Democracy Within Federalism: An Attempt to Reestablish Middle Ground

ALEXANDER HANEBECK*

TABLE OF CONTENTS

* Research Assistant at the Chair for Administrative and Constitutional Law, Legal Philosophy and Comparative Law, J.W. Goethe-Universität Frankfurt am Main, Germany. Erstes Juristische Staatsexamen 1997, Justus Liebig-Universität, Giessen, Germany; LL.M. 1998, University of Wisconsin. I would like to thank Ann Althouse and Brun-Otto Bryde. I am also indebted to Kara Preedy for her willingness to discuss ideas and read drafts.

I. INTRODUCTION

In the last few years federalism has become the issue on which the Supreme Court is most clearly divided, with a narrow five-to-four majority strengthening the position of the states at the expense of the federal government.[1] This was again the case at the end of its last term in the decisions pertaining to state sovereign immunity.[2] The majority

1. *See* Linda Greenhouse, *High Court Faces Moment of Truth in Federalism Cases*, N.Y. TIMES, Mar. 28, 1999, § 1, at 34. The cases are: *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and *Printz v. United States*, 521 U.S. 898 (1997). The majority consists of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas.

2. *See* Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999). This trend has continued. *See* Linda Greenhouse, *Women Lose Right to Sue Attackers in Federal Court*, N.Y. TIMES, May 16, 2000, at A1.

and their dissenters clearly feel that federalism is not merely an abstract concept but that there are fundamental and urgent questions rooted in it; those in dissent are unyielding, with compromise apparently being impossible. While Chief Justice Rehnquist predicted a more state-friendly approach fifteen years ago,[3] which seems to have transpired, it is now the turn for more federally inclined Justices to predict that the opinion of the Court will be fleeting.[4] In the 1999-2000 term the tone between the two sides hardened,[5] conveying the impression that they have little to say to each other.[6] This Article attempts to find middle ground in this debate by analyzing the fundamental questions of federalism through the lens of democracy within federalism.

Democracy and federalism as the topic of an Article almost sounds like no topic at all. Mildly put, it is not a precisely limited subject. The books on either one of these subject matters alone could easily fill an entire library. But democracy *within* federalism raises some very specific questions. The first and most fundamental question is: From where does democratic legitimacy under the United States Constitution originate? If one asked that question on the street or in the halls of a university, it would probably lead to an answer like: "From the people, obviously." That person is likely to have a puzzled look on his or her face, as if a rather weird question had been asked. The trouble is that, in a federal system, there is more than one entity that could be referred to as "the people." It could be the people of the several states as separate entities, or the people of the United States as one single entity. To be more precise, the question is: Who are "the people?" This exact question was the central part of the decision in *U.S. Term Limits, Inc. v. Thornton*,[7] and the reactions to it, especially the dissent by Justice Thomas, showed that this question struck a nerve.[8] In addition, the Court's decisions on state sovereign immunity at the end of its last term have resulted in an impassioned debate about the reconfiguration of the

3. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

4. *See Alden*, 119 S. Ct. at 2295 (Souter, J., dissenting).

5. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

6. *See generally* Linda Greenhouse, *Supreme Court Shields States from Lawsuits on Age Basis*, N.Y. TIMES, Jan. 12, 2000, at A1 (describing the path that the majority of the Court is taking as a "march in the direction of states' rights").

7. 514 U.S. 779 (1995).

8. The dissent has been described as a manifesto, a reinstallation of the Articles of Confederation, or as questioning the legacy of Reconstruction. *See* Robert F. Nagel, *The* Term Limits *Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 844 (1996).

balance between the authority of states and the federal government.[9] One of the dissenters in these cases, Justice Stevens, even accused the Court of resurrecting the Articles of Confederation.[10] This reaction is due to the link between these questions and the identity of the United States. Either the United States has a state-based and state-centered form of government drawing its legitimacy from the people of each single state, or the national government is legitimized by the nation as a whole. One might expect this fundamental question to have been discussed and answered when the Constitution was created or later interpreted, but more than two hundred years later still no consensus exists. The second question, closely linked to the first, is: How are the states represented at the national level? Not only is the mode of representation part of the answer to the first question, it is also important with regard to the stability of the system. Are the states in a position to protect not only their interests but also their powers and their position within the constitutional structure? Different answers to this second question have played a prominent role in Supreme Court decisions about federalism, and what is necessary to protect the federal structure.[11]

These are by no means new questions. On the contrary, the conflict between the two levels of government, state and federal, is a very old one. The main battleground of this debate, however, has been over states' rights and the protection of individual rights by federal courts. As John Hart Ely observed, this is not where federalism hangs in the balance.[12] He correctly points out what is becoming obvious in recent Supreme Court decisions. For the existence of states as independent entities, it is more important where legislative competence lies.[13] This Article is concerned with the groundwork for a debate over the distribution of legislative competence, because it attempts to describe the structure in which these powers are allocated—the structure of democracy within federalism.

As a starting point, an analysis of Supreme Court decisions will show: (1) how much the Court struggled with the question of how to evaluate the states' influence at the national level; and (2) how antagonistic the

9. *See* Linda Greenhouse, *States Are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1. Initial reactions have been mixed. *Compare* Anthony Lewis, Editorial, *The Supreme Power*, N.Y. TIMES, June 29, 1999, at A19 (attacking the Court and calling the majority "a band of radical judicial activists" who are rewriting the structure of the government without support in the text of the Constitution), *with* David Ignatius, *Back to the States*, WASH. POST, June 27, 1999, at B7 (approving the decisions and interpreting them as a step toward a government "close to the people").

10. *See* Greenhouse, *supra* note 9, at A1.

11. *See infra* Parts II.A.1-2.

12. *See* JOHN HART ELY, ON CONSTITUTIONAL GROUND 33 (1996).

13. *See id.*

positions of the Justices are concerning the source of democratic legitimacy. This Article argues that both positions are too narrow. Middle ground and some of the compromises that were made during the Founding Era have been lost in that debate. This Article attempts to define and defend that middle ground. Analyzing the federal structure of government by looking at the democratic processes reveals the dual foundation of this structure. Democratic legitimacy is derived from the people of the states as distinct and equal political entities, and from the people of the United States as a whole. To argue in favor of one or the other as the only or primary source of legitimacy is to neglect a vital part of the federal structure created by the Constitution. The changes which have been made with regard to the representation of states at the national level lead to the conclusion that the interests of the states as states, as opposed to the interests of the people of the states, are not represented sufficiently anymore. However, these changes do not alter the basic structure of the sources of democratic legitimacy.

II. THE SUPREME COURT

This Part discusses cases that are concerned with the definition of limits to the powers of either the federal government or the individual states. In these decisions, the fundamentally different views of the federal system become evident.

A. Political Process as a Safeguard for Federalism?

How the states are represented on the federal level became significant in the conflict over the adequacy of democratic processes, and the representation of state interests therein, as a procedural safeguard for federalism. In other words, the Supreme Court discussed whether the states can look after themselves. This debate evolved on the basis of the post-New Deal Commerce Clause doctrine, which began with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[14] and developed into a "tradition of restraint" under which the Court "routinely rubber-stamped" Congressional statutes without regard to how much or how little they actually had to do with interstate commerce.[15] Nevertheless,

14. 301 U.S. 1 (1937).
15. Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 793 (1996).

the Supreme Court attempted to develop judicially enforceable limits in *National League of Cities v. Usery*,[16] only to overrule this decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[17] Different views of the national democratic process were crucial in both cases. The following section describes the different positions in these two cases and examines the impact they had in some other, more recent cases.

1. National League of Cities v. Usery

In *National League of Cities*, the majority held that Congress cannot regulate the "States as States,"[18] and therefore statutes interfering with "traditional[]"[19] or "integral"[20] governmental functions of the states are unconstitutional. The main dissent, written by Justice Brennan, argued that restraints on the plenary commerce power of Congress "lie in the political process and not in the judicial process."[21] In a separate dissent based essentially on a similar view of the political processes, Justice Stevens pointed to the political powers of those affected by the legislation which was declared unconstitutional in order to demonstrate that intervention by the Court was inappropriate.[22]

2. Garcia v. San Antonio Metropolitan Transit Authority

National League of Cities was overruled by *Garcia*[23] after only nine years. The majority embraced the basic argument of the dissent in *National League of Cities* and elaborated on the concept of the political process as a tool for the states to influence the federal government, thus preventing enactment of laws that unduly burden them. According to the Court in *Garcia*, the Framers believed that the federal structure of government functions as a limit to the powers of Congress. As state interests are represented in the national political process, the states can protect their powers from the federal government without judicial intervention.[24] The Court acknowledged that the structure has changed since 1787 and mentioned the Seventeenth Amendment, but it was convinced that the procedural restriction provided by the representation of the states was still intact.[25] Examples of how the political process

16. 426 U.S. 833 (1976).
17. 469 U.S. 528, 531 (1985).
18. *National League of Cities*, 426 U.S. at 845.
19. *Id.* at 851.
20. *Id.* at 852.
21. *Id.* at 857 (Brennan, J., dissenting).
22. *See id.* at 881 (Stevens, J., dissenting).
23. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530-31 (1985).
24. *See id.* at 550.
25. *See id.* at 554.

effectively protected the states were listed in the opinion of the Court.[26] Left open was the possibility of extraordinary defects in the political process, which could lead to the invalidation of congressional regulation.[27] Denial of the right of participation in the national political process and political isolation of a state are examples of such a malfunction, as highlighted by the Court in *South Carolina v. Baker*.[28] The dissent in *Garcia* criticized the majority's description of the political process. Though members of Congress are elected in the various states, the dissent regarded them as members of the federal government as soon as they are in office.[29] The dissent conceded that the political process could have worked as a safeguard at some point in history. However, it emphasized political alterations such as the growing influence of national media, and therefore the growing significance of national issues, as well as changes in the constitutional structure that limit state influence.[30] In her separate dissent, Justice O'Connor gave examples of the unprecedented growth of the federal government in order to demonstrate the insufficiency of the political process for the representation of state interests.[31]

3. New York v. United States

Garcia has not been overruled explicitly. However, either it has been declared inapplicable or the Court has failed to mention it in cases where the safeguard doctrine could have been relevant, raising doubts about the validity of the decision. In *New York v. United States*,[32] which declared parts of a congressional statute unconstitutional, the Court distinguished *New York* from *Garcia* on the basis that the former involved congressional legislation applicable to private parties and states while the latter was concerned with legislation applicable to states only.[33] Justice White wrote for the dissent that this distinction is not tenable since a state is not affected less if the restriction applies to private parties as well.[34] According to the dissent, the Court could not have struck

26. *See id.* at 552-55.
27. *See id.* at 556.
28. 485 U.S. 505, 512-13 (1988).
29. *Garcia*, 469 U.S. at 564-65 (Powell, J., dissenting).
30. *See id.* at 565 n.9 (Powell, J., dissenting).
31. *See id.* at 587-88 (O'Connor, J., dissenting).
32. 505 U.S. 144 (1992).
33. *See id.* at 160.
34. *See id.* at 202, 205 (White, J., dissenting in part).

down the statute under the process-based ruling of *Garcia* because, in the case of *New York*, the political process had functioned nicely and the states had been able to protect themselves.[35] Even if the distinction made by the majority were tenable and *Garcia* itself were not applicable, the basic notion expressed in *Garcia*, namely the reliance on a procedural safeguard for federalism, could have been employed in *New York*. This is because the states in *New York* were very involved in the creation of the regulation that was struck down.[36] Considering these arguments, it does appear that the *New York* ruling turns away from the concept of a procedural safeguard.

4. United States v. Lopez

In *United States v. Lopez*,[37] the Supreme Court, for the first time since the New Deal, invalidated a statute based on the argument that it exceeded Congress's power under the Commerce Clause.[38] *Garcia* was ignored by all the opinions. The majority emphasized that the federal government is a government of enumerated and therefore limited powers, and held that it is necessary for the Court to enforce these limits.[39] In the eyes of the Court, a refusal by the judiciary to enforce these limits would be the authorization of a general federal police power.[40] In a concurring opinion, Justice Kennedy wrote that, as the political process lacks the structural mechanisms to safeguard a balance between the states and the federal government, the Court must intervene.[41] As in *Garcia*, the role of the judiciary opposite Congress was discussed, but the result was completely different. Instead of accepting the idea of a procedural safeguard preventing Congress from overstepping its powers and diminishing the role of the states, the Court judged the outcome and tried to define what constitutes the overstepping of congressional powers.[42] It is surprising that not even the dissenters mention *Garcia*, especially since two of the dissenting opinions maintained that the Court should defer to Congress's superior ability to make empirical judgment[43] and its higher institutional competence.[44] The dissent, like the majority in *Garcia*, argued that deference to

35. *See id.* at 206 (White, J., dissenting in part).
36. *See id.* (White, J., dissenting in part).
37. 514 U.S. 549 (1995).
38. *See id.* at 551.
39. *See id.* at 566-68.
40. *See id.* at 564.
41. *See id.* at 578 (Kennedy, J., concurring).
42. *See id.* at 558-63.
43. *See id.* at 616-17 (Breyer, J., dissenting).
44. *See id.* at 604 (Souter, J., dissenting).

congressional judgment is necessary, but only in *Garcia* was the underlying reason faith in the political process. Most striking, however, is that Justice Kennedy did not mention *Garcia* in his concurring opinion, since his perception of the political branches as ill-equipped to maintain the balance between nation and states is the exact opposite of the ruling in that case.[45] As not only the majority, but all of the Justices ignored *Garcia*, the belief that the political process is a sufficient safeguard for the balance in the federal system seems to have vanished, even though only Justice Kennedy explicitly has said so.

5. Printz v. United States

In *Printz v. United States*,[46] *Garcia* staged a comeback. The majority held that Congress cannot compel state officers to implement a federal program that intrudes on state autonomy.[47] In this case, the dissent relied on *Garcia* and the belief that the political system is the primary safeguard for federalism established therein. Referring to *Garcia*, the dissent claimed that when evaluating the effects of federal legislation on the states, a congressional enactment is supported by a strong presumption of validity.[48] Two years after *Garcia* was ignored in *New York* and *Lopez*, the notion of primarily procedural limits, based on the effectiveness of the democratic processes, was again part of the debate.

6. *Summary*

The Court still struggles with the question of when to defer to Congress and when to intervene. A significant part of that problem is the lack of consensus concerning the structure of national democratic processes. Either their structure allows them to function as an effective safeguard for federalism, which would reduce the role of the Court to that of a guardian of these processes, or the structure of these processes does not provide state interests with sufficient influence on the federal government. In the case of the latter, the Court must define limits for the national institutions. The Court's evaluation of the structure of the democratic processes on the national level is therefore crucial to the decision of cases concerning the balance between the nation and the

45. *See supra* note 41 and accompanying text.
46. 521 U.S. 898 (1997).
47. *See id.* at 933.
48. *See id.* at 956-57 (Stevens, J., dissenting).

states.

B. *The Source of Democratic Legitimacy*

In *U.S. Term Limits, Inc. v. Thornton*,[49] the Supreme Court invalidated an amendment to the Arkansas Constitution. The majority held that Congress is "a uniform national body representing the interests of a single people."[50] Accordingly, the people of a single state cannot make a decision regarding the qualifications for persons representing that single national people.[51] In his concurring opinion, Justice Kennedy wrote that the people as a whole legitimize the national government.[52] He then emphasized the two political identities of United States citizens:

> In one sense it is true that 'the people of each State retained their separate political identities,' for the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union. It does not at all follow from this that the sole political identity of an American is with the State of his or her residence. It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one *independent* of, though consistent with, their identity as citizens of the State of their residence.[53]

Both opinions maintained that the legitimacy of the federal government is not derived from the states or the people of the states, but from a single people with an identity of its own—the people of the United States. In contrast, the dissent claimed that the authority of the Constitution is ultimately based upon the people of each individual state and not on a single national people.[54] This raises the stakes considerably since not only the legitimacy of the federal government is debated, but also a more fundamental debate comes into view. This is a debate about the legitimacy of the Constitution itself. In accordance with its view on the source of constituent power, the dissent portrayed Congress as representing the people of each state and not the people of the nation.[55]

These two radically different opinions discuss a more fundamental problem than the cases mentioned above. It is a debate not only concerning the political process within a federal system, but also about the foundation of this federal system. Is the Constitution's power reliant on each state and the people thereof as a separate entity, or is it to be

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49. 514 U.S. 779 (1995).
50. *Id.* at 822.
51. *See id.* at 821-22 & n.32.
52. *See id.* at 839 (Kennedy, J., concurring).
53. *Id.* at 840 (quoting Thomas, J., dissenting) (citation omitted) (emphasis added).
54. *See id.* at 846 (Thomas, J., dissenting).
55. *See id.* at 858-59 (Thomas, J., dissenting).

found in the people of the United States as a whole, in the American people?

III. THE CONSTITUTION IN THE BEGINNING

The recent struggle for a new jurisprudence of federalism in which the conflicts about democracy became apparent has been a "campaign of history."[56] More often than not, the analysis of this history, of the intentions of the Framers as well as of the ratifying conventions in the states, proves to be conflicting. Because this discussion focuses heavily on the history of the Constitution, one should start with the Founding. In addition, beginning with an analysis of early constitutional history creates a foundation on which the study of subsequent development can be based and a background against which the changes of the constitutional structure can be highlighted. The Court struggles with the evaluation of the national democratic processes; there is fundamental disagreement concerning the source of democratic legitimacy. This Article shows that the opposing views concerning the latter do not reflect all aspects of the Constitution but omit a crucial feature of its creation and of its development: compromise. The process of creating and amending the Constitution established a middle ground, which is lacking in the opinions of the Justices. With regard to the safeguard doctrine, the Court fails to distinguish between the states and the state governments, and therefore fails to see the important changes since the Founding that made the safeguard doctrine untenable.

Historians and legal scholars agree that, under the Constitution of 1787, it is the people that are sovereign and not the states or the federal government.[57] However, it is highly contested whether the people of the

56. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 295 (1996). This is also true for the latest decisions about state sovereign immunity, most clearly in *Alden v. Maine*, 119 S. Ct. 2240 (1999), where the Justices present very different versions of history.

57. *See* THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 13 (1993); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 44 (1987); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 32 (1995); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530 (1969); Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 132, 149 (Leonard W. Levy & Dennis J. Mahoney eds., 1987); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-52 (1987) (quoting nationalists as well as states' rights advocates).

states separately or the American people constitute this sovereignty. Since the constitutional text does not explicitly declare one or the other to be the source of its legitimacy, further examination is necessary. This Article focuses on representation in the new governmental structure within the context of the general development of the document during the Philadelphia Convention. The Constitutional Convention approved the Constitution unanimously[58] and ratification of the Constitution took place in popularly elected state conventions.[59] This Article initially looks at the Constitution as it was approved by the Convention in Philadelphia and ratified in the state conventions, and then examines the Bill of Rights.

A. The Convention's Constitution

In the 1780s, disillusionment with American politics grew despite attempts to reform state constitutions.[60] By 1786, the political atmosphere was increasingly receptive to a reform of some sort;[61] dissatisfaction with the political system in the states was growing,[62] and the shortcomings of the state governments resulted in hostility of nationalists[63] toward them.[64] As a result of that growing sentiment, the Annapolis Convention met in September 1786 with the goal of considering a common interstate policy regarding commerce with only five of the thirteen states present.[65] The nationalists, most notably Alexander Hamilton and James Madison, used the occasion to call for another convention in 1787, which was endorsed by a reluctant Congress only after all states apart from Rhode Island had approved.[66] The

58. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 641 (Max Farrand ed., 1911) [hereinafter RECORDS].

59. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 69-85 (1996) (providing an account of the ratification process).

60. *See* WOOD, *supra* note 57, at 463.

61. *See* GORDON S. WOOD, THE MAKING OF THE CONSTITUTION 13-14 (1987).

62. *See id.* at 14-18.

63. The terms "nationalists" and "states' righters" will be used to characterize two groups with opposing positions during the Convention. When the Articles of Confederation were discussed, these two positions already existed, although not as organized groups. Of course, these are generalizations, but they serve to illustrate the basic conflicts in the Convention.

64. *See* WOOD, *supra* note 61, at 15 (noting that Madison's paper about the vices of the political system of the United States, written in the winter of 1786-1787, was concerned mostly with the deficiencies of state governments); *id.* at 19 (quoting Henry Knox, who urged Rufus King to "smite" the state governments); Amar, *supra* note 57, at 1440 (quoting Madison).

65. *See* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 494-96 (1995).

66. *See* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS

congressional endorsement stated that the "purpose" of the Convention should be "revising the Articles of Confederation."[67] In 1787, most Americans, including states' rights defenders, saw the necessity of giving Congress additional powers; the strengthening of the national government was agreed upon.[68]

In that climate favorable to change, each state legislature selected delegates for the Convention. The majority of the delegates saw themselves as representatives of their respective states; one delegation had instructions prohibiting it from changing equal representation of the states in Congress.[69] However, a few delegates considered themselves representatives of America or of the American people as a whole.[70] Though the interests of the states strongly influenced the delegates' perspectives, they did not always determine them, as demonstrated by the regularly occurring divisions within state delegations.[71] According to the rules of the Convention, each state's delegation had one vote, and a minimum of seven states had to be present to do business.[72]

Clearly, the starting point for the concrete development of a new constitutional text was composed of different conflicting elements. The national government was to be strengthened, but the nationalists wanted much more, while the reluctant state legislatures selected the delegates and gave instructions in order to protect their powers. The situation at the outset of the Convention suggested that a compromise of some sort was the most likely outcome.

The following sections will focus on the provisions of the Constitution concerning two democratic processes: (1) the election of Congress and the President, and (2) the procedures for ratifying and amending the

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AND DEVELOPMENT 87-88 (7th ed. 1991); Leonard W. Levy, *Constitutional History, 1776-1789*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 376, 382 (Leonard W. Levy et al. eds., 1986).

67. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 71-72 (Roscoe R. Hill ed., 1936).

68. *See* M.E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 34 (1993); DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 4 (3d ed. 1996); WOOD, *supra* note 57, at 471; Levy, *supra* note 66, at 382 (quoting defendants of states' rights conceding the ineptness of the national government and the need for change).

69. *See* 1 RECORDS, *supra* note 58, at 4.

70. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: INTELLECTUAL ORIGINS OF THE CONSTITUTION 185 (1985).

71. *See* ANDERSON, *supra* note 57, at 43.

72. *See* 1 RECORDS, *supra* note 58, at 8.

Constitution. A careful analysis will provide answers to the following questions: First, what is the source of democratic legitimacy according to the Constitution? Second, what role do the people of the states and state institutions play in these processes?

1. The Text

The Preamble states: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."[73] Grammatically, this may either describe the one people of the United States, or refer to the inhabitants in a less specific way. The latter interpretation does not make a distinction between the people of the states and the American people, but refers only to the people in general. In this understanding, the Preamble simply announces that the constituent power is no longer in the hands of a monarch, but in the hands of the people. The difference, however, from the preamble of the Articles of Confederation, with its reference to each state, is striking.[74] This could be an argument for a nationalist interpretation, concluding that the constituent power is derived from the one people of the United States. Yet the Preamble crept into the document late during the Convention. On September 10, 1787, a draft of the Constitution was referred to the Committee of Style; the Preamble read: "We the People of the States of New-Hampshire [and the other states] do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity."[75] The version reported to the Convention by the Committee on September 12 was the vastly different final text, as quoted above.[76] No debates about this change in the Committee are reported and no remark regarding it was made in the Convention.[77] This lack of debate is quite surprising, as the change from "We the People of the States," including the enumeration of all states, to "We the People of the United States," and the omission of the enumeration of the states,

73. U.S. CONST. preamble.

74. In the Preamble of the Articles of Confederation, those signing the document describe themselves as "Delegates of the States." An explicit reference to "the peoples" in the plural is made in article 1 of the Treaty on European Union, which speaks of an "ever closer union among the peoples of Europe." J.H.H. WEILER, THE CONSTITUTION OF EUROPE 327 (1999) (emphasis omitted). This phrase has been one of Europe's articles of faith. *See id.* at 344-48 (discussing different views of multiple *demoi*).

75. 2 RECORDS, *supra* note 58, at 565.

76. *See* 2 *id.* at 590.

77. *See* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 166 (1996) (quoting Max Farrand, who suggests the practical explanation that enumeration of the states was impossible because nobody could know which states would ratify).

changes the meaning drastically. Indeed, the indifference of the Convention toward this alteration suggests that the change was not intended to be that significant, but only considered a stylistic change. Whatever the motive for the change, the Preamble in itself does not provide conclusive evidence for a nationalist or state-centered reading of the Constitution.[78]

a. Amendment Process/Ratification

In Article V, the possibility of amending the Constitution is made dependent upon the assent of three-fourths of the states; the amendments can be ratified either by the state legislatures or by conventions in the states.[79] Congress can propose amendments, but the process can also be initiated by two-thirds of the state legislatures.[80] Not only does the validity of an amendment depend upon the assent of institutions in a majority of the states, but it can also take place without Congress or any other national organ initiating it.[81] If the state legislatures initiate the amendment process, Congress calls a national convention to propose amendments.[82] This guarantees a national forum to debate constitutional amendment, even if Congress does not debate the proposals prior to calling a convention. As a result, there is always a national institution involved in the process, either initiating or deciding on the amendments. Furthermore, as unanimity is no longer required to amend the Constitution, the power of a single state to veto changes in the law, which will then bind it, is abolished; by comparison, each state did have this power under the Articles of Confederation.[83]

Similarly, according to Article VII, the Constitution is established as soon as it is ratified by popularly elected conventions in nine states.[84] This abandoned the unanimity rule concerning not only the amendment but also the establishment of the Constitution. Moreover, in two ways it gave the Constitution a new kind of legitimacy. In contrast to the

78. *See* Amar, *supra* note 57, at 1450 (emphasizing the importance of taking the whole document into account instead of just relying on the Preamble, although he concludes that the whole Constitution unequivocally supports the unitary people thesis).
79. *See* U.S. CONST. art. V.
80. *See id.*
81. *See id.*
82. *See id.*
83. The Articles of Confederation could only be amended with the assent of all state legislatures. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41 (1991).
84. *See* U.S. CONST. art. VII.

Articles of Confederation, neither state governments nor other existing state institutions decided upon the adoption of the document.[85] In addition, the appeal to the people to elect conventions for the sole purpose of ratifying the Constitution provided a more direct democratic basis for the national constitution than most of the state constitutions had. The constitutions of the states were drafted and adopted in provincial congresses that were generally considered extraordinary political bodies,[86] but most of them also assumed the powers of "ordinary" legislatures.[87] Only in New Hampshire and Massachusetts were the constitutions adopted through popular ratification rather than by the conventions that drafted them.[88] However, the majority necessary to put the document into effect was not a majority of the people of the United States, but a majority of state conventions, each having one vote.

The rejection of unanimity and of ratification by state legislatures leads at least one scholar to the conclusion that the Preamble refers to the whole people of the United States as the locus of constituent power.[89] In order to draw this conclusion, one must make the assumption that if a power is not exclusively in the hands of the states, it is in the hands of the American people. The possibility of something in between, of a combination of some sort, is neglected. The ratification and the amendment processes establish essentially similar procedures. Denying a single state the power to prevent the validation of the Constitution or of a constitutional amendment clearly subordinates the people of each state to something larger. This larger entity, however, is not the people of the United States, as a one-state convention/one-vote rule is employed. The deciding entity consists of a majority of the peoples of the states, with each people having one vote through its convention or legislature. Thus, the Constitution is not based on each people of each state, nor is it founded on a consolidated American people.

b. Congress

In Article I, the Constitution deals with the election and powers of

85. *See id.*

86. *See* MARK W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 24 (1997).

87. *See id.* at 15-33 (giving an account of constitution making in the states, arguing that the revolutionary situation made it necessary for the conventions to perform ordinary legislative functions but that there was a distinction between the constituent and the legislative power).

88. *See id.* at 33.

89. *See* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 335-36 (1993); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 909 (1990).

both branches of the bicameral Congress. The members of the House of Representatives are to be chosen by the "People of the several States."[90] This language is a remarkable change from the Preamble in that the former refers to the several states in the plural, and to their respective peoples as electing the members of the House.[91] Adding to this state-based form of election is the fact that the qualifications for electors were the same as for each corresponding state legislature;[92] the qualifications were not set at the national level, thus allowing for different rules in every state. But section 2 of Article I goes on to apportion the representatives according to the number of inhabitants of each state, thereby providing for popular representation in the House, as opposed to representation of the states.[93] Therefore, the House does not represent the people of the states based on the notion that they are equals and have equal voting power, but according to the size of their population. This creates an institution based on the population of the United States as a whole and representing the whole people of the United States. Because each state is guaranteed at least one representative regardless of the size of its population,[94] this system is not one of pure popular representation. Nevertheless, the House of Representatives, as a body based on the population of the nation, has a distinctly national character. However, due to the reference to the people of the states as those electing its members, there are still strong traces of the states as relevant entities.

The second branch of Congress, the Senate, consists of two Senators from each state. The Senators were to be elected by the legislature of the state they represented;[95] the Senate was therefore the counterpart of the House, providing equal representation for every state. The Entrenchment Clause in Article V, guaranteeing equal representation of the states in the Senate, illustrates the emphasis that was placed on the equality of the states in at least one branch of the national legislature.[96] In contrast, the fact that Senators and Representatives are paid out of the Treasury of the United States[97] indicates that, although Senators represent the states, an allegiance with and responsibility toward the

90. U.S. CONST. art. I, § 2, cl. 1.
91. *See* U.S. CONST. preamble.
92. *See* U.S. CONST. art. I, § 2, cl. 1.
93. *See* U.S. CONST. art. I, § 2.
94. *See* U.S. CONST. art. I, § 2, cl. 3.
95. *See* U.S. CONST. art. I, § 3, cl. 1.
96. *See* U.S. CONST. art. V.
97. *See* U.S. CONST. art. I, § 6, cl. 1.

nation exist.

Overall, Congress represents three different groups. The population of the nation is represented in the House, by popular representation. The minimum of one representative per state and the state-based election process ensure the relevance of the people of each state. The state governments are represented in the Senate, which thus indirectly represents the people of each state, and also guarantees the representation of the governmental bureaucracy. Compared with the Continental Congress created by the Articles of Confederation, not only did the national legislature gain powers, but the election process was nationalized as well. Although the state governments lost much of the control they had over the national legislature under the Articles of Confederation, they nevertheless retained a substantial amount of that control through their representation in the Senate.

c. The President

No distinct national executive power existed under the Articles of Confederation. In contrast, the Constitution created the office of President of the United States, vesting all the executive power in this office.[98] The electors, who form the Electoral College and choose the President, are appointed in each state according to rules set up by the state legislature,[99] thereby forming the state-centered part of the process. Each state appoints as many electors as it has representatives in Congress, thereby incorporating popular representation into the process of presidential selection. If no candidate achieves the necessary majority in the Electoral College, the House of Representatives decides by selecting among the two candidates who received the most votes.[100] In making this decision, each delegation from each state has one vote. Thus, the process of electing the President incorporates the influence of the states through the control that state legislatures have over the election of the electors; this process also has a national basis due to the apportioning of the delegates. In principle, this resembles the way that Congress is elected, although the similar result is achieved by different means. In both cases, relevant national and state components exist.

d. Conclusion

The Constitution reflected different priorities. The bicameral Congress incorporated a branch based on popular representation and a

98. *See* U.S. CONST. art. II, § 1, cl. 1.
99. *See* U.S. CONST. art. II, § 1, cl. 2.
100. *See* U.S. CONST. art. II, § 1, cl. 3.

branch based on equal representation of the states. The role of the state governments is noteworthy. They had substantial influence on the national government, based on representatives chosen by them, which gave a voice to those who would lose power if the nation were to diminish the role of the states. This, arguably, enables the states to protect themselves. The process of electing the President incorporates popular representation and a strong influence of the states. Ratification and amendment processes create an entity with constituent power that is situated "in between" the people of each state and the people of the United States. This entity is composed of the people of the states as separate political units and the unitary American people; each part of that entity is unable to use its share of the constituent power without the consent of the other component. Using these various and sophisticated ways of creating and securing a balance between nation and states, the Constitution relies on two pillars as its foundation. Legitimacy for the Constitution itself and for the national institutions is derived neither solely from the people as a whole nor solely from the people of each state individually, but rather from both.[101]

2. *The Development of the Text*

The nationalists eventually persuaded the convention to right things they perceived to be wrong in the Articles of Confederation. All delegates accepted the necessity of change, none openly advocated preserving the status quo,[102] and the nationalists entered the Convention with strong beliefs and a definite objective that they wanted to achieve.[103] Several nationalist delegates, among them James Madison, James Wilson, and Rufus King, did not want any recognition of state sovereignty in the Constitution, reducing the state governments to "mere

101. *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249 (1997). Smith views the Constitution as a social compact with the states and the people as parties, but without specifying whether the people are the American people or the peoples of the states; if there are specifications they are contradictory, speaking of both the people of the several states and the people of the United States as the sources of authority for the national government. *See id.* at 292-93.

102. *See* MCDONALD, *supra* note 70, at 213.

103. *See* WOOD, *supra* note 57, at 474-75; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 46-56 (1996) (giving a longer description of Madison's preparation and the development of his ideas).

'planets' orbiting the federal 'sun.'"[104] Madison was the first to arrive in Philadelphia and was better prepared than anyone else.[105] In contrast, the nationalists' opponents faced the difficulty of wanting to strengthen the central government without compromising the sovereignty that the states possessed.[106]

Presenting the Virginia Plan at the beginning of the Convention, Edmund Randolph openly discussed a "consolidated union, in which the idea of states should be nearly annihilated."[107] Though the Virginia Plan had provisions guaranteeing that the states would continue to exist in some way,[108] it would have created a supreme national government.[109] The best example for this is resolution 6 of the Virginia Plan, empowering Congress to negate all state laws "contravening in the opinion of the National Legislature the articles of Union."[110] With their proposal, the nationalists set the stage for the debates[111] and, at least in the beginning, dominated its dynamics.

a. Amendment Process/Ratification

The Virginia Plan's initial provision regarding amendments was brief. It simply stated that an amendment provision was necessary and that the assent of the national legislature should not be a requirement.[112] The New Jersey Plan, introduced as an alternative to the Virginia Plan on June 15, 1787,[113] did not contain an amending provision.[114] Serious

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104. Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 221 (1996).

105. *See* WOOD, *supra* note 57, at 472-73 (including an account of how Madison started to prepare in the winter of 1785-1786).

106. *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 654 (1993).

107. 1 RECORDS, *supra* note 58, at 24 (emphasis omitted). Randolph is quoted only by Yates, but there is support for this view in other remarks by Randolph. *See* ANDERSON, *supra* note 57, at 51.

108. *See* ANDERSON, *supra* note 57, at 52.

109. *See* WOOD, *supra* note 57, at 525.

110. 1 RECORDS, *supra* note 58, at 21.

111. *See* BRADFORD, *supra* note 68, at 4 (emphasizing the importance of having a substantive motion accepted for discussion at the beginning of any meeting of this kind).

112. *See* 1 RECORDS, *supra* note 58, at 22 (Res. 13).

113. *See id.* at 242-45.

114. *See* JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 28 (1992) (discussing whether the drafters of the New Jersey Plan considered amendment unnecessary or expected the relevant provisions of the Articles of Confederation to remain in place). The omission of an amendment provision in the New Jersey plan seems to support the contention that its drafters intended that the existing amendment provisions would remain, but the rejection of the New Jersey Plan diminishes the relevance of this question.

debate on this issue occurred only in the last week of the Convention.[115] The Committee of Detail then proposed that the national legislature should call a national convention to amend the Constitution upon the application of two-thirds of the state legislatures.[116] This proposal was passed unanimously on August 30 and almost no debate was recorded.[117] It then was opened for reconsideration on September 10, and was altered drastically. Amendments now are binding only when three-fourths of the states assent, whereas previously a national convention could decide alone.[118] On September 15, motions to require ratification by all the states, to add a provision protecting the internal police of the states, and to throw out the amendment article altogether failed. The Entrenchment Clause and the option for the states to call for a national convention found a majority.[119] As a result of the changes made during the first two weeks of September, the amendment process agreed upon in the end was vastly different from the one that was passed unanimously on August 30. The procedure first started with proposals by the states, with the final decision regarding the proposed amendments in the hands of a national convention. It resulted in a procedure beginning with proposals by Congress and ending with ratification by the states. This reduced the role of national institutions significantly. No proposal tried to establish a national referendum, or tried to ensure that a number of states containing a majority of the population of the United States would be sufficient to amend the Constitution.[120] If the constituent power was a power of the one people of the United States, as the Preamble is read by some, it is significant that the power to amend the Constitution was not vested in them.[121] The irrelevance of the people of the United States as a whole for this process—their significance was not even suggested during the debates—is at odds with a nationalist interpretation of the Preamble, which locates the constituent power solely in that one people.[122]

115. *See* ANDERSON, *supra* note 57, at 161.
116. *See* 2 RECORDS, *supra* note 58, at 174, 188.
117. *See* 2 *id.* at 467-68.
118. *See id.* at 557-59.
119. *See id.* at 629-31.
120. *See* ANDERSON, *supra* note 57, at 158.
121. The dangers of democratic despotism were on the minds of all enlightened thinkers of the time. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 282-83 (1967).
122. *See* ANDERSON, *supra* note 57, at 160 (concluding that a single national body politic in charge of amending the Constitution was not even debatable at the end of the Convention).

According to the Virginia Plan, the ratification of the Constitution was to take place in assemblies or one national assembly elected by the people in each state after the approbation of Congress.[123] The clause making the approbation of Congress necessary was removed without any debate,[124] and a proposal to reinsert it was rejected on September 10.[125] The delegates were very concerned with avoiding obstacles that might prevent ratification of their work. The motions requiring unanimity or the approbation of Congress were easily defeated by a ten-to-one vote; most of the speakers pointed to the negative effect on the likelihood of ratification.[126] Requiring ratification in conventions elected for that purpose was a tool not only to achieve a more direct democratic legitimacy but also to circumvent the state legislatures.[127] Since they were to lose a considerable amount of their power, they were thought of as reluctant ratifiers.[128] Randolph's motion to have a second convention debate and ratify the Constitution was unanimously rejected because this would have meant that everything the Philadelphia Convention had agreed upon would be questioned again.[129]

Most importantly, although debates about the adoption procedure blended philosophic and practical considerations,[130] purely national ways of ratification did not play a significant role in the debates. A national referendum was not debated at all, and the motion of Governor Morris to refer the Constitution to a national convention for ratification was not seconded, and therefore could not even be voted on.[131] Neither a debate nor a vote on Madison's proposal to require a majority of both the people of the United States and the states is recorded. The debate focused on whether state legislatures or conventions should ratify and on the number of states in which ratification should be necessary.[132] The Convention clearly did not have a single sovereign in mind when it discussed the locus of constituent power.

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123. *See* 1 RECORDS, *supra* note 58, at 22 (Res. 15).
124. *See* 2 *id.* at 478.
125. *See* 2 *id.* at 563.
126. *See* 2 *id.* at 475-77 (concerning the question of unanimity; King, Morris, Madison, Ghorum, and Pinkney used the utilitarian arguments); *id.* at 561-63 (concerning the motion requiring Congress's approbation; Wilson, King, and Rutlidge emphasized the difficulties that would result from that requirement).
127. *See* ANDERSON, *supra* note 57, at 165.
128. *See id.*; KYVIG, *supra* note 59, at 49.
129. *See* RAKOVE, *supra* note 103, at 106-07.
130. *See* KYVIG, *supra* note 59, at 49.
131. *See* 2 RECORDS, *supra* note 58, at 93.
132. *See* 2 *id.* at 475-77.

b. Congress

The Virginia Plan as Randolph proposed it on May 29, 1787, called for a bicameral national legislature and abandoned the one-state/one-vote principle of the Articles.[133] The members of the first branch were to be elected by the people of the states and the members of the second branch chosen by those of the first from a list of nominees drawn up by the state legislatures.[134] The plan was referred to the Committee of the Whole. Their amended plan was presented to the Convention on June 13, which foresaw that the members of the second branch were to be elected by the state legislatures,[135] thereby strengthening the role of the state governments. However, the principle of popular representation was established for both branches, expressly repudiating the rules of the Articles of Confederation.[136] In contrast, the New Jersey Plan proposed amendments to the Articles without changing the structure or mode of election of Congress, thereby preserving the basic notion of equal representation of the states.[137] The adherence to this constitutive principle and the differences between the two proposals are plainly visible in the different terms used to describe the legislature: while the New Jersey Plan speaks of the "U. States in Congress,"[138] the Virginia Plan talks about the "national Legislature."[139] The New Jersey Plan was rejected in the Committee of the Whole on June 19,[140] and the Virginia Plan then became the single basis for the debates. This was a crucial victory for the nationalists, because it was the decision not to continue the debate based upon a proposal embodying the essential character of the Articles of Confederation.[141]

It was a victory in an important battle, but not victory in the war as a whole. The development concerning representation in the second branch of Congress illustrated this, and resulted in arguably the most important conflict of the Convention. No agreement could be reached on the question of whether the second branch should be based on popular representation or if the states were to be represented equally. The

133. *See* 1 *id.* at 20 (Res. 2 & 3).
134. *See* 1 *id.* at 20-21 (Res. 4 & 5).
135. *See* 1 *id.* at 228 (Res. 4).
136. *See* 1 *id.* at 229-30 (Res. 7 & 9).
137. *See* 1 *id.* at 242-45.
138. 1 *id.* at 243.
139. 1 *id.* at 228.
140. *See* 1 *id.* at 313.
141. *See* WOOD, *supra* note 57, at 547.

committee that was appointed on July 2 to find a compromise[142] did not include any of the most outspoken nationalists.[143] What became known as the Connecticut Compromise was reported to the Convention on July 5, recommending popular representation in the first branch and equal representation of the states in the second branch.[144] John Dickinson had brought up this solution as early as June 6;[145] thus, it was not a new approach, but one that had been previously disapproved. The nationalists continued to oppose the compromise during the ensuing debates,[146] but on July 16, in a close five-to-four vote, the Convention resolved the issue and adopted the compromise.[147] Thus, states' righters won back some of the territory they had lost when the New Jersey Plan was defeated. Though a majority favored the compromise, the delegates were still cautious about state influence on Congress.[148] They tried to alleviate it by making the national treasury responsible for the salaries of the members of Congress instead of having the states pay them.[149]

From the original Virginia Plan to the final result, Congress was changed from an institution with a pointedly national character in which the state governments were not represented, to a legislature incorporating equal representation of the states as well as popular representation in which the state governments had considerable influence. The nationalists had to accept equal representation in the Senate, but the states' righters had to accede to popular representation in the House. Both sides did so reluctantly, thinking either that the Constitution would suffer from the same flaws as the Articles of Confederation,[150] or that more state influence was necessary.[151] This exemplifies one essential feature of the Philadelphia Convention: It was not the place for ideological victories, but for compromise and practical

142. *See* 1 RECORDS, *supra* note 58, at 509.

143. *See* ANDERSON, *supra* note 57, at 63 (interpreting this as an indication for the nationalists losing control of the Convention at the end); Lance Banning, *The Constitutional Convention, in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 112, 121-22 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

144. *See* 1 RECORDS, *supra* note 58, at 524.

145. *See* 1 *id.* at 136.

146. *See* ANDERSON, *supra* note 57, at 63-67 (giving an account of the reaction of the nationalists to the compromise).

147. *See* 2 RECORDS, *supra* note 58, at 15-16. At the vote, New York was absent and Massachusetts divided. *See* 2 *id.*

148. *See* Richard A. West, Jr., *We the People: Limitations on Congressional Term Limits Are Unconstitutional Content-Determinative Regulations*, 46 RUTGERS L. REV. 1787, 1829-30 (1994) (noting that the Committee report provided for payment by the states and was changed due to concerns about state influence).

149. *See id.*

150. *See* WOOD, *supra* note 57, at 525-26.

151. *See* ANDERSON, *supra* note 57, at 57 (quoting opponents of popular representation).

solutions. In *The Federalist No. 62*, Madison described equal representation in the Senate as a result of "mutual deference and concession which the peculiarity of our political situation rendered indispensable."[152]

c. The President

According to the original version of the Virginia Plan and the amended plan that was agreed upon in the Committee of the Whole, the national executive was to be elected by the national legislature.[153] Even the New Jersey Plan had called for a national executive to be elected by Congress,[154] but this was a Congress unchanged from the one established by the Articles. It therefore was a very different form of election, essentially based on the state governments represented in Congress.[155] Two different schools of thought existed after the rejection of the New Jersey Plan. One was in favor of a strong national executive, elected by an Electoral College or direct popular election; the other favored a weak national executive elected by and responsible to Congress.[156] The idea of direct popular election received little support.[157] Apparently unable to find a permanent majority for one of the two remaining alternatives, the Convention changed its mind three times before a compromise was agreed upon.[158] Election of the President should take place in the Electoral College and the process of choosing the electors was to be determined by the state legislatures, thereby recognizing the states. However, it was a widely shared belief that, in most elections, no candidate would receive a sufficient majority of votes in the Electoral College.[159] This made the next step all the more important in the eyes of the delegates. The Convention decided that the next step would take place in the House of Representatives, with each state's delegation having one vote.[160] As the contingency election was expected to be

152. THE FEDERALIST NO. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961).
153. *See* 1 RECORDS, *supra* note 58, at 21 (Res. 7), 230 (Res. 9).
154. *See* 1 *id.* at 244 (Res. 4); Shlomo Slonim, *Designing the Electoral College*, *in* INVENTING THE AMERICAN PRESIDENCY 33, 35 (Thomas E. Cronin ed., 1989).
155. *See* Slonim, *supra* note 154, at 35.
156. *See* KELLY ET AL., *supra* note 66, at 96.
157. *See id.*
158. *See id.* at 96-97.
159. *See* ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 81 (1994).
160. *See* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789, at

significant, equal representation of the states in that election was an important compromise, satisfying delegates from small states in particular.[161]

The first significant aspect is the minimal support that direct popular election received. The rejection of direct election by the people early in the Convention and without much discussion reveals some uneasiness toward having decisions made at a purely national level, as well as skepticism toward direct, unfiltered democracy.[162] The other important aspect is again the compromise between nationalists and states' righters, between those wanting the strongest possible national executive and those wanting a weaker one.

d. Conclusion

Neither the plan of the states' righters nor the plan of the nationalists was made effective. The New Jersey Plan was rejected, and essential parts of the Virginia Plan were amended. The Framers avoided explicit textual description of the central government as "federal" or "national."[163] The development of the different compromises and the difficulties both sides had accepting them demonstrate clearly that none of the theoretical concepts prevailed.[164] Nationalists as well as states' righters argued in favor of who they thought the sovereign should be, but no side was able to win a majority.[165] This compromise, giving significant influence on the national government to the people of each state and the state governments as well as to the people of the United States, is a principal characteristic of the Constitution.

3. Ratification in the State Conventions

The understanding of those who ratified the Constitution is at least as important as the understanding of those who drafted it, since the legitimacy of the document is derived from the ratifying conventions.[166]

132-33, 137 (1969) (stating that originally, the Senate was to choose from the five candidates who received the most votes, but because the Senate was perceived as too strong the power to decide was given to the House).

161. *See* HARDAWAY, *supra* note 159, at 82; KELLY ET AL., *supra* note 66, at 97.

162. *See* WOOD, *supra* note 61, at 17-18 (noting that the belief in democracy had been diminished since the time of independence by the experience with democracy in the states, which was perceived by many as majoritarian tyranny).

163. Amar, *supra* note 57, at 1455 n.125; *see* 1 RECORDS, *supra* note 58, at 335.

164. *See* Neil M. Richards, Note, U.S. Term Limits v. Thornton *and Competing Notions of Federalism*, 12 J.L. & POL. 521, 557-58 (1997) (arguing that federalism is an ambiguous theory reflecting a compromise).

165. This becomes evident by the aforementioned compromises.

166. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 ("From these Conventions the constitution derives its whole authority.").

The problem with this approach, however, is that it is extremely difficult to determine the Ratifiers' precise intentions.[167] This section will identify the causes of this problem and argue that some of the causes support the understanding of the Constitution as a compromise.

The Constitution was sent to Congress, accompanied by a letter that George Washington had signed on behalf of the Convention; Congress then submitted the Constitution and the letter to the state conventions for ratification. The letter endorses the notion that the adoption of the Constitution creates a new national sovereign and includes references to a union already existing.[168] Although the letter is an important document, it marks only the beginning of the ratification debates, reflecting the views of George Washington and not of the whole Convention or the Ratifiers.

a. Ratification Debates

The ratification debates were a struggle in which the participants' goals dominated the arguments to a large degree. The purpose of their statements was not to interpret the Constitution, but to advocate either its ratification or its rejection. A number of participants who in fact considered the Constitution to be inadequately nationalist subsequently argued in favor of it; their public arguments differed from those that they had used in the secrecy of the debates in the Convention.[169] They believed that it was necessary to cater to the existing sentiments in order to be successful in the public debate. Therefore, the Framers had convened secretly in Philadelphia. The Framers expected not to be able to say or write what they really thought in a public debate, and they acted correspondingly. Therefore, their writings published during the debates on ratification should be treated with great caution. The nationalists argued in favor of a document that they considered insufficient, not because of a strong belief in the compromise that was achieved, but because the alternative seemed even worse to them and because they considered the compromise to be inevitable.[170] James

167. *See* Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1602 (1997).

168. *See* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 638-39 (1995).

169. *See* MCDONALD, *supra* note 70, at 276-77.

170. *See* WOOD, *supra* note 57, at 526.

Madison, who is often portrayed as the father of the Constitution, is the best example of this. He defended the Constitution eloquently in *The Federalist Papers*, but was not satisfied at all with the outcome.[171] This seriously affects the value of the writings of the supporters. Their writings were not an interpretation of the constitutional text by individuals who were trying to be objective, but rather represent advocacy by persons whose goal was to "sell" the Constitution to the public.[172] The opponents of ratification, the so-called Anti-Federalists, played a major role in shaping the Constitution; their ideas and beliefs are reflected in the compromise that eventually evolved. Their writings, which argue against adopting the Constitution, however, can hardly be seen as an authoritative interpretation of the document. As a result, neither the writings of the supporters nor those of the opponents are a reliable source to help discover the Ratifiers' intent.

Another difficulty in the analysis of the ratification debates involves distinguishing expectations of how the nation would be governed from an understanding of the rules and standards in the Constitution.[173] Finally, the documentary record for the state conventions is poor and uneven;[174] proceedings of the conventions were taken down inaccurately, as some of the stenographers were partisans and others lacked adequate skills.[175] The larger public discussion offers a bewildering array of sources ranging from silly to brilliant.[176] It is impossible to determine

171. *See id.* at 472-74 (describing the purely national constitution Madison initially wanted). In addition, there is debate about the compatibility of Madison's later writings with his essays in *The Federalist Papers*. *See* Douglas W. Jaenicke, *Madison v. Madison: The Party Essays v. The Federalist Papers*, *in* REFLECTIONS ON THE CONSTITUTION: THE AMERICAN CONSTITUTION AFTER TWO HUNDRED YEARS 116, 116-47 (Richard Maidment & John Zvesper eds., 1989) (arguing that Madison's later writings are significantly different).

172. *See* Richards, *supra* note 164, at 535-36 (pointing out the same limitations of sources from the debates, finding the ratification-era evidence concerning his inquiry to be ambiguous).

173. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1490-91 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) and giving a good example of the need to make the distinction).

174. *See* Rakove, *supra* note 167, at 1602.

175. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 19-25 (1986) (pointing out that the independence of the persons recording the debates is at least questionable for the conventions in Connecticut, New York, Pennsylvania, Maryland, Virginia, and North Carolina).

176. *See* BERNARD BAILYN, FACES OF REVOLUTION, PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE 229-30 (1990); Rakove, *supra* note 167, at 1602; *see also* Richards, *supra* note 164, at 530 & n.38 (describing the ratification process as having left more substantial evidence than the Constitutional Convention concerning the particular subject of his inquiry, but acknowledging the spotty character of the records).

which—and how much—of these articles and speeches became part of a shared or consensual understanding of the Ratifiers.[177]

It may be possible to show a generally accepted Ratifier intent regarding some issues. However, the balance between nation and states was such a controversial topic that these debates can be a source of many quotations in support of various different and contradictory views. A coherent, general Ratifier intent does not follow from the statement, "the Constitution was ratified on the basis of many understandings."[178]

b. The Federalist Papers

As the documents from the ratification debates that are most quoted today, *The Federalist Papers* warrant a closer analysis of their value for constitutional interpretation. As described above, one initial reason for caution when interpreting *The Federalist Papers* is that their goal was to help convince a majority of the positive attributes of the Constitution. Thus, they cannot be read solely as a faithful reflection of the Convention's intentions.[179] In addition, *The Federalist Papers* had only minimal influence on the ratification debates; their circulation was very limited.[180] There were more influential publications and speeches, and *The Federalist Papers* are read far more closely today than they were during the debates.[181] However, *The Federalist Papers* are the prime example of the relative futility of trying to claim that documents from the ratification debates support only one view. The Supreme Court Justices frequently draw different conclusions from the writings of

177. *See* Rakove, *supra* note 167, at 1602.

178. Martin Diamond, *What the Framers Meant by Federalism*, *in* A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 24, 41 (Robert A. Goldwin ed., 1963); *see* John C. Ranney, *The Bases of American Federalism*, 3 WM. & MARY Q. 1, 32 (1946) (pointing out the mixing and interpenetrating of motives and describing how the importance of certain issues varied from state to state).

179. *See supra* notes 169-72 and accompanying text.

180. *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 665 (1998); Stephen L. Schechter, *The Federalist on Federalism*, *in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 291, 294 (Stephen L. Schechter ed., 1990) (stating that the impact on its intended audience, the people of New York, was negligible).

181. *See* BAILYN, *supra* note 176, at 230-31 & n.12 (noting that the comments on *The Federalist Papers* at the time were few and politically unremarkable, and stating that their importance is mainly a 20th century phenomenon); Kramer, *supra* note 180, at 679 (arguing that Madison did not find an audience until well into our own century); Rakove, *supra* note 167, at 1597; James Etienne Viator, *Introduction: The Federalist—A Symposium*, 21 TEX. TECH. L. REV. 2317, 2319 (1990).

Madison, Hamilton, and Jay.[182] The best example is the discussion of *The Federalist No. 27* in *Printz*, which is interpreted differently by the Court,[183] the main dissent,[184] and the separate dissent by Justice Souter.[185] All three opinions go to great lengths to prove that the other understandings are wrong, but fail to convince each other. The reason for this disagreement is that all of them find some language to support their view, speaking of an "unequivocal statement"[186] or at least discovering "natural assumptions" on which the arguments in *The Federalist No. 27* rest.[187] Similarly, scholarly debate over the proper meaning of *The Federalist Papers* with respect to the constitutional system of federalism did not provide any consensus.[188] Used by committed nationalists and enthusiastic advocates of state sovereignty as a basis for their arguments, Publius spoke with many voices over the years.[189] This illustrates the difficulties of interpreting *The Federalist Papers*,[190] even though it is the most "comprehensive and systematic" document from the ratification debates.[191] The possibility of supporting all these different views based on *The Federalist Papers* perfectly illustrates the character of the Constitution as a compromise. As all the different ideas are reflected in the Constitution, they are also reflected in the writings of those who defended it.

4. Summary

Although it is agreed upon that the people are the source of

182. The justices draw very different and often opposite conclusions not only from *The Federalist Papers* in its entirety, but also from the same article. For example, the Court's interpretation of *The Federalist No. 52* is conflicting in *Term Limits. Compare* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806-07 & n.18 (1995) ("The text of The Federalist No. 52 belies the dissent's reading."), *with id.* at 900-02 (Thomas, J., dissenting) (the opposing view of the dissent). Probably the most famous paper, *The Federalist No. 39*, is quoted in support of the respective views of both sides in *Garcia. See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985); *id.* at 570 (Powell, J., dissenting).

183. *See* Printz v. United States, 521 U.S. 898, 910-11 (1997).

184. *See id.* at 947-50 (Stevens, J., dissenting).

185. *See id.* at 971-72 (Souter, J., dissenting).

186. *Id.* at 947 (Stevens, J., dissenting).

187. *Id.* at 911.

188. *See* James W. Ducayet, *Publius and Federalism: On the Use and Abuse of* The Federalist *in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 824 (1993).

189. *See id.* at 825-40 (showing the vastly different conclusions drawn from *The Federalist* in three separate historical periods).

190. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 572-73 (1995) (providing another example of the ambiguity discussing *The Federalist No. 46*); Richards, *supra* note 164, at 531-34 (discussing the ambiguity of *The Federalist* regarding state-imposed term limits, especially of *No. 39*).

191. Rakove, *supra* note 167, at 1597.

democratic legitimacy for government under the Constitution, it is still greatly disputed whether this means the people of the states or the people of the United States. The Constitution as it was ratified from 1787 to 1789 does not answer this question.[192]

Congress represents the people of the states, the governments of the states, and the people of the United States. In this respect, the election of the national executive is similar, because all of these different groups are represented in this process, too. The development toward this result shows that both the nationalists and the states' righters had to make concessions regarding both processes. This result manifests in another way in the ratification and amendment processes, which create a constituent power that neither consists solely of the people of the United States nor relies exclusively on the people of each state. The development of the relevant Articles demonstrates that a purely national as well as a purely state-based form of ratification and amendment failed to win enough support in the Philadelphia Convention. Neither the people of each state nor the unitary American people are the sovereign upon whose decision the legitimacy of the Constitution is founded. Instead, the legitimacy of the Constitution is based upon both components acting together. The role given to the state governments changes the result of the processes, as institutions trying to protect their own power are integrated into the process. The basic scheme is not altered by this since these institutions derive their democratic legitimacy from the people of each respective state. Not a single sovereign, but rather a cooperative sovereign, was brought into being.[193] Two columns support the Constitution itself and the national government: the people of the individual states and the American people.

192. *See* H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 *passim* (1993) (arguing that the Constitution in general does not provide many specific answers or specific outcomes but does provide a framework termed "political grammar").

193. The concept of sovereignty should be used only very carefully to describe the states or the national government in a federal system. It developed in 16th and 17th century Europe as a description of autonomous and absolute power embodied in a ruler or governmental body, and no governmental body in a federal system is completely autonomous or has absolute power. That the use of this concept to describe parts of a federal system in the 20th century is not without problems is demonstrated by the discussion on sovereign state autonomy. *See infra* Part IV.A.1.

B. *The Bill of Rights*

During the ratification debates, the prospect and sometimes promise of immediate amendments had swung the balance in favor of accepting the Constitution, most notably in Massachusetts, Virginia, and New York. Subsequently, Congress approved twelve amendments in September 1789, and the ten amendments that became the Bill of Rights were ratified by December 1791. Among those, the Tenth Amendment is the most relevant in this context.

1. The Text

The term "the people" is used in the First, Second, Fourth, Ninth, and Tenth Amendments. In the First and Fourth, this term describes a group entitled to certain rights, and it is not possible to derive from it anything concerning the source of democratic legitimacy. The Second Amendment refers only to militias in the states; in this context, "the people" is a state-centered term.[194] The Ninth Amendment invokes the authority of the people, but there is no explicit or implicit indication whether the authority is located in the people of the states or the people of the United States. In the Tenth Amendment, the powers not delegated to Congress are given explicitly to the states or to the people, again without explicit clarification of the relation between the two or specification of whether this refers to the American people or the people of the states. Nevertheless, it is possible to make some observations. The reference to "the people" must be seen within the context of solidifying the position of the states within the Constitution,[195] which suggests a state-oriented interpretation of the Amendment and of the term "the people." In addition, the powers retained by the states or the people are defined as those not prohibited to the states by the Constitution. With regard to the people, this definition makes sense only if "the people" are the people of the states severally. To restrict the people of the United States as a whole to the powers not prohibited to the states seems absurd. On the other hand, by speaking of "the states respectively" in the plural but referring to "the people" in the singular, the language of the Tenth Amendment supports the idea of a unitary people.[196] All in all, the short text of the Tenth Amendment provides contradictory clues, but does not provide a conclusive answer.

194. *See* Monaghan, *supra* note 77, at 133 n.66.

195. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (indicating that the Tenth Amendment may be only a truism, but even if this is so, the position of the states is secured by explicitly stating this truism).

196. *See* Amar, *supra* note 57, at 1456.

2. *The Development of the Text*

The ratifying conventions proposed amendments containing provisions that would alter the structure of the Constitution. For example, the Virginia convention suggested requiring a two-thirds majority in both Houses to enact commerce regulations.[197] New York's convention proposed requiring an oath of all federal officers not to infringe or violate state constitutions.[198] Under many of the proposals, the ability of the national government to impose direct taxes would have been rigorously diminished.[199] Madison, who had committed himself to work for a bill of rights during his election campaign in Virginia,[200] ignored most of these propositions,[201] and focused on individual rights instead.[202] For him, the amendments' purpose was to delineate inviolable rights of mankind, while the Constitution's structure should be "as little touched as possible."[203] In his speech introducing the amendment proposals in Congress, Madison made clear that his proposal was a Federalist's document.[204] As a consequence, one of the clauses in his proposal explicitly protected some rights from infringement not only by the national government, but also by the state governments.[205] During the debates in the House of Representatives, some of the provisions proposed in the ratification conventions and omitted by Madison were

197. *See* 4 THE ROOTS OF THE BILL OF RIGHTS 843 (Bernard Schwartz ed., 1980).

198. *See* 4 *id.* at 918 (31st proposal).

199. *See* 4 *id.* at 713 (4th proposal by Massachusetts convention); 4 *id.* at 757 (3rd proposal by South Carolina convention); 4 *id.* at 760 (4th proposal by New Hampshire convention); 4 *id.* at 843 (3rd proposal by Virginia convention); 4 *id.* at 915, 916 (3rd and 15th proposals by New York convention).

200. *See* Robert A. Rutland, *Framing and Ratifying the First Ten Amendments, in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 305, 308 (Leonard W. Levy & Dennis J. Mahoney eds., 1987); *see also* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 348 (1996) (pointing out the influence of Madison's correspondence with Jefferson, who vigorously supported a bill of rights).

201. *See* ANDERSON, *supra* note 57, at 177; KYVIG, *supra* note 59, at 99.

202. *See* Donald S. Lutz, *The Pedigree of the Bill of Rights, in* THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 42, 47-53 (Ronald Hoffman & Peter J. Albert eds., 1996) (tracking Madison's success in shifting the discussion on both powers and rights to one only on rights).

203. Rutland, *supra* note 200, at 311 (quoting Madison).

204. *See* Murray Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 CONST. COMMENTARY 233, 239-40 (1987).

205. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 663 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS] (quoting part of Madison's fifth proposal).

brought forth by Anti-Federalists but rejected by the large Federalist majority.[206] After the House had approved seventeen amendments, the Senate reduced the wordiness of the resolutions and dropped the resolution prohibiting states from infringing some rights, finally approving a package of twelve amendments.[207] The only relevant change after that concerned the establishment of religion.[208] In general, Madison and a Federalist Congress changed the amendments proposed in the ratifying conventions to language that did not alter the structure of the Constitution, but promoted individual rights. Some of the state legislatures debating the ratification of the proposed amendments called for additional amendments similar to those put forward by state ratification conventions.[209] They simply were unable to achieve their goal of amendments that would alter the constitutional structure in favor of the states.

The only exception hereto may be the Tenth Amendment. All of the conventions that had attached an appeal for amendments included a provision similar to the final Tenth Amendment. Most states wanted Congress's powers to be restricted to those "expressly"[210] or "clearly"[211] delegated. The convention in New York approved language explicitly allocating the retained power to the "People of the several States, or to their respective State Governments."[212] Madison's proposal omitted the term "expressly" and did not refer to the people of the states, but only to the states severally as the locus of the retained power.[213] Motions by Gerry and Tucker to insert "expressly" into the text failed in the House.[214] Gerry also motioned to refer specifically to the people of the states by adding "and people thereof" after "States" but this proposal

206. *See* GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 37-38 (1995); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 112 (1997) ("Antifederalists had won only 10 of 59 seats in the House, and only Virginia sent Antifederalists to the Senate."); KYVIG, *supra* note 59, at 104.

207. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 44-48 (1957); *see also* KYVIG, *supra* note 59, at 104.

208. *See* KYVIG, *supra* note 59, at 104-05.

209. *See* Kenneth R. Bowling, *Overshadowed by States' Rights: Ratification of the Federal Bill of Rights*, *in* THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 85-90 (Ronald Hoffman & Peter J. Albert eds., 1997).

210. 3 THE ROOTS OF THE BILL OF RIGHTS *supra* note 197, at 712 (first proposal by Massachusetts convention). *See* 4 *id.* at 757 (second proposal by South Carolina convention); *id.* at 760 (first proposal by New Hampshire convention).

211. 4 *id.* at 911-12 (third resolution in the declaration of the New York convention).

212. 4 *id.* at 912.

213. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 205, at 663 (eighth proposal).

214. *See id.* at 665.

was rejected as well.[215] The records are contradictory regarding the motions in the House to add "or to the people" at the end of the amendment. Though motions to do so by Representative Carroll and Representative Sherman are recorded as being agreed to, the version reported to the Senate omitted the words.[216] In the Senate, another attempt to insert "expressly" failed.[217] With the addition of the words "or to the people," the Senate gave the provision its final wording.[218] However, the Senate did not convene publicly and no debate about this particular change is recorded.[219]

Lacking records of any kind, it is impossible to determine whether this addition was a reference merely to popular sovereignty in general, or more specifically to the American people. Nonetheless, the development in Congress demonstrates that it is at least highly unlikely that the last phrase refers to the people of each state because a motion explicitly referring to them was rejected.

In sum, the final version of the Tenth Amendment changed from explicitly recognizing the authority of the people of the several states to a greatly diluted version of what the Anti-Federalists had in mind originally. It used the term "the people" in the singular and did not limit Congress to expressly granted powers. In its historic context, it reaffirms "the centralizing tendencies of the new system."[220] Nevertheless, the states as entities are recognized and the powers that they have under the Constitution are explicitly protected. Though the text developed into something far less state-centered than the proposals of the ratifying conventions, one of their core demands, the explicit protection of state power, was still met.

3. Summary

The Bill of Rights has been characterized as state-centered because it emerged from an effort in the ratifying conventions to preserve state

215. *See id.*
216. *See id.* at 665-66.
217. *See id.* at 667.
218. *See id.* at 668-69.
219. *See* ANDERSON, *supra* note 57, at 177 (noting that the Senator whose journal provides the best view behind the closed doors of the Senate was out sick and therefore almost nothing is known about this particular debate in the Senate).
220. Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 331, 349 (Ronald K. L. Collins ed., 1980).

autonomy.[221] This disregards the crucial role that Madison and a Federalist Congress played in the process trying to preserve the structure of the Constitution. Anti-Federalists, such as Richard Henry Lee and Patrick Henry, were extremely disappointed with the results, especially with the lack of protection for the states.[222] However, to declare a Federalist victory and to interpret the Tenth Amendment as supporting the thesis of a unitary people[223] ignores important state-centered aspects. There was enough pressure to overcome the Federalists' opposition to a bill of rights;[224] moreover, the Tenth Amendment is an ambiguous provision, which partly mirrors state-centered views. In the debates concerning the ratification of the amendments, Federalists opposed them as being too strong and Anti-Federalists considered them not strong enough.[225] The Bill of Rights is as much a compromise as is the Constitution. It reflects the efforts of the conventions to strengthen the position of the states, as well as the Federalists' opposing point of view that amendments were unnecessary.

C. Conclusion

Compared to the Articles of Confederation, the Constitution provided an immense nationalization of power and of the political processes. In the federal structure of the Constitution, three groups participate in the democratic processes legitimizing the federal government: the people of the states, the state governments, and the American people.

The influence given not only to the people of each state, but also to the state governments, enables the latter to defend their interests at the national level. The state legislatures are the institutions that stand to lose power whenever Congress regulates an area previously regulated by the states. Their involvement thus creates an institutionalized counterinterest to the inherent interest of the national institutions in increasing their own power. With the participation of that interest in the national democratic processes and its considerable influence in mind, the safeguard doctrine in *Garcia* seems feasible.[226]

The people of the states severally and the people of the United States as a whole are part of the process of electing the federal government,

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221. *See* Monaghan, *supra* note 77, at 133.

222. *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 213-15 (1991).

223. *See* Amar, *supra* note 57, at 1456.

224. *See* Rutland, *supra* note 200, at 309-13 (providing an account of how reluctant the members of the House were to take on this issue).

225. *See* CRAIG R. SMITH, TO FORM A MORE PERFECT UNION: THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 1787-1791, at 151 (1993).

226. *See supra* Part I.A.2.

which is thus supported by these two foundations together. The Constitution created a structure in which the term "the people" sometimes describes the people of a single state and sometimes describes the American people. The middle ground established during the Founding is the incorporation of two distinct political entities into the constitutional structure and its democratic processes by giving significant roles to both of them.

IV. CONSTITUTIONAL DEVELOPMENT

The previous Part identified the three groups that participate in the national democratic processes created by the Constitution. This Part analyzes changes that have affected each of these groups and their roles since the Founding. First, the constitutional amendments will be considered, along with an analysis of their effect on the structure of the democratic processes. Some amendments were accompanied by other changes in the laws governing electoral processes, which had a significant impact on the structure of these processes. These amendments will be considered in their context and as a part of other developments taking place at the same time. Second, some of the amendments that were never ratified, but were close to ratification, will be examined more closely. Rejected amendments are an important part of constitutional development as they help to demonstrate the limits of constitutional change.

A. Early Amendments

Only two amendments were adopted between the ratification of the Bill of Rights and the Civil War, both of them around the turn of the century. Each was a reaction to a specific event. The Eleventh Amendment became the center of a debate on state sovereignty. The Twelfth Amendment had a lasting, though mostly indirect, impact on the structure of the democratic processes.

1. Amendment XI

The Eleventh Amendment[227] overturned the Supreme Court's decision in *Chisholm v. Georgia*.[228] It is a short and very specific amendment,

227. *See* U.S. CONST. amend XI.
228. 2 U.S. (2 Dall.) 419 (1793).

stating that the jurisdiction of the federal courts does not include suits against states by citizens of other states or any foreign country. The Supreme Court ruled in *Chisholm* that Georgia was required to pay the bill of a South Carolina merchant from whom war supplies were purchased.[229] This provoked a quick response; ratification of the Amendment was completed by February of 1795.[230] It has become the center of a debate involving questions of state sovereignty. In *Seminole Tribe v. Florida*,[231] the majority of the Supreme Court reaffirmed *Hans v. Louisiana*.[232] The Court interpreted the Amendment as confirming the presupposition "that each State is a sovereign entity in our federal system; and . . . '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent.'"[233] The dissent argued that this conclusion—that sovereignty logically results in immunity—seems to be at odds with the metamorphosis of the sovereignty concept during the Founding.[234] The concept of sovereignty as a single higher authority that is subject to no law had been replaced by a concept of dual delegated sovereign powers in the federal system, which ultimately originates in the people.[235] The conflicting opinions show, at the very least, that invoking state sovereignty in order to derive immunity from it, without an attempt to define the sovereignty of a state in the existing federal system, is too simple. The difficulty of finding such a definition can be observed in the most recent decisions on state sovereign immunity.

In *Alden v. Maine*,[236] the Court unsuccessfully attempted to clarify the meaning of sovereignty, stating that the states "retain the dignity, though not the full authority, of sovereignty."[237] Nevertheless, however critical one might be of the decisions, their effect must be recognized. The Supreme Court has reaffirmed *Hans* for over a century now. More importantly, the decisions at the end of the last term have substantially hampered the enforcement of federal laws against the states because citizens can no longer sue for a violation of federal law.[238] Therefore, in effect, a stronghold of state immunity was created.

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229. *See id.* at 479.
230. *See* KYVIG, *supra* note 59, at 112-14 (stating that the process of notifying federal officials was considerably slower and that the addition of the amendment was not announced by President John Adams until January 1798, but it was quickly and overwhelmingly ratified by all states).
231. 517 U.S. 44 (1996).
232. 134 U.S. 1 (1890).
233. *Seminole Tribe*, 517 U.S. at 54 (quoting *Hans*, 134 U.S. at 13).
234. *See id.* at 149-50 (Souter, J., dissenting).
235. *See id.* at 150-51 (Souter, J., dissenting).
236. 119 S. Ct. 2240 (1999).
237. *Alden*, 119 S. Ct. at 2247.
238. *See, e.g.*, *id.* at 2246.

Despite its considerable impact, however, the sovereign immunity jurisprudence leaves the structure of democratic processes within federalism intact. Some potentially might argue that if there is presupposed state sovereign immunity, the entity that possesses such sovereignty must be the locus of constituent power. But, based on the premise that the Court's wide understanding of state sovereignty is correct, it is still a concept limited to the question: Can the states be sued on the basis of federal law? Although the sovereignty as understood by the Court is "inviolable,"[239] it is also "residuary."[240] One, therefore, cannot argue that whoever possessed this sovereignty at the time of the Founding necessarily possessed the constituent power as well, since this sovereignty is not a complete sovereignty.

2. *Amendment XII*

The Twelfth Amendment, ratified in 1804, concerns the process of electing the President. The amendment was designed to prevent the events of the 1800 election from recurring: a tie in the Electoral College between Thomas Jefferson and Aaron Burr and a weeklong deadlock in the House.[241] Providing for distinct ballots for President and Vice President was its most important change. It also contains a sophisticated description of the procedure when no candidate achieves a sufficient majority in the Electoral College. The language of the amendment is very similar to the language of the provisions in Article II, Section 1 that are superseded. The events in the presidential elections of 1796 and 1800, which led to the amendment and the changes in the political system of which the amendment was one part, are examined below.

a. Background

Article II, Section 1, Clause 3 of the Constitution gave each elector two votes without distinguishing between votes for President and Vice President. The runner-up, the newly elected President's most successful opponent, became Vice President. Although no formal party machinery existed, the 1796 election was de facto a contest between the Federalists and the Republicans, who had emerged as the opponent of the

239. *Seminole Tribe*, 517 U.S. at 86.
240. *Id.* at 141 (Souter, J., dissenting).
241. *See* KYVIG, *supra* note 59, at 114-15.

Federalists. Each group had a candidate for President and Vice President but the result was Federalist John Adams becoming President and the Republican Jefferson being elected Vice President.[242] Party discipline in support of a ticket was not yet strictly enforced because no developed nominating procedure existed.[243] In 1800, a bitterly contested election featured two organized political parties,[244] which had chosen their nominees for President and Vice President in congressional caucuses.[245] The Republicans wanted to avoid the outcome of 1796, an administration headed by the leaders of two hostile political organizations; all of their electors voted for Jefferson and Burr, the latter being the candidate for Vice President.[246] This time, the result was a tie between the two members of the same party; the House had to resolve the tie. In the House, the Federalists had enough votes to block a majority for Jefferson; several Federalists decided to vote for Burr, whom they considered the lesser evil.[247] Only on the thirty-sixth ballot, and after six days of debates and backroom discussions, was Jefferson elected President on February 17.[248] The members of the Constitutional Convention had not foreseen the rise of political parties and their domination of the presidential elections.[249] National party organizations enabled the ticket of a party to undoubtedly win an election and achieve a majority in the Electoral College. The method of voting in the college made it difficult to convert this majority into the election of both party candidates. If some electors of a party did not vote for their vice-presidential candidate, the presidential candidate of the opposing party could be elected Vice President in order to avoid a tie between their presidential and vice-presidential candidates. Furthermore, the proceedings gave the minority a chance to prevent the presidential

242. *See* HARDAWAY, *supra* note 159, at 91; Charles C. Euchner & John Anthony Maltese, *The Electoral Process, in* SELECTING THE PRESIDENT: FROM 1789 TO 1996, at 1, 7 (1997); Merrill D. Peterson, *Constitutional History, 1789-1801, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 387, 390 (Leonard W. Levy et al. eds., 1986).

243. *See* SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776-1993, at 98-99 (1994).

244. *See* Charles C. Euchner, *Chronology of Presidential Elections, in* SELECTING THE PRESIDENT: FROM 1789 TO 1996, at 149, 152 (1997); Peterson, *supra* note 242, at 391.

245. *See* MILKIS & NELSON, *supra* note 243, at 99.

246. *See* TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804, at 99 (1994).

247. *See* MILKIS & NELSON, *supra* note 243, at 99; Euchner & Maltese, *supra* note 242, at 7-8.

248. *See* KURODA, *supra* note 246, at 102-05 (giving an account of what happened in the House).

249. *See* MILKIS & NELSON, *supra* note 243, at 107; THACH, *supra* note 160, at 133; Dennis J. Mahoney, *Twelfth Amendment, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1927, 1927 (Leonard W. Levy et al. eds., 1986).

candidate of the winning party from being elected by voting for the winning party's vice-presidential candidate, either in the Electoral College or, as the Federalists had done, in the House. In a nutshell, once the national process had produced a majority, the minority had a chance to counteract this result. This prompted the Republicans to seek amendment.

b. The Amendment

During the Eighth Congress, the basic feature of the Twelfth Amendment, separate ballots, was agreed upon in both chambers. The House and the Senate disagreed only with respect to minor issues, such as the number of candidates the House should be able to choose from if there was no sufficient majority in the Electoral College, and what should happen if the House failed to elect a President.[250] Federalists saw the proposed amendment as an assault on state equality, increasing the influence of the large states, and thereby destroying the federal principle.[251] The reason for this was that tie votes in the Electoral College, and with that the referral of the election to the House, were now seen as highly unlikely. This would reduce the influence of the small states since they had equal voting power in the House, but not in the Electoral College.[252] In the opinion of the Federalists, it would direct the United States toward a consolidated republic.[253] However, they failed to block the proposed amendment in Congress.[254] A presidential election has been referred to the House only once since then, in the 1825 election of John Quincy Adams.[255] The fact that the referral to the House became so rare effectively did away with one important part of the compromise concerning presidential elections in the Constitutional Convention. The

250. *See* KURODA, *supra* note 246, at 117-52 (describing the discussions in Congress).

251. *See id.* at 140-41 (quoting Senator Uriah Tracy, whose speech summed up the position of the Federalist minority).

252. *See* NEAL R. PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE 73 (1968) (quoting Senator William Plummer).

253. *See* KURODA, *supra* note 246, at 141.

254. *See* PEIRCE, *supra* note 252, at 73-74 (voting in the Congress was cast almost exclusively along party lines).

255. *See* HARDAWAY, *supra* note 159, at 55. The problem in the 1825 election was not the lack of a majority in the Electoral College but contested popular vote returns. Congress had to decide the validity of these returns and therefore this was an exceptional situation, not a referral to the House for the reasons the Framers had anticipated. *See id.*

compromise was accepted because the delegates expected the House to decide in a relevant number of elections, thereby giving the equal representation of the states in this procedure actual and not just theoretical significance. Furthermore, the Twelfth Amendment invigorated the development of national political parties,[256] thereby nationalizing the presidency profoundly.

c. Developments in the Political System

Amending the Constitution was only one part of the changes in the political system in the early nineteenth century. It arguably did no more than give constitutional recognition to changes in the political culture manifested by the emergence of political parties at a national level. The parties aggregated national support for their candidates and recruited electors pledged to them, changing the role of the elector from a person free to vote for whomever seemed most competent to a person devoted to a particular party.[257] Another important change was the loss of influence that the state legislatures suffered, although this was self-inflicted. The Constitution confers plenary power upon the legislature of each state to choose the method of appointment for electors[258] under the condition that the Equal Protection Clause is not violated.[259] In the first few presidential elections, most state legislatures chose electors themselves, while only a few used intermediate methods involving the electorate and the legislature.[260] The popularization of democratic ideals and negative experience with legislative politics created an uneven but inevitable movement toward popular selection of electors.[261] By 1820, merely nine states did not provide for popular election of presidential electors; by 1832, only North Carolina's electors were not popularly elected.[262] Though this mode of election was not required by the Constitution, it had an impact on the process of electing the President as the influence of the state governments was de facto eliminated. In addition, another development strengthened the role of the people of a state as distinct political units: Since the 1830s, the states almost

256. *See* KYVIG, *supra* note 59, at 116-17.

257. *See* LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 28 (1972); LAWRENCE D. LONGLEY & NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 22 (1996); John D. Feerick, *The Electoral College—Why It Ought to Be Abolished*, 37 FORDHAM L. REV. 1, 11 (1969).

258. *See* U.S. CONST. art. II, § 1, cl. 2; Williams v. Rhodes, 393 U.S. 23, 28-29 (1968); McPherson v. Blacker, 146 U.S. 1, 35-36 (1892).

259. *See Williams*, 393 U.S. at 29-32.

260. *See* HARDAWAY, *supra* note 159, at 45; PEIRCE, *supra* note 252, at 74-77.

261. *See* LONGLEY & PEIRCE, *supra* note 257, at 24.

262. *See* HARDAWAY, *supra* note 159, at 46 (noting that since 1865, all states provided for direct election of their electors).

exclusively used a winner-takes-all method for choosing their electors, a method that gives all the electors of a state to the candidate with the most votes.[263] Therefore, the votes of a state are not split between different candidates, but every state speaks with one voice in the Electoral College.

d. Conclusion

As a result of the changes in the political system and of the Twelfth Amendment's ratification, one part of the national political process, the election of the President, has changed fundamentally. The results were twofold. First, the process was nationalized by the emergence of parties operating on a national level, organizing campaigns in all the states.[264] Keeping in mind the constitutional provisions that remained intact, most importantly the fact that electors are still appointed in each state, the change was a gradual one. The people of each state still vote separately. There is no proportional representation in the Electoral College, and the winner-takes-all method ensures that states remain relevant as distinct political units in the process of electing the President. In contrast, the influence of the state governments was eliminated as the legislatures provided for direct elections to appoint the electors. As a result, the institutions that lose power when the national government attempts to expand its sphere of competence cannot directly use the process of electing the President to prevent their own loss of power. This does not mean that they cannot use the process in an indirect way by appealing to those inside it, for example by supporting certain presidential candidates. This, however, is not a position that can be relied upon. Therefore, the ability of state governments to influence the national government in order to protect their own powers decreased significantly, making the safeguard doctrine less persuasive.

263. *See* LONGLEY & PEIRCE, *supra* note 257, at 99. Maine, since 1969, and Nebraska, since 1992, are the only states currently with a different system, though neither has produced a division of electoral votes so far. *See id.*

264. Early 19th century parties did not fully congeal as national agencies until 1840, and 19th century democracy "stretched from exclusive provincialism to inclusive nationalism." ROBERT H. WIEBE, SELF-RULE, A CULTURAL HISTORY OF AMERICAN DEMOCRACY 72 (1995).

B. *Reconstruction Amendments*

The Thirteenth Amendment was ratified in 1865, more than sixty years after the Twelfth Amendment. The Fourteenth and Fifteenth Amendments followed in 1868 and 1870. They are arguably the most important amendments to the Constitution, especially as they provided the basis for many landmark Supreme Court cases during the twentieth century. However, their impact on the structure of the democratic processes, regarding the balance between the participants with whom this Article is concerned, is slim. On the face of it, however, the national institutions' increase in power might suggest otherwise. The Fourteenth and Fifteenth Amendments asserted the civil rights of the former slaves, at least on paper, including the right to vote. Congress was given the power to enforce all three amendments. The Due Process and Equal Protection Clauses of the Fourteenth Amendment embody one of the most important aspects of Supreme Court jurisprudence. In addition to changes in the constitutional text, changes in the interpretation of the Constitution broadened national powers considerably. A specific authorization of the national government was no longer necessary, and implied powers became an accepted basis for national action.[265] In general, the powers of national institutions grew considerably during the Reconstruction, tilting the scale heavily in favor of the central government. But the decision-making process at the national level and the influence that the people of a state or the state governments had in that process did not change. That national institutions gained considerable influence over democratic processes in the states by establishing rules concerning the right to vote,[266] and by subjecting legislative apportionment in the states to federal judicial review[267] does not change this result. The existence of the people of a state as a distinct political unit and their ability to make themselves heard on the national level were the same as before the Reconstruction Amendments. What changed was the composition of the people of a state and, through this, the outcome of the political process in the state. But it is important to stress that the influence that the outcome at the state level can exert in the national democratic process was not altered. The means that the people of a state have to participate on the national level did not change. Citizens of a given state had as much influence on the national government or on the process of amending the Constitution as before. Although the positions of the confederate states on slavery and secession

265. *See* KYVIG, *supra* note 59, at 154.

266. For example, the Voting Rights Act of 1965 was based on Section 2 of the Fifteenth Amendment. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

267. This process was established in *Baker v. Carr*, 369 U.S. 186, 199 (1962).

were defeated, the way the Constitution defined the roles of the people of a state, of state governments, or the American people in the national political processes remained unchanged. While the Civil War and Reconstruction took the United States a long way with regard to the acceptance of the role of the states within the federal system, the structure of the democratic processes remained the same.

C. Early Twentieth Century Amendments

No more amendments were ratified in the nineteenth century. This long period of unsuccessful attempts to amend the Constitution, and the fact that the only amendments since 1804 resulted from the Civil War and Reconstruction, led to growing criticism of Article V. Many scholars purported an amendment to be impossible in normal circumstances.[268] The successful proposals at the beginning of the twentieth century alleviated this criticism. In the twenty years from 1913 to 1933 six amendments were ratified. The Sixteenth Amendment, allowing Congress to collect taxes on income, further nationalized powers, and enabled the federal government to widen its range of activities substantially.[269] Once again, this amendment had no influence on the structure of the democratic processes. In the context of this Article, the Seventeenth Amendment is the most important amendment ratified in the early twentieth century.

1. The Development of Amendment XVII

The Seventeenth Amendment, ratified in 1913, changed the method for electing Senators from election by state legislature to direct election by the people of the respective states.[270] The first proposal to provide for popular election of senators instead of election by the state legislatures was made as early as 1826;[271] by the 1890s, the movement supporting this proposal had gained strength.[272] Criticism of the then-existing procedure for electing senators was based on the general perception of state legislatures as being corrupt and unable to agree on a senator. This

268. *See* KYVIG, *supra* note 59, at 191-92.
269. *See* U.S. CONST. amend. XVI.
270. *See* U.S. CONST. amend. XVII.
271. *See* KYVIG, *supra* note 59, at 208.
272. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 536-37 (1997).

would result in Senate seats being vacant for up to four years and even the complete lack of Senate representation for a state for a period of two years.[273] In addition, a broad movement toward more direct popular control and participatory democracy existed at the beginning of the twentieth century.[274] This justified amending the Constitution instead of solving the problems of corruption and legislative deadlock with less drastic reform measures.[275] It seems that all of these issues were far more important than the effect that this would have on the structure of the democratic process. This is due to the fact that the possible impact of the Seventeenth Amendment on federalism was never an issue throughout the debates; even most of its opponents did not expect any centralizing effects.[276]

Since 1893, the House had repeatedly endorsed an amendment resolution providing for direct election of Senators; however, all of these proposals either died in a Senate committee or were never voted on by the Senators.[277] Frustration over the conflict between the Senate and the House led one Representative to introduce a resolution for the abolition of the Senate.[278] By 1911, over half of the states had a system in place under which the state legislature elected the candidate winning a primary, thereby approximating direct election.[279] Because of this, the number of Senators popularly chosen, and therefore inclined to establish direct election, rapidly grew.[280] In 1911, the House adopted a resolution not only providing for direct election of Senators but also eliminating federal control of senatorial elections.[281] The Senate insisted on some degree of federal control and the House agreed after almost a year of deadlock.[282] This defeat of an attempt to achieve more state control over

273. *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1353 (1996); Bybee, *supra* note 272, at 538-43; Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 639 (1991).

274. *See* C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 84-89 (1995); Amar, *supra* note 273, at 1354; Roger G. Brooks, Comment, Garcia, *the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189, 202 (1987).

275. *See* Bybee, *supra* note 272, at 544; Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1025 (1994).

276. *See* Brooks, *supra* note 274, at 199-200, 205.

277. *See* KYVIG, *supra* note 59, at 209.

278. *See* JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES 273 (1996).

279. *See* KYVIG, *supra* note 59, at 210; Ronald D. Rotunda, *The Aftermath of* Thornton, 13 CONST. COMMENTARY 201, 207 (1996).

280. *See* KYVIG, *supra* note 59, at 210-11; VILE, *supra* note 278, at 272.

281. *See* KYVIG, *supra* note 59, at 213.

282. *See id.*

elections manifested the elimination of state government influence on the national political processes. Ratification proceeded quickly, and after less than eleven months the necessary number of states had approved the Amendment.[283]

2. *The Consequences of Amendment XVII*

Defenders of state sovereignty in the Constitutional Convention believed legislative election of Senators to be more important as a safeguard for federalism than equal representation of the states in the Senate.[284] After the Convention accepted legislative election, nationalists and states' righters alike believed that the states were receiving a powerful tool.[285] The Seventeenth Amendment effectively repealed what in Philadelphia had been considered a potent procedural remedy for federal encroachment into the states' sphere. In *Garcia*, however, the majority did not view this change as substantial enough to alter fundamentally the influence of the states in the national political processes.[286] Even those on the Court opposed to the safeguard doctrine mentioned the Seventeenth Amendment only in passing, if at all.[287] The reason for neglecting the importance of the Seventeenth Amendment is the failure to distinguish between the people of a state and the government of a state. This corresponds with the lack of differentiation between the interests of a state in general and the desire to protect the powers of a state government.[288] For example, it is in a state's general

283. *See id.*
284. *See* Brooks, *supra* note 274, at 193.
285. *See id.*
286. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176 (1980); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 858-59 (1979); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547-48 (1954). Wechsler does not even mention the Seventeenth Amendment in the section which describes the Senate's role in safeguarding federalism, and Choper and Kaden mention it only in passing.
287. *See* United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring); *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting); *id.* at 584 (O'Connor, J., dissenting).
288. *Cf.* Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 110 (1985); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510 (1994). Both authors argue that the safeguard doctrine does not take into account the specific interests of states as

interest to acquire federal funds for local projects or to ensure that specific local needs are considered during the making of federal laws. Arguably, the political processes have been successful in providing these interests with considerable influence. A senator's ability to obtain federal funds for her state or to avoid regulation detrimental to a sector of the economy important in that state is of utmost importance for that senator's reelection. The Court in *Garcia* points to the substantial proportion of federal revenue directed into the states' treasuries in various ways as evidence of the influence of state interests.[289] However, the protection of the powers of state governments is different from these general interests. The only organizations or institutions that are permanently interested in preserving these powers are the state governments themselves because they are the institutions in danger of losing power. Local and national special interest groups are concerned with their specific issues or sets of issues and do not care too much whether it is the federal or the state government that is responsible.

The abstract interest of preserving the powers of government at the state level is no longer represented in the national political process. Although the senators still represent the states, they now represent only the people of the states. The Seventeenth Amendment therefore eliminates the permanent institutional instinct of self-preservation of state governments from the national democratic process.

D. Mid to Late Twentieth Century Amendments

A period of important constitutional developments without formal changes to the Constitution followed the amendments ratified early in the twentieth century. The New Deal period resulted in the widespread public, and subsequently judicial, acceptance of a new notion of what was expected from government. National powers grew significantly after the Supreme Court gave up on the narrow interpretation of the Commerce Clause.[290] However, the structure of the democratic processes was not altered.

From 1951 to 1997, another seven amendments were ratified. Two amendments, the Twenty-Second and the Twenty-Fifth, again deal with technicalities regarding the presidency. Participation of the citizens of the District of Columbia in presidential elections was made possible by the Twenty-Third Amendment. Amendments XXIV and XXVI enlarged the electorate by outlawing any connection between paying taxes and the

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states, as opposed to regional or local interests in general.

289. *See Garcia*, 469 U.S. at 552-53.

290. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

right to vote, used by some southern states to discriminate against some of their citizens, and by lowering the voting age from twenty-one to eighteen. Congress adopted the Twenty-Seventh Amendment, which denies Congress the authority to raise its own salary, in 1789 with the first ten amendments, and it was finally ratified by the required number of states in 1992. All of these amendments are best characterized as refining rather than restructuring the Constitution,[291] and thus offer no substance for further examination.

E. Proposed Amendments

This section briefly examines proposed amendments that came close to ratification or at least approval in Congress, but ultimately failed. The purpose is to show which parts of the Constitution that structure democratic processes have come under intensive scrutiny, but ultimately have been considered worth keeping. In other words, proposals that have failed indicate the limits of change so far. Two movements that have tried to achieve amendments will be used as examples for these limits, concerning further nationalization as well as the strengthening of the states.

1. Direct Presidential Election

"No amendment effort has been more consistent than that for reform of the electoral college" throughout the history of the Constitution.[292] Although changes have occurred, they were gradual, leaving the basic system intact. More radical changes have been discussed since the beginning of the nineteenth century, direct popular election of the President being the most popular one.[293] In the 1960s, an amendment providing for the direct election of the President and a runoff election if no candidate received forty percent of the total vote gained widespread popularity. The Chamber of Commerce and the American Bar Association supported it,[294] and polls indicated that more than eighty percent of the public along with the state legislators favored such an amendment.[295] In 1969, a 338 to 70 vote in the House approved it, but

291. *See* KYVIG, *supra* note 59, at 350.
292. VILE, *supra* note 278, at 109.
293. *See id.* at 112.
294. *See id.*
295. *See* LONGLEY & BRAUN, *supra* note 257, at 156 (citing a Gallup poll taken in

resistance in the Senate proved insurmountable.[296] Opponents focused their attention on what they perceived to be negative effects on the function of democratic processes within federalism and noted that thirty-four states would lose voting power under the proposed amendment.[297] Senators from southern states opposed abolishing the Electoral College because they saw it as "an important bulwark of states' rights" and feared that the state element of the presidency would be lost without it.[298] Senators of small states were convinced that direct vote would leave their states helpless against large states, and there was a general fear of opening the door for amendments challenging other institutions that recognized states as distinct entities.[299] In the following years, the amendment was reintroduced with slight modifications, such as congressional choice instead of a runoff election; nevertheless, support dwindled.[300] Although supporters of direct election never got as close to success as at the end of the 1960s, the issue did not disappear. In 1979, a popular election amendment had the support of President Jimmy Carter but was soundly defeated in Congress.[301] The independent candidacy of Ross Perot in the 1992 presidential race resulted in a number of reform proposals as House selection of the President became a realistic possibility, though none of them came as close to being successful as the proposal at the end of the 1960s.[302]

There are obviously limits to the degree of nationalization acceptable to a majority large enough to alter the Constitution. The concept of a President elected on a purely national basis so far has been beyond such a limit. A willingness to eliminate the role of state governments from the democratic processes is not followed by a willingness to do away with the influence of the people of a state as a distinct entity. In

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1968).

296. *See id.* at 152-74 (giving a detailed account of the events, including a description of the organizations and individual legislators involved); KYVIG, *supra* note 59, at 389-91.

297. *See* KYVIG, *supra* note 59, at 390. The negative impact of reform on federalism also has a prominent place in scholarly literature arguing for the preservation of the Electoral College. *See* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 213-14 (1975); *see also* HARDAWAY, *supra* note 159, at 141-62 (not only focusing on direct election but also discussing a variety of reform proposals).

298. LONGLEY & BRAUN, *supra* note 257, at 166.

299. *See id.*

300. *See* KYVIG, *supra* note 59, at 391-93; LONGLEY & BRAUN, *supra* note 257, at 173-74.

301. *See* Slonim, *supra* note 154, at 33.

302. *See* Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 257-63 (1994) (describing the proposals made in the House and the Senate in 1992 and 1993).

addition, the defeat of the amendment in the Senate and the reasons for the rejection show that state interests are still powerful at the national level. It is, however, important to note that these are the interests of the people of a state, whose role in the selection of the national executive has been preserved, not the interests of the state government.

2. *States' Rights Amendments*

In 1963, three so-called states' rights amendments received considerable support in the aftermath of the Supreme Court decision in *Baker v. Carr*,[303] in which the Supreme Court declared that state legislative apportionment is subject to federal judicial review.[304] These proposals originated from the Council of State Governments and affiliated organizations late in 1962.[305] The first and most important proposal would have changed the amendment process of Article V. The option of calling a national convention was to be abolished; if two-thirds of the state legislatures submitted an identical amendment, Congress should have merely certified this and the amendment would have been deemed proposed for ratification.[306] As a result, the Constitution could have been amended without the participation of any national forum; neither Congress nor a national convention would have deliberated the issue. The amendment process thereby would have been placed entirely into the hands of state legislatures.[307] This would have dramatically shifted the locus of constituent power by marginalizing national institutions and placing the power almost entirely in the hands of state institutions. The second proposal would have withdrawn federal jurisdiction over apportionment, and the third proposal would have established a Court of the Union to review Supreme Court decisions relating to the rights reserved to the states or the people.[308] Proponents of

303. 369 U.S. 186 (1961).
304. *See id.* at 237.
305. *See* Paul Oberst, *The Genesis of the Three States-Rights Amendments of 1963*, 39 NOTRE DAME LAW. 644, 648-52 (1964).
306. *See* Frank E. Shanahan, Jr., *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A. J. 631, 634 (1963) (providing the complete text of the proposal).
307. *See* Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 960-61 (1963); Albert E. Jenner, *Observations on the Proposed Alteration of the Constitutional Amendatory Procedure*, 39 NOTRE DAME LAW. 625, 625-26 (1964); Oberst, *supra* note 305, at 644-45.
308. *See* Shanahan, *supra* note 306, at 634-35 (including the full text of both proposals).

the amendments called upon state legislatures to seek a national convention. Though they received considerable support, the number of legislatures endorsing the amendments fell well short of the necessary two-thirds.[309] The proposals provoked harsh reactions; opponents called them an attempt to convert the United States into a confederation.[310] Under the impression of this hostile reaction, state legislatures rejected the proposals, and they received little support when introduced in the Senate and the House.[311] In the end, even the National Legislative Conference backed away from the amendments.[312]

This attempt to amend the Constitution demonstrates the limits at the other end of the spectrum. As much as there has been an unwillingness to eliminate the people of a state completely from the national democratic processes, there has also been an equivalent reluctance to erase the national institutions from those processes.

V. CONCLUSION

The Constitution came to life as a compromise that included the people of the states, the state governments, and the American people. All of them were given considerable influence on the national democratic processes, within a carefully balanced system. This federal system cannot simply be declared to have been based ultimately on a single group. The Constitution itself and the national democratic processes established in the document derive democratic legitimacy from two sources: the American people and the people of the states. This inclusive compromise has largely survived.

Two conclusions can be drawn from the development of the Constitution. First, the state governments have been excluded from the national democratic processes. This eliminates an important interest from the equation: the interest of the state governments to preserve their powers. In addition, developments other than constitutional change made an impact. Obviously, changes in society and the availability of technology—in this context, especially the development of national mass media—have had an impact on the way the democratic processes

309. *See* KYVIG, *supra* note 59, at 372.

310. *See* Charles L. Black, Jr., *Proposed Constitutional Amendments: They Would Return Us to Confederacy*, 49 A.B.A. J. 637, 637 (1963). The Court of the Union proposal caused the angriest comments. *See* Philip B. Kurland, *The Court of the Union or* Julius Caesar *Revised*, 39 NOTRE DAME LAW. 636, 637 (calling the proposal "absurd[]" and suggesting that seemingly only "those close to the lunatic fringe" were prepared to support that plan); *see also* Oberst, *supra* note 305, *passim* (describing the proposals in a generally pejorative way).

311. *See* KYVIG, *supra* note 59, at 373.

312. *See id.* at 373-74.

function. The formation of interest groups at a national level and the influence they have on a member of Congress or on the President may reduce the importance of debates at the state level. How much these changes matter is not only a complex question, but also one that goes beyond analyzing the constitutional structure. Nevertheless, with the only institutional actor permanently interested in the protection of the powers of state governments excluded from the national democratic process, the safeguard doctrine can hardly be upheld. That some state interests are represented on the national level is not sufficient.

The second conclusion is that the part of the compromise made in the Constitutional Convention that created a structure supported by two columns—the people of the states and the people of the United States—is still in place, despite continuous efforts to change some of the provisions in which that compromise is embodied. While the state governments lost their access to the national democratic process, the people of the states as distinct political units continue to be an integral part of the structure of national democratic processes. Electing the President still follows most of the rules established in Philadelphia. Altered only to a limited degree by the Twelfth Amendment, the Electoral College is still there, including the mixture of equal representation of the people of each state and popular representation that is its characteristic feature. Congress is still a bicameral legislature with one chamber representing the people of the states as distinct and equal political units and the other chamber based upon popular representation. The amendment process of Article V was not changed at all, leaving the constituent power where the Framers put it: in the joined hands of the American people as a whole and the people of the states as separate entities. Ultimately, then, the dual foundation of the national institutions is still a meaningful part of the structure of the Constitution. The middle ground established during 1787 to 1789 has not been abandoned.