was to protect from congressional interference and “nontraditional” or “proprietary” functions performed by state and local governments that the Congress was allowed to regulate. \textsuperscript{319} “We doubt that courts ultimately can identify principled constitutional limitations on the scope of the Congress’s Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty.” \textsuperscript{320}

Justice Harry Blackmun held for the majority, but, as in \textit{National League of Cities} itself, only for a bare majority, that the protection of federalism must come from the political process, not the courts. \textsuperscript{321} The principal means chosen by the Framers to ensure the role of the states in the federal system lies in the structure of the federal government itself. He elaborated:

It is no novelty to observe that the composition of the Federal Government was

\begin{itemize}
  \item \textsuperscript{314} \textit{Id.} at 851 (citation omitted).
  \item \textsuperscript{315} \textit{Gibbons} v. \textit{Ogden}, 22 U.S. (9 Wheat.) 1, 46 (1824).
  \item \textsuperscript{316} \textit{National League of Cities}, 426 U.S. at 852 (citation omitted). \textit{But see} \textit{CURRIE}, supra note 308, at 564-65 (defending Rehnquist’s opinion).
  \item \textsuperscript{317} 469 U.S. 528 (1985).
  \item \textsuperscript{318} See \textit{id.} at 531.
  \item \textsuperscript{319} See \textit{id.} at 539, 543.
  \item \textsuperscript{320} \textit{Id.} at 548.
  \item \textsuperscript{321} See \textit{id.} at 556-57.
\end{itemize}
designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent.

Blackmun's language, while an accurate-enough description of how federalism was originally protected, was nonetheless misleading in a crucial respect: He maintained the fiction that federalism is currently protected structurally. With this assertion, Blackmun showed that he, no less than Rehnquist in National League of Cities, had forgotten the fundamental lesson of the Seventeenth Amendment, viz., that federalism was dead. Blackmun did acknowledge that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.

He nevertheless insisted that the structural limitation "that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States'" remained sufficiently in place and that federalism retained its vitality.

As proof that federalism was alive and well, Blackmun noted that, while the Congress had subjected state mass-transit systems to federal wage-and-hours obligations, it had simultaneously provided extensive

---

321. Blackmun mentions the mode of electing the Senate only in passing and places most of his emphasis on equal representation of the states in the Senate. His argument is reminiscent of the Senate Committee Report in 1896 responding to Congressman Bartlett. See supra note 216.
324. See also South Carolina v. Baker, 485 U.S. 505 (1988), in which Justice William Brennan declared that the "limits on Congress' authority to regulate state activities" set out in Garcia "are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." Id. at 512 (emphasis omitted).
325. Garcia, 469 U.S. at 554.
326. Id. Amar argues that the Court removed itself from the business of protecting state entities from the application of federal law "largely on the theory that the federal structure enables state governmental entities to protect themselves through the political process. I think it fair to say that Justice Blackmun's opinion did not really grapple with the fundamental change in that structure reflected by direct election." Amar, supra note 215, at 1380 (citation omitted).
funding (over $22 billion) for state and local mass transit. He reported that:

Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area.

Blackmun therefore drew what he considered to be the only conclusion: “Congress’ treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.” Blackmun’s evidence, however, utterly fails to support his contention that the current constitutional structure actually protects the interests of “States as States” or that constitutional federalism retains any vitality whatsoever. Quite the contrary, it shows only that, in the post-Seventeenth Amendment era, members of Congress will look after the interests of those subordinate to them and that the states have now been reduced to that subordinate status. Whereas, for the Founders, senators could be trusted to look after the interests of the states because the state legislatures were their masters, for Blackmun and his colleagues, the members of Congress can be trusted to look after the interests of the states because the states are now their supplicants whose well-being depends on their sufferance.

What Justice Antonin Scalia said of the Lemon test in Lamb’s Chapel v. Center Moriches Union Free School District can also be said of the corpse of federalism: It is “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” It is therefore not surprising that, eleven years after Garcia, the Court’s desire to exhume the original federal design and to draw lines between the Congress’s permissible and impermissible use of its Commerce Clause power once again became

327. See Garcia, 469 U.S. at 555.
328. Id.
329. Id.
332. Id. at 398 (Scalia, J., concurring).
Irresistible. In *United States v. Lopez*, it declared unconstitutional the Gun Free School Zones Act of 1990, not because it trenchered on state integrity or the attributes of state sovereignty but simply because it exceeded the scope of the Commerce Clause. Reviewing case law, Chief Justice Rehnquist held for what was again a bare majority that the Congress can regulate intrastate activity only when it "substantially affects interstate commerce." Did possession of a handgun within 1000 feet of a school substantially affect interstate commerce? The federal government in its defense of the statute and the four Justices in the minority said "yes," claiming that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy because the costs of violent crime are substantial and because violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. They also claimed that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment and that a handicapped educational process, in turn, results in a less-productive citizenry, thereby adversely affecting the nation's economic well-being. However, Rehnquist and his colleagues in the majority said "no," insisting that if they were to accept the federal government's argument, it would be difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we [would be] hard pressed to posit any activity by an individual that Congress is without power to regulate.

Rehnquist admitted "legal uncertainty" concerning whether "an intrastate activity is commercial or noncommercial," and he acknowledged that there were no "precise formulations" for what the Congress could or could not regulate. He even conceded that "some of our prior cases have taken long steps" down the road to "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States" and that "[t]he broad language in these opinions has suggested the possibility of additional expansion." Nonetheless, Rehnquist declined to take that next step.

334. *See id.* at 551.
335. *Id.* at 559.
336. *See id.* at 563-64 (opinion of the Court), 625-26 (Breyer, J., dissenting).
337. *See id.* at 564.
338. *Id.* at 564.
339. *Id.* at 566.
340. *Id.* at 567.
341. *Id.*
Rather, he put his foot down and said "no," even though he never provided a compelling explanation for why he had drawn where he had the line between Congress's permissible and impermissible use of the Commerce Clause.

Justice Clarence Thomas concurred in Lopezs even as he rejected the majority's use of the substantial-effects test. He declared that "much if not all of Article I, Section 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce."

An interpretation of the Commerce Clause that renders "the rest of [Section] 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Article I, Section 8." He attributed the growth of federal power to the Court's failure to interpret the Commerce Clause correctly, but a more likely culprit was the Seventeenth Amendment's elimination of the structural protection that the election of the Senate by state legislatures had provided to federalism.

Thomas said that he awaited a future case in which the Court could reconsider the substantial effects test and construct a new "standard" that better "reflects the text and history of the Commerce Clause." There is, however, little reason to expect that future courts will be more successful than past ones in drawing a clear line between the powers of the federal and state governments. As Lino Graglia has noted, judicial

342. Id. at 589 (Thomas, J., concurring).
343. Id.
344. See id. at 584-85.
345. Interestingly, it was that very "absence of structural mechanisms" that ultimately persuaded Justice Anthony Kennedy to join the majority opinion in Lopezs. See id. at 578 (Kennedy, J., concurring). His vote was quite surprising in light of statements he had made earlier in his concurring opinion. He acknowledged, for example, that, unlike the "workable standards to assist in preserving separation of powers and checks and balances" that the Court had developed, "our role in preserving the federal balance seems more tenuous." Id. at 575 (Kennedy, J., concurring). He also admitted that the conclusion could be drawn from The Federalist Papers... that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment.

Id. at 577 (citation omitted). See supra note 67 and accompanying text.
346. Lopez, 514 U.S. at 585.
second-guessing of Congress's use of its Commerce Clause power can never effectively protect federalism, for

principled limits cannot be defined. Because the power to regulate interstate commerce would seem necessarily to include the power to regulate things that affect it, and all things affect it, the question is unavoidably one of degree. The question presented in each case is not whether a particular activity affects interstate commerce, but whether it affects it significantly enough to justify federal regulation, considering the loss of local autonomy involved.

Graglia states the inevitable conclusion: Because that question "is one of magnitude (an empirical question), the Court is in no position to contradict a (presumed) congressional determination of the substantiality of the effect. It is difficult for the Court to contradict Congress's definition of substantiality when it has no alternative definition of its own." 348

A better approach in that "future case" would be for the Court to announce that federalism died with the ratification of the Seventeenth Amendment, that the Court therefore is withdrawing explicitly from reviewing congressional power under the Commerce Clause, and that it will hereafter treat Commerce Clause questions as political questions, acknowledging in the language of Baker v. Carr 349 that there are no "judicially discoverable and manageable standards for resolving" them and that the resolution of these questions was "constitutional[ly] commit[ted]" by the Founders "to a coordinate political department," i.e., to the Congress with its House elected by the people and its Senate whether elected indirectly by state legislatures or directly by the people.

C. Prohibition of the "Commandeering" of State Officials

While the Court has attempted, for the most part, to protect the original federal design primarily through its use of dual-federalism principles or its narrow construction of the Commerce Clause, as of late, it has also begun to protect it by declaring that Congress lacks the power

---

347. Graglia, supra note 69, at 768-69.
348. Id. at 769. Graglia also stated,

Although the Constitution contemplates a federal system of divided powers rather than a national system of totally centralized power, it is doubtful that such a system can be made a matter of a judicially enforceable legal or constitutional guarantee. Discussions of federalism that speak, as most do, of the need to maintain separate 'spheres' or 'areas' of federal and state authority and to maintain the 'boundaries' between them tend more to mislead than to aid understanding of the problem. Political power is not a physical or spatial entity subject to such a division.

Id. at 722.
349. 369 U.S. 186 (1962).
350. Id. at 217.
to "commandeer" state officials into carrying out federal programs. In *New York v. United States*, the Court held unconstitutional a key provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required a state that had failed to provide for the disposal of all of its internally-generated waste by a particular date to take title to and possession of that waste and become liable for all damages suffered by the generator or owner of that waste as a result of the state's failure to take prompt possession. Justice Sandra Day O'Connor, a former state legislator and state court judge, asserted for a six-member majority that,

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Why does the Congress have the authority to regulate either directly or through preemption but not through conscription or commandeering? Because, O'Connor continued, coercing the states into enacting or enforcing a federal regulatory program "infring[es] upon the core of state sovereignty reserved by the Tenth Amendment" and "is inconsistent with the federal structure of our Government established by the Constitution." O'Connor acknowledged that the Tenth Amendment declares but "a truism that all is retained which has not been surrendered." Nonetheless, she insisted that the Tenth Amendment is as enforceable and contains limitations as identifiable as the First Amendment itself.

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

352. See id. at 149.
353. Id. at 178.
354. Id. at 177.
355. Id. at 156 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).
356. Id. at 156-57.
How are these limits to be determined if they are not derived from the text? O’Connor’s exposition is unclear on this matter but the answer apparently is that they come from the Court’s own sense of its responsibility to protect the original federal design and the core of state sovereignty. As she asserts, “The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”\(^3\) How does a truism, a tautology, help the Court to “determine” whether that core has been penetrated by the federal government, whether the line separating constitutionality from unconstitutionality has been crossed? It is a question O’Connor sidesteps.

O’Connor’s answers to the questions of what are the limits that the Tenth Amendment imposes on the federal government and where the line to be drawn separating permissible from impermissible federal legislation contrast strikingly with the answers of the founding generation. Their entire understanding of the Tenth Amendment was intimately connected to their understanding of federalism and their sense of how it was protected by the mode they had provided for electing the Senate. Senators could be trusted to scrutinize whether proposed federal legislation would violate the “core of state sovereignty” and to refuse to assent to it if it did. The Tenth Amendment was appropriately a truism, for the mode of electing the Senate ensured that the reserved power of the states would remain inviolable. Once the Seventeenth Amendment was ratified, however, the Framers’ structural answer to these questions was no longer available, leaving O’Connor and her colleagues to choose between only two other possible answers: trusting the line drawn by the popular branches, or trusting the line they would draw. Not surprisingly, O’Connor and her colleagues chose the answer most flattering to themselves.

The issue of “commandeering” state officials surfaced again in *Printz v. United States*,\(^3\) as the Court considered the constitutionality of that provision of the Brady Handgun Violence Prevention Act of 1993 that commanded state and local law-enforcement officers to conduct background checks on prospective handgun purchasers. Justice Scalia held for a five-member majority that this congressional command was “fundamentally incompatible with our constitutional system of dual sovereignty” and therefore unconstitutional.\(^3\) Contrary to O’Connor in *New York*, Scalia acknowledged that there was no constitutional text, not even the Tenth Amendment, that spoke to the precise question of

---

357. *Id.* at 157 (emphasis added).
359. *Id.* at 935.
whether congressional action compelling state officers to execute federal laws was unconstitutional. Therefore, he turned to three other sources: historical understanding and practice, the structure of the Constitution, and the Court’s past decisions.

Scalia began by researching historical understanding and practice. He reviewed the actions of the early Congresses, observed that they studiously “avoided use of this highly attractive power,” and concluded that “the power was thought not to exist.” He would have been more precise if he had concluded that the power to commandeer may indeed have existed but that the Senate, representing the interests of the states as states, simply refused to accede to its use.

Scalia then turned to the structure of the Constitution, where, most interestingly, he ultimately found federal commandeering of state officials to be unconstitutional not so much because it violated the principles of federalism but because it violated separation of powers. He noted that “[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed,’ personally and through officers whom he appoints.” The Brady Act, however, effectively transferred this responsibility to thousands of state and local law-enforcement officers in the fifty states, who, as Scalia pointed out,

are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

This argument comes, of course, directly from his dissent in Morrison v. Olson. In Morrison, Scalia wrote for himself alone; in Printz, however, by sugarcoating his separation-of-powers argument with a defense of federalism, he was able to write for a five-member majority.

360. See id. at 905.
361. See id.
362. Id.
363. Id. at 922 (citations omitted).
364. Id. at 922-23 (citations omitted).
366. Scalia’s argument on the need to preserve separation of powers within the federal government itself is reminiscent of Chief Justice Marshall’s opinion in Marbury. See supra note 155.
Finally, Scalia turned to the Court’s previous decisions on commandeering. He found them “conclusive[367] although, given the arm’s-length distance he kept from the Tenth Amendment and in light of the separation of powers argument he had just made, perhaps not wholly persuasive.

VII. CONCLUSION

The Court’s most recent effort to protect federalism at the expense of the democratic principle is City of Boerne v. Flores.368 In it, the Court found unconstitutional the Religious Freedom Restoration Act of 1993 on the grounds that it exceeded Congress’s powers under Section 5 of the Fourteenth Amendment.369 Section 5 states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”370

Justice Anthony Kennedy held for a six-member majority that Congress’s enforcement power was limited to passing “measures that remedy or prevent unconstitutional actions” by the states and did not extend to passing “measures that make a substantive change” in what the Court has held the Constitution means.371 He admitted that the “line” between measures that are remedial and those that are substantive “is not

367. Printz, 521 U.S. at 925.
369. See id. at 536.
371. City of Boerne, 521 U.S. at 519. Contrast the contemporary Court’s understanding of Section 5 with the pre-Seventeenth Amendment Court’s understanding of that section (and confidence in the Congress’s exercise of the power it confers) as expressed in Ex Parte State of Virginia, 100 U.S. 339 (1879).

It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. Id. at 345-46. The Ex Parte State of Virginia Court also stated:

Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State.... But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.

Id. at 347-48.

738
easy to discern"\textsuperscript{372} and ultimately depends on how "flagrant"\textsuperscript{373} the violation was that the Congress sought to remedy. He noted, for example, that, in \textit{Katzenbach v. Morgan},\textsuperscript{374} the Court held that Congress could expand the rights for Spanish-speaking American citizens in section 4(e) of the Voting Rights Act of 1965 without that measure being considered substantive because the discrimination that Congress sought to correct was flagrant "invidious discrimination."\textsuperscript{375} How did the Court in \textit{Morgan} know that the discrimination against Spanish-speaking American citizens that section 4(e) addressed was flagrant? Interestingly, it was not because the Congress had declared it to be so but simply because the Court believed that it was. As Justice John Marshall Harlan II pointed out in his \textit{Morgan} dissent: "There were no committee hearings or reports referring to this section [4(e)], which was introduced from the floor during debate on the full Voting Rights Act."\textsuperscript{376} By contrast, in \textit{City of Boerne}, the Court held that Congress could not expand the religious rights of Americans generally through the Religious Freedom Restoration Act because, despite the extensive record established through hearings in both the House and the Senate, the Court was not persuaded that religious bigotry was widespread.\textsuperscript{377} For the Court, the absence of widespread religious discrimination meant that there was no need for a remedy, which, in turn, made the Religious Freedom Restoration Act a substantive and, therefore, unconstitutional measure. Such subjectivity and subterfuge was hardly becoming; neither was its overt reliance on \textit{The Civil Rights Cases},\textsuperscript{378} a decision in which the Court held that Congress lacked the power to enforce the rights of citizenship guaranteed by the Fourteenth Amendment to blacks and, therefore, the power to prohibit racial discrimination in public accommodations.\textsuperscript{379} The Court, however, appeared not to care; it was engaged in the important work of protecting "the federal balance."\textsuperscript{380}

The Court's decision in \textit{City of Boerne} is especially ironic. The Court asserted that the Congress unconstitutionally exceeded the powers

\textsuperscript{372} \textit{City of Boerne}, 521 U.S. at 519.
\textsuperscript{373} \textit{Id.} at 525.
\textsuperscript{374} 384 U.S. 641 (1966).
\textsuperscript{375} \textit{Id.} at 656.
\textsuperscript{376} \textit{Id.} at 669 n.9 (Harlan, J., dissenting).
\textsuperscript{377} \textit{See City of Boerne}, 521 U.S. at 531.
\textsuperscript{378} 109 U.S. 3 (1883).
\textsuperscript{379} \textit{See id.} at 25.
\textsuperscript{380} \textit{City of Boerne}, 521 U.S. at 536.
conferred on it by Section 5 of the Fourteenth Amendment and thereby upset federalism. But, if ever there was an amendment intended to enhance the power of Congress at the expense of the Court, it was the Fourteenth Amendment. After all, it begins in Section 1 by explicitly repudiating the Supreme Court’s outrageous assertion in *Dred Scott* that blacks could not be citizens of the United States, and it concludes in Section 5 by giving to the Congress, and not to the Court, the power to enforce its many provisions. Additionally, if ever there was an amendment consciously intended to strengthen the power of Congress at the expense of the states, it was also the Fourteenth Amendment. The Civil War established on the fields of battle that we were indeed a nation, not a confederacy, and the Fourteenth Amendment ratified that fact, both in how it limited the states and in how it empowered the Congress—the mode of electing the Senate ensured that Congress’s new powers under Section 5—would not be used to the destruction of the states. Yet, in *City of Boerne*, the Court, in the name of federalism and in the face of a virtually-unanimous Congress, arrogantly exercised its power of judicial review. Its obsession with protecting the original federal design, weakened by the Fourteenth Amendment and left without structural support by the Seventeenth Amendment, was matched by its complete disregard for the democratic principle embodied in the Seventeenth Amendment.

In a January 27, 1838, speech to the Springfield Young Men’s Lyceum entitled “The Perpetuation of Our Political Institutions,” Abraham Lincoln described how the founding principles of the republic were “fading” from view.\(^{381}\) He did not fear that they would ever be entirely forgotten, only “that like every thing else, they must fade upon the memory of the world, and grow more and more dim by the lapse of time.”\(^{382}\) Nevertheless, Lincoln warned, the consequences were profound. Those founding principles “were a fortress of strength; but, what invading foeman could never do, the silent artillery of time has done; the levelling of its walls.”\(^{383}\)

Lincoln’s words describe perfectly the fate that has befallen the original federal design. The Framers designed the Constitution so that federalism was protected structurally through the election of the Senate by state legislatures. Over time, however, the public’s understanding of the reasons for that structural protection faded, and the walls of federalism were leveled by the ratification of the Seventeenth

---

382. Id.
383. Id.
Amendment and the public’s desire to make the Constitution more democratic. Thus, the Seventeenth Amendment effectively killed federalism, something that the public did not anticipate and that the Supreme Court has repeatedly failed to appreciate. The Court has sporadically attempted to rebuild the wall of federalism, but its efforts have always failed, for, as it has candidly confessed, it cannot determine exactly where the wall should go, i.e., it cannot identify a principled line demarcating federal from state powers. Its memory concerning federalism has also faded; while it remembers that the Framers wanted federalism to be protected, it has forgotten that they believed that only constitutional structure, and not an activist Court, can protect it. Its interventions, inconsistent with the original design, have been unprincipled and unsuccessful and have served “neither the purposes of federalism nor the ideals of democracy.”384 The Court should acknowledge that fact and allow the original federal design to rest in peace—the victim of the “silent artillery of time.”385

384. Bybee, supra note 2, at 567.
385. Lincoln, supra note 381, at 20.