Did the Seventeenth Amendment Repeal Federalism?

I

In 2001, Dr. Ralph A. Rossum, Professor of American Constitutionalism at Claremont McKenna College, published *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy.*[1] He thereby joined an almost century-long dialogue over the efficacy and the merits of the alteration in our basic law that shifted the method by which United States senators are chosen, from selection by the state legislatures to direct popular election.[2] He also offered a startling thesis: the amendment, which was intended by its Progressive Era proponents to advance democ-

1. Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, Maryland: Lexington Books, 2001). A preliminary version of part of this book's argument appeared as "The Irony of Constitutional Democracy," *San Diego Law Review* 36 (Summer 1999): 671–741.

2. Previous studies, cited by Rossum, that deal with this subject include George H. Haynes, *The Election of Senators* (1906); James M. Beck, *The Vanishing Rights of the States* (1926); John D. Buenker, *Urban Liberalism and Progressive Reform* (1973); Alan P. Grimes, *Democracy and the Amendments to the Constitution* (1978); Todd J. Zywicki, "Senators and Special Interests: A Public Choice Analysis of the 17th Amendment" (1994); C. H. Hoebecke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* (1995); Jay S. Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Siren's Song of the Seventeenth Amendment" (1997); and Todd J. Zywicki, "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals" (1997). I am grateful to my former student, Mr. Matthew Phillips, for providing me with a useful bibliographic summary of these works.

racy and to eliminate one manifestation of corruption in government, fundamentally transformed the nature of American federalism by removing from the national government the primary institutional safeguard for the protection of the states as corporate entities. Rossum's exploration led him first to review and critique efforts by the U.S. Supreme Court since 1976 to protect federalism through an array of constitutional doctrines; then to discuss the Framers' view of federalism, and the Senate's special role in protecting it, by drawing upon excerpts from the records of the Constitutional Convention of 1787, *The Federalist Papers*, case studies from the First Congress, and some landmark cases of the Supreme Court under the leadership of Chief Justice John Marshall; then to examine the forces that led to the adoption of the Seventeenth Amendment; and finally to review the subsequent expansion of national powers at the expense of the states, concluding with some recommended constitutional doctrines that, in his judgment, the Court should now adopt.

A work that attempts to cover so much constitutional ground inevitably invites scrutiny and hazards dispute. The present review will offer some of both. In addition to reexamining the relevant source materials that Rossum cites, I shall also consult some others, such as the observations of Alexis de Tocqueville, John Stuart Mill, and James Bryce. It is appropriate to state at the outset that the view taken here is generally critical of Rossum's thesis, and to acknowledge that he has identified issues of fundamental importance to an informed grasp of the American regime and the nature of American politics, perhaps of politics per se. He has also, incidentally, highlighted the tunnel vision and naiveté of one strand of late nineteenth- and early twentieth-century Progressivism and thereby admonished against two features of reform movements—the familiar political phenomenon sometimes known as "the law of unintended consequences" and a variation on this familiar theme that we may call "the law of undetected (or misidentified) causes."

II

In his first chapter, Rossum reviews and critiques recent efforts by the U.S. Supreme Court since 1976, and especially since 1992, to protect federalism—that is, to carve out a sphere of significant state

autonomy—by means of an array of constitutional doctrines, all of them, in his judgment, flawed and inadequate. This critique of the Court's conservative judicial activism and often confused jurisprudence is trenchant and generally convincing, but is so detailed and intricate as to warrant a separate review-essay. The context for this confusion, as he anticipates it in his introduction, is that "these decisions reveal an activist Court that has utterly failed to appreciate that the original federal design it is so committed to protecting is no longer a part of our constitutional system, as it was fundamentally altered by the Seventeenth Amendment."[3]

Rossum's next three chapters discuss the Framers' view of federalism, the Senate's intended role in protecting it, and the mode of electing senators as the linchpin of securing that role. This inquiry provides a generally useful overview of the American Founding, as well as a challenging exercise in rediscovering the obscure and seeing the familiar in a different light. It entails examination of the records of the Constitutional Convention, *The Federalist Papers*, and other contemporaneous sources. It is to this material that I shall first turn my attention.

In order to assess Rossum's core argument about the importance of the Constitution's original method of senatorial selection, it

3. Rossum, 3. Just how significant this fundamental alteration is depends on the reach that one attributes to the original mode of senatorial selection. This is a matter about which Rossum seems to waver. In his introduction, he declares that "the original federal design has been amended out of existence and is no longer controlling—in the post–Seventeenth Amendment era, it is no more a part of the Constitution the Supreme Court is called upon to apply than for example, in the post–Thirteenth Amendment era, the Constitution's original fugitive slave clause" (1). Considering the contribution that the fugitive slave clause made to the Civil War, this powerful comparison suggests that indirect election gave the states a high degree of control over the U.S. Senate—a conclusion that is reinforced by his later comments concerning the state legislatures' ability to "instruct" their respective senators (94–100). Or again, "for the framers, senators could be trusted to look after the interests of the states because the state legislatures were their masters" (245). In his conclusion, however, he states more modestly, "The election of the Senate by State legislatures was the structural protection that ensured that the interests of the states as states would be *taken into account* when any law was passed by the Congress" (284; emphasis supplied).

is necessary to go back to the Virginia Plan as it was first presented to the Constitutional Convention on May 29, 1787. The relevant articles, as recorded by Madison, read:

> 3. Resd. that the National Legislature ought to consist of two branches.
> 4. Resd. that the members of the first branch of the National Legislature ought to be elected by the people of the several States every for the term of ; to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those beculiarly [sic] belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; *to be incapable of re-election for the space of after the expiration of their term of service, and to be subject to recall.*
> 5. Resd. that the members of the second branch of the National Legislature ought to be *elected by those of the first* out of a proper number of persons nominated by the individual Legislatures, to be of the age of years at least; to hold their offices *for a term sufficient to ensure their independency,* to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.[4]

Certain phrases have been italicized to call attention to the Framers' intent to make the two houses of Congress as different from each other as their common reliance on the principles of democratic republicanism—the absence of a hereditary aristocracy and the need for periodic or occasional elections—would allow.[5] Thus,

4. *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1966), 1:20–21; emphasis supplied.
5. "As the improbability of sinister combinations will be in proportion to the

the original proposal for the House of Representatives included provisions for mandatory rotation in office and recall. These were later removed, but the fundamental principle of dependence on the people and the expectation of a relatively frequently changing membership are evident here. By contrast, the original proposal for the Senate contains no limitation on a senator's succeeding himself or any provision for recall. Other features of the Senate, though not stated in the resolution, seem to have been assumed: that it would be a smaller body than the House and that its members' terms of office would be staggered in order to produce greater stability.

As originally proposed, the state legislatures would nominate senators, with the House of Representatives choosing from among the nominees. This was, of course, very soon simplified to election by the state legislatures.[6] This change is, I would suggest, less significant than it may at first appear, for the essence of this article is the phrase "for a term sufficient to ensure their independency"—that is, their independence, once they are elected, *from their electors*, whoever those electors might be. In the original proposal, this meant independence from the House, upon whom the Senate was to function as a check, to which end a House membership that was constantly changing due to forced rotation would contribute. But even with the state legislatures doing the electing, the length of senatorial terms (first stipulated at seven years, later reduced to six in order to make for neater staggering of terms), in conjunction with the absence of recall, would necessarily render the senators independent of the state establishments during most of their term. This result would also follow from the common practice in the states of annual or biennial election of at least the lower legisla-

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dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government," *Federalist* 62.

6. The alacrity with which the Convention rejected election of the second house by the first, and its eventual unanimity for election by the "individual Legislatures," suggests that this outcome may have been a foregone conclusion, and that the original proposal was an attempt by the nationalists to stake out a bargaining position and to bring the Senate's defining principle of "independency" into view from the start. Farrand, 1:51–52, 150–56.

tive house, with consequently high rates of turnover in their membership. During the course of a single seven- or six-year senatorial term, the composition of the senator's "constituency" might change between three and six times, thus diluting or even obliterating any obligation he might feel to the persons who had actually elected him, and making unknowable for most of his term the identities of those who would be deciding on his reelection. This principle of "independency," and not the bare fact of election by the legislatures, is the true linchpin to the U.S. Senate's originally intended constitutional role.

Most of the controversy at the Convention regarding the Senate focused, as is well-known, on the formula for representation that would apply to it—proportionality to population versus equality among the states. This was the issue over which the Convention nearly ran aground, and which was finally resolved by the Connecticut Compromise, which stipulated "that in the 2d branch each State shall have an equal vote." This proposition was formally presented to the Convention on July 5 and was approved on July 16.[7] Interestingly, a week later, on July 23, a motion to have the senators vote per capita—that is, as individuals rather than as state delegations—was proposed, very briefly debated, and passed 9–1. (Voting at the Convention was by state delegations.) Only one delegate, Luther Martin of Maryland, spoke against the substance of the motion "as departing from the idea of the *States* being represented in the 2d. branch."[8] Even the Virginia Plan's ardent opponents, even those who insisted on equality in the Senate as necessary to protect the small states, seem (with the notable exception of Mr. Martin) to have viewed this prospective body not as a House of States, but as a self-directed second chamber of a national legislature, each of whose members should be able to exercise his own judgment, will, voice, and vote.

The absence of a recall provision may also imply that the state legislatures could not instruct their senators how to vote, or, in any event, that they could not effectively and immediately enforce any attempt to instruct them. The propriety of constituents binding

7. Farrand, 1:526; 2:15.

8. Farrand, 2:94–95; emphasis in original.

members of the House of Representatives was debated in some of the early Congresses, and the objection then raised against it—that the practice sacrificed deliberative representative government to the fragmentation of narrow, partial views—seems equally applicable to the binding of senators by their state legislatures.[9] Also of interest in this regard is a proposed Anti-Federalist constitutional amendment that the first session of the House of Representatives rejected in 1789, in the course of considering what became the Bill of Rights, that "the election of Senators for each State shall be annual, and no person shall be capable of serving as a Senator more than five years in any term of six years."[10] This proposal, which would have subordinated the U.S. Senate to the state legislatures and transformed it into a near replica of the Confederal Congress, helps us to appreciate, by means of contrast, the substantial independence from those bodies that the Senate, as constitutionally established, was meant to have.

Rossum presents an impressive list of instances—from 1789 through the early twentieth century—in which state legislatures issued instructions to their U.S. senators. Sometimes such instructions were followed, sometimes they were disregarded, and sometimes the "delinquent" senator resigned his office.[11] This phenomenon may more closely reflect the assumptions, first of the Anti-Federalists who were selected by some states, and later of triumphant Jeffersonian and Jacksonian democracy, than the implicit design of the Framers.[12] As the Supreme Court was much later to

9. *A Second Federalist: Congress Creates a Government*, ed. Charles S. Hyneman and George W. Carey (Columbia, SC: University of South Carolina Press, 1967), 236–50.

10. Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, DC: The AEI Press, 1997), 131. For a summary of the overall Anti-Federalist strategy in this proceeding, see Goldwin, 130–39.

11. Rossum, 98–100. The practice reached its peak during the second quarter of the nineteenth century, then fell off after the Civil War. Rossum, 99, 116 n. 52. Arguably, more significant than the third group's ultimate resignations is the fact that these senators did not follow their "constituents'" instructions.

12. Other examples of the transformation of constitutional structures are the demotion of presidential electors from deliberative, decision-making officers

characterize the Senate's role in the appointment of inferior executive officers,[13] the state legislatures' role in populating the Senate was to be limited to the front end. They could determine who the office holder would be, but, once chosen, do little to control his conduct in office.[14]

III

There is a pervasive assumption in *The Federalist Papers* that the general government will, at least in the then-near future, not concern itself with the states' internal affairs. Thus, Madison says, in *Federalist* 10, on the subject of representation:

> It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects.

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to mere ciphers, consequent upon the advent of political parties in the 1790s; the conversion of the Senate from a potential high council to the executive to a body that more closely resembles the House of Representatives, owing to the increase over time in the number of senators; and the practical establishment of an extra-constitutional two-term limit on election to the presidency.

13. *Myers v. United States*, 272 U.S. 52 (1926).

14. We get a telling glimpse into this divergence over the Senate's intended role in an exchange that occurred at the New York Ratifying Convention on June 24, 1788: "Hon. Mr. Lansing . . . Now, if it was the design of the plan to make the Senate a kind of bulwark to the independence of the states, and a check to the encroachments of the general government, certainly the members of this body ought to be peculiarly under the control, and in strict subordination to the state who delegated them. . . .

Hon. Mr. Hamilton . . . Sir, the main design of the Convention, in forming the Senate, was to prevent fluctuations and cabals. With this view, they made that body small, and to exist for a considerable period." Farrand, 3:337. It may be helpful to recall that John Lansing and his fellow Anti-Federalist delegate Robert Yates left the Convention when it went into recess at the end of July, in order to allow the Committee of Detail to do its drafting work, did not return or sign the final document, and opposed its ratification.

> The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.[15]

This and similar passages express a broad expectation of how the proposed general government is likely to behave, but it places no special importance on the selection process for U.S. senators as the reason for this expectation. Rather, the assumption seems here to be that Congress will stay clear of "local and particular" interests because it is the sensible thing to do, and perhaps because the people—and hence their elected representatives—are predisposed to favor their respective state governments.[16]

Federalist 39 considers the balance that the Constitution strikes between national and federal (i.e., confederation) principles, and concludes that it is a complex "composition" of both. "The Senate," Madison says, "will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress [under the Articles of Confederation]. So far the govern-

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15. *Federalist* 10.

16. See esp. *Federalist* 17. But cf.: "Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; *unless the force of that principle should be destroyed by a much better administration of the latter.*" (*Federalist* 17; emphasis supplied.) Cf. also: "The more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community. . . . The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed." (*Federalist* 27.)

ment is *federal*, not *national*."[17] This statement, however, expresses no particular anticipation that the senators will behave as guardians of state "sovereignty." It calls attention to one of several features of the Constitution—others being its mode of adoption, the method of selecting representatives and the president, the direct (unmediated) operation of its laws upon the people, and the amendment process—some of them just as "federal" as the mode of selecting senators, which, taken together, highlight its complex character and its irreducibility to a single principle.

In the papers leading up to the thematic discussion of the Senate, Publius drops some tantalizing but ambiguous suggestions about its supposed character. In *Federalist* 58, while answering the objection that the proposed Congress will fail regularly to reapportion itself, he says:

> There is a peculiarity in the federal Constitution which insures a watchful attention in a majority both of the people and of their representatives to a constitutional augmentation of the latter. The peculiarity lies in this, that one branch of the legislature is a representation of citizens, the other of the States: in the former, consequently, the larger States will have most weight; in the latter, the advantage will be in favor of the smaller States.[18]

While the Senate is here portrayed as representing the states, the focus is not on the protection of state autonomy, but on the equality of state representation which gives the smaller states a relative advantage in that body. A few pages later, comparing the likely character of the two houses, he observes

> that in all cases the smaller the number, and the more permanent and conspicuous the station, of men in power, the stronger must be the interest which they will individually feel in whatever concerns the government. Those who represent the dignity of their country in the eyes of other nations will be

17. *Federalist* 39; emphasis in original.
18. *Federalist* 58.

> particularly sensible to every prospect of public danger, or of dishonorable stagnation in public affairs.[19]

Again, the emphasis here is on other qualities of the Senate: its size, duration, and conspicuousness, especially as a national presence on the international stage.

In *Federalist* 59, while considering the hypothetical horror that some recalcitrant state legislatures might attempt to destroy the national government by declining to appoint senators, Publius says:

> So far as that construction may expose the Union to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision.[20]

The phrase "absolute safeguard" is perhaps the strongest expression of the principle for which Rossum contends. But even here one should be mindful of the rhetorical context. The state power of appointment is susceptible to an obvious and undeniable abuse—refusal to cooperate—but this is a risk that must be tolerated, because the alternative, of lodging this power elsewhere, could readily lend itself to an even more unsettling "interpretation." Moreover, it may be expedient, in order to discourage the states from neglecting their constitutional duty to select senators, to magnify, either actually or rhetorically, the stake that they stand to have in fulfilling that role. Finally, in No. 60, there is this observation:

> In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government. As

19. Ibid.
20. *Federalist* 59.

> long as this interest prevails in most of the State legislatures, so long it must maintain a correspondent superiority in the national Senate, which will generally be a faithful copy of the majorities of those assemblies.[21]

The expectation expressed here is not that the Senate will defer to state autonomy, but that both it and the state legislatures will replicate the prevalent interests present in the constituent society. The overall effect of these several reflections is to create the anticipation that the relation of the senators to the state establishments that appoint them will be stated clearly and emphatically. This anticipation is strikingly disappointed in the immediate sequel.

The major discussion of the U.S. Senate's functions occurs in Nos. 62 and 63. There, the connection between the Senate and the state legislatures that are to appoint them is stated with remarkable brevity and tepidness:

> Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is *probably the most congenial with the public opinion*. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the *formation* of the federal government as must secure the authority of the former, and may form *a convenient link* between the two systems.[22]

Much more attention is paid to the other foci of these two essays: the senators' qualifications; the states' equality of representation; the number of senators and the length of their term of office; and the body's powers. Much is said here of the need for a smaller, more stable,[23] second house of a national legislature, a body that will feel "a due sense of national character,"[24] including a sensitivity

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21. *Federalist* 60.
22. *Federalist* 62; emphasis supplied.
23. "The facility and excess of law-making seem to be the diseases to which our governments are *most* liable . . ." Ibid.; emphasis supplied.
24. *Federalist* 63.

to the opinions of other civilized nations. But there is no further topical treatment of the need to represent the states' political establishments or to protect their distinctive interests as states via legislative appointment. One should always be cautious about interpreting a silence. It is, of course, possible that Madison fails to dwell on this function at this point because he regards it as trivially obvious or already established by the preceding argument. But given Publius's general discursive inclination to be expansive and thorough, it is a most curious omission.

This pattern of minimizing or disconnecting the Senate's indirect mode of election from its supposed role as special protector of state sovereignty is visible in the sequel argument as well. Thus, in No. 62, Madison remarks that "*the equal vote allowed to each State* is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."[25] John Jay, in his single paper on the treaty-making power, says of the appointment of the president and the Senate by "select assemblies":

> This mode has . . . vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors. . . . The inference which naturally results from these considerations is this, that the President and senators so chosen will always be of the number of those who best understand our *national* interests, whether considered *in relation to the several States* or to foreign nations, who are best able *to promote those interests*, and whose reputation for integrity inspires and merits confidence.[26]

And, in the discussion of the impeachment process, both houses of Congress are comprehended in Publius's rhetorical questions: "Is it not designed as a method of NATIONAL INQUEST into the con-

25. *Federalist* 62; emphasis supplied.
26. *Federalist* 64; emphasis supplied.

duct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as *the representatives of the nation* themselves?"[27]

The Federalist's treatment of the Senate's mode of election is, in sum, a nuanced and highly rhetorical exercise in reshaping and redirecting an easy but misguided first impression. In this respect, it may be distinguishable from other, less subtle, participants in the ratification debates whom Rossum cites, who, perhaps naively, took the nexus between the senators' mode of election and expected conduct more at face value.[28] But on this score, Publius may have been too subtle by half. Insofar as some senators, especially in the early nineteenth century, may actually have regarded themselves as morally bound to follow the directions of their "constituent" state legislatures, to that very extent the constitutional reliance on the structural features designed to secure senatorial "independency" were trumped by the political spirit of deference to the states or by the ordinary virtue of gratitude. Contrary to Rossum's contention, what this phenomenon betokens is not the primacy of structural

27. *Federalist* 65; emphasis supplied.

28. Rossum, 93–105. But not all the opponents of the Constitution, it seems, shared this view of the importance of the Senate's mode of election. Cf. the Anti-Federalist "Brutus": "The *apportionment* of members of Senate among the States is not according to numbers, or the importance of the States; but is equal. . . . [It] is proper on the system of confederation—on this principle I approve of it. It is indeed *the only feature of any importance* in the constitution of a confederated government. . . . It is difficult to fix the precise period for which the senate should be chosen. . . . Men long in office are very apt to feel themselves independent [and] to form and pursue interests separate from those who appointed them. And this is more likely to be the case with the senate, as they will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little feelings of the middling class of people. . . . It farther appears to me proper, that the legislatures should retain the right which they now hold under the confederation, of recalling their members. It seems an evident dictate of reason, that when a person authorizes another to do a piece of business for him, he should retain the power to displace him, when he does not conduct according to his pleasure." "Essays of Brutus," No. 16, in *The Anti-Federalist: An Abridgment of The Complete Anti-Federalist by Murray Dry*, edited, with commentary and notes by Herbert J. Storing (Chicago: The University of Chicago Press, 1985), 189–90; emphasis supplied.

controls, but the vindication of Tocqueville's observation about the limits of formal rules in the face of a divergent set of social norms.[29]

IV

In the fourth chapter, Rossum offers in support of his thesis three case studies of important legislation adopted between 1789 and 1791 by the First Congress, in which sat several men who had either attended the Constitutional Convention or been active in the ratification process: the adoption of the Bill of Rights, the Judiciary Act of 1789, and the charter of the first Bank of the United States.

Of these three, only the first clearly offers a prima facie example of the Senate acting as a guardian of state rights. The House of Representatives had approved and transmitted for the Senate's consideration a list of seventeen articles of amendment. The Senate reworded some of these articles, consolidated some others, and rejected two outright, resulting in a list of twelve that were sent out for ratification by the state legislatures. Ten, comprising our familiar Bill of Rights, were ratified and added to the Constitution by December 1791.[30] One of the two articles that the Senate killed read as follows: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."[31] Representative James Madison had initially moved a slightly differently worded version of this proposal, and regarded it as "the most valuable amendment in the whole list."[32] Because the Senate at that time met in executive

29. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2002), 1:156, 292–95.

30. Of the two proposed amendments that were not ratified at that time, one would have regulated the ratio of U.S. Representatives to population. It became obsolete with the eventual growth of the House beyond the numbers contemplated. The other, which read, "No law, varying the compensation for the services of the senators and representatives, shall take effect until an election of representatives shall have intervened," lay dormant for over 200 years, and was then revived and ratified in 1992 as the Twenty-Seventh Amendment. Goldwin, 165–66.

31. Hyneman and Carey, 276.

32. Ibid.

session, we have no record of their debates, and cannot know for certain why they acted as they did. But it seems plausible that they shared the sentiment of Rep. Henry St. George Tucker:

> This is offered, I presume, as an amendment to the Constitution of the United States, but it goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do.[33]

Here, arguably, the Senate was acting, conformably to Rossum's thesis, to preserve state autonomy.[34]

The other two examples are more ambiguous. The Judiciary Act of 1789 was, Rossum observes, "crafted almost exclusively by the Senate," and subsequently approved overwhelmingly by the House without material alterations.[35] It performed the necessary function of filling the gap left by the Constitution regarding the detailed structure and procedures of the federal judiciary, and it did so, Rossum reports, in a way that satisfied Anti-Federalist Senator Richard Henry Lee, and that left Madison, who on this issue was an archnationalist, "infuriated."[36] The Act seems to be a careful and sensible piece of political compromise. On the one hand, it tilted in a nationalist direction by establishing a system of federal courts, including trial courts of first resort, below the U.S. Supreme Court, rather than leaving it entirely to the state courts to apply in the first instance acts of Congress and treaties to which the United States was a party. On the other hand, it placed a number of restrictions on the jurisdiction of the federal district and circuit courts, and it recognized "the laws of the several States" as "rules of decision in trials at common law in the courts of the

33. Ibid., 275.

34. I have long wondered why Chief Justice Marshall failed to mention this incident, which supports the conclusion the Supreme Court reached in *Barron v. Baltimore*, 7 Pet. 243 (1833), that the Bill of Rights applies directly only to the U.S. government, not to the States.

35. Rossum, 131, 136.

36. Ibid., 137.

United States."[37] Rossum offers a set of technical reasons for this outcome: the Senate opted to establish federal trial courts at all because the desirability of having such courts to apply admiralty law was universally acknowledged. But once the existence of such courts was conceded for this purpose, the Anti-Federalist objection to federal courts on the basis of their expense was no longer available to block the extension of their jurisdiction to some other areas of law. And the Virginia legislature had prohibited its courts from hearing cases that might arise under acts of the U.S. Congress. If other states followed this harmful precedent, federal laws might fail altogether to receive judicial enforcement.[38] But the premise of this line of reasoning is that there are some matters for which state judges, whether because they are unschooled or because they are susceptible to parochial bias, are not to be trusted. The existence of federal courts for these matters, while obviating the objection from expense, would in no way compel the addition of any other matters to federal jurisdiction. And the example of Virginia exposed the paramount importance of enforcing federal law, even if it meant defying state legislative judgments. The Senate, that is, arguably acted here primarily and emphatically as part of a sovereign national legislature. The further fact that the directly elected House, in which the Federalists predominated, made no attempt to materially change the Senate bill suggests that the package aptly reflected popular opinion as much as it might have reflected special solicitude for states' rights.

By the time the Bank Act of 1791 came along, battle lines had shifted somewhat. Most notably, Madison was now arguing an antinationalist, strict constructionist line. One cannot shed the suspicion that constitutional arguments on both sides had become, at least in part, a façade for the pursuit of opposed sectional interests. In the course of presenting an account of the Act's legislative history, Rossum apparently succumbs to circular reasoning. He quotes statements by Representatives William Loughton Smith and Elbridge Gerry in support of the bank bill, which had at that point already passed the Senate. First, Smith:

37. Ibid.
38. Ibid., 136–37.

> It would be a deplorable thing if . . . so enlightened a body as the Senate of the United States should, by so great a majority as were in favor of this bill, pass a law hostile to the liberties of this country, as the opposition to this measure have suggested the bank system to be.[39]

Next, Gerry:

> The interpretation of the constitution, like the prerogative of a sovereign, may be abused, but from hence the disuse of either cannot be inferred. In the exercise of prerogative, the minister is responsible for his advice to his sovereign, and the members of either House are responsible *to their constituents* for their conduct in construing the constitution. We act at our peril: if our conduct is directed to the attainment of the great objects of Government, it will be approved.[40]

And Rossum's gloss on both speeches:

> Smith's argument showed keen insight. The Senate, whose mode of election ensured the protection of the interests of the states as states, did not regard its reliance on implied powers to pass the Bank Act as a threat to the "residuary sovereignty" of the states. . . . The state legislatures were, of course, the constituents of the Senate, and, as Gerry made clear, it was for them to judge whether the Senate, through its use of implied powers, was serving "the great objects of Government" or jeopardizing the original federal design.[41]

But neither speech refers particularly to the Senate's mode of election. Smith rather calls attention to that body's general enlightenment, and Gerry's reference to "their constituents" could just as well denote popular opinion, as filtered through the state legislatures, as the legislators personifying the states in their corporate capacity.

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39. Ibid., 142. The Senate had passed the bill by a vote of 16–6. Ibid., 140.
40. Ibid., 142–43; emphasis supplied.
41. Ibid.

The example that is supposed to demonstrate corporate representation ends up assuming its own conclusion.

What these actions of the First Congress, taken as a whole, seem to display is a pattern of sensible senatorial accommodation to state interests, and probably to the popular opinion of the day, but not subservience. Other than the rejected provision of the proposed Bill of Rights, no examples are given of the Senate blocking House-approved legislation in order to protect the states.[42] Prior to the Civil War, the Senate functioned as a vehicle to maintain the precarious regional balance between free and slave states. Viewed through the lens of this issue, the protection of state legislative autonomy became a subordinate matter. Whether, on the one hand, a senator favored expansive use of Congress's power to regulate foreign and interstate commerce in order to discourage traffic in slaves or, on the other, to enforce the fugitive slave clause depended more on the degree of his region's attachment to or abhorrence of "the peculiar institution" than on any consistent judgment regarding state rights. In the end, it was the still indirectly elected Senate of the Reconstruction Congresses that recommended the Civil War amendments, with their substantial explicit and implied inroads on state autonomy in the spheres of property in slaves, civil rights, and black suffrage.

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42. Over a century later, in the period immediately preceding adoption of the Seventeenth Amendment, George Haynes would similarly view the Senate as the guardian, not of State interests per se, but of thoughtful, "conservative" deliberation, in contrast to the haste that characterized the "rule-ridden" House of Representatives. Haynes, *supra* n. 2, 220–22. See especially his remarks on the debates over the Spanish-American War resolutions in 1898 (221 n. 15). Professor Rossum has also directed my attention to the tie vote by which the Senate rejected the bill to extend the charter of the Bank of the United States in 1811. But the Bank was always controversial, in popular opinion as well as in the eyes of the state governments. Thus, a parallel bill was "indefinitely postponed" in the House of Representatives by a vote of 65–64 a few weeks earlier. *Annals of Congress*, 11th Congress, 3rd Session, 346–47, 826. Five years later, following the tribulations of the War of 1812 and in the midst of an economic depression, both houses braved residual opposition from the state establishments by chartering the Second Bank of the United States.

V

Rossum concludes his account of the Founding Era by examining three Supreme Court opinions of Chief Justice John Marshall. Two of them, *McCulloch v. Maryland* and *Gibbons v. Ogden*, are well-known landmark cases. The third (chronologically the first), *United States v. Fisher*, is largely overlooked but, Rossum convincingly suggests, deserves more attention than it has generally received.[43]

Fisher deals with a challenge to a provision of the bankruptcy statute that Congress enacted in 1797, which gave priority to the claims of the United States government against the estate of any deceased debtor who was indebted to the United States at the time of his death. Rossum calls attention to a particular passage in Marshall's opinion for the Court:

> Addressing the complaint that, by giving priority to the claims of the United States, the law will "interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have adopted to secure themselves against the delinquencies on the part of their own revenue officers," Marshall bluntly asserted: "[T]his is an objection to the Constitution itself. The mischief suggested, *so far as it can really happen*, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends."[44]

Focusing on the phrase that I have emphasized, he then continues:

> Marshall did not believe that "mischief" would result from giving the Congress free rein, for he implicitly trusted the Senate not to approve of such "mischief." The senators were, he would later say, "the representatives of the state sovereignties." Given the mode of electing senators, Marshall could confidently construe the Necessary and Proper Clause as conferring on Congress "any means which are in fact conducive to the exercise

43. *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Gibbons v. Ogden*, 9 Wheat. 1 (1824); *United States v. Fisher*, 2 Cranch 358 (1805).
44. Rossum, 159; emphasis supplied.

> of a power granted by the Constitution" without worrying that this power would be abused.[45]

While Marshall's language in *Fisher* is consistent with this explanation, it does not require it. Equally consistent is the supposition that Congress will be populated by prudent men, however they may happen to be chosen, who will be vigilant to prevent or to correct abuses of authority by officers of the United States.[46] Moreover, given that the defining characteristic of most of Marshall's landmark cases is the quashing of state claims that clash with the Constitution or acts of Congress,[47] one should probably take with a box of salt his profession of doubt that the mischief of conflicting federal and state claims on debtors' estates would really happen. Indeed, the phrase "so far as it can really happen" can be read as an expression of measured expectation.

Rossum's accounts of *McCulloch* and *Gibbons* are generally clear and correct,[48] though sometimes overstated. Apropos of *McCulloch*, Rossum summarizes the Court's interpretation of Congress's Article I, Section 8 powers as follows: "What Congress can do under its enumerated powers—i.e., what powers are delegated to it as opposed to reserved to the states—is a question for Congress alone to decide."[49] This, despite Marshall's perhaps grandiose prefatory paragraph:

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45. Ibid.

46. The later statement about "state sovereignties" is taken from an extrajudicial, anonymous defense of the *McCulloch* decision Marshall published fourteen years later. Ibid., 174 n 15.

47. In addition to *McCulloch* and *Gibbons*, see *Fletcher v. Peck*, 6 Cranch 87 (1810); *Sturges v. Crowninshield*, 4 Wheat. 122 (1819); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Cohens v. Virginia,* 6 Wheat. 264 (1821); *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824).

48. They also include summaries of the arguments presented by counsel on the losing side of each case, which helps one appreciate the logic of the State rights position, and the picturesque historical tidbit that Gibbons and Ogden nearly fought a duel. Rossum, 160–63, 167–70. Curiously, Rossum says nothing about the simmering background controversy over the interstate movement of slaves and free blacks as an informing element of the arguments over Congress's power to regulate interstate commerce.

49. Rossum, 161.

> In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if is to be so decided, *by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.*[50]

Again, although the famous rule of interpretation that the Court lays down is quite generous toward Congress, it does not totally renounce judicial limitation: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[51] Here are some six or seven grounds on the basis of which the Court could, however rarely, strike down an act of Congress.[52] On the particular matter of the senators functioning as agents of the state legislatures, Rossum himself records that "several states, resentful of the federal presence it symbolized and the stiff competition it provided, took advantage of the public's general

50. 4 Wheat., at 400–401; emphasis supplied.

51. 4 Wheat., at 421.

52. The immediate context of the later statement, "The choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election," is the opposition of Congressional discretion to dependence on the States, not whether Congressional action in this area is judicially reviewable. 4 Wheat., at 424.

hostility to the Bank and passed measures designed to regulate or prohibit its operations within their borders."[53] And while the Court in *Gibbons* seems to allow Congress total discretion over which laws it may enact to regulate interstate commerce,[54] this discretion is predicated on a presumably justiciable determination that the particular law is indeed a regulation of interstate commerce.

In sum, what Rossum provides, in his review of early Congressional enactments and Supreme Court cases, is not a proof of the proposition that the election of U.S. senators by the state legislatures created a vital dependence of the former on the latter. Rather, he demonstrates, with only partial success, that *assuming* such a dependency may help to clarify some otherwise murky and ambiguous language in certain congressional speeches and Court opinions. And perhaps this is all he intends.[55]

VI

Apart from the aforementioned list of instances in which state legislatures attempted, apparently with mixed success, to instruct their senators on how to vote, Rossum provides no comprehensive account of the actual conduct of the Senate during the nineteenth century on the basis of which one could gauge the degree to which protecting state autonomy was an actual and ongoing concern.[56] This is an important gap in the narrative, which we can try to fill by consulting the comments of some notable observers of American politics of that extended era.

Alexis de Tocqueville thought the principal institutional expression of the idea of state sovereignty to be the equal representation of the states in the U.S. Senate, but by 1835 he regarded this safeguard, which many of the Founders considered so essential, as a historical vestige:

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53. Rossum, 160.

54. 9 Wheat., at 196–97.

55. See *supra*, n. 3.

56. A clear example, which slightly precedes the nineteenth century, might be Congress's proposal of the Eleventh Amendment, which bars civil suits against a State by citizens of another State or foreign citizens or subjects. Rossum describes this event briefly in the context of critiquing the Rehnquist Court's federalism jurisprudence. Rossum, 28–32. See also *supra*, n. 42.

> All the states are young; they are close to one another; they have homogeneous mores, ideas, and needs; the difference that results from their greater or lesser size is not enough to give them very opposed interests. Therefore the small states have never been seen to join forces in the Senate against the designs of the great. Besides, there is such an irresistible force in the legal expression of the will of a whole people that when the majority comes to express itself through the organ of the House of Representatives, the Senate finds itself very weak in its presence.[57]

Turning his attention to the indirect mode of electing senators, Tocqueville calls it immensely significant, but not for the purpose of representing state interests. His vivid description of the U.S. Congress's bicameralism merits quotation in full:

> When you enter the House of Representatives in Washington, you feel yourself struck by the vulgar aspect of this great assembly. Often the eye seeks in vain for a celebrated man within it. Almost all its members are obscure persons, whose name furnishes no image to one's thought. They are, for the most part, village attorneys, those in trade, or even men belonging to the lowest classes. In a country where instruction is almost universally widespread, it is said that the people's representatives do not always know how to write correctly.
>
> Two steps away is the chamber of the Senate, whose narrow precincts enclose a large portion of the celebrities of America. One perceives hardly a single man there who does not recall the idea of a recent illustrious [deed]. They are eloquent attorneys, distinguished generals, skillful magistrates, or well-known statesmen. All the words that issue from this assembly would do honor to the greatest parliamentary debates of Europe.

57. Tocqueville, 1:112. In this respect, he unknowingly echoes an anticipation stated by Hamilton and Madison at the Constitutional Convention. Farrand, I:325, 447–48, 466, 486.

> Whence this peculiar contrast? Why is the elite of the nation found in this chamber rather than in the other? Why are so many vulgar elements gathered in the first assembly when the second seems to have the monopoly on talents and enlightenment? Both nevertheless emanate from the people, both are the product of universal suffrage, and up to now no voice has been raised in America to assert that the Senate is the enemy of popular interest. Where, therefore, does such an enormous difference come from? I see only a single fact that explains it: the election that produces the House of Representatives is direct; that from which the Senate emanates is subject to two stages. The universality of citizens names the legislature of each state, and the federal constitution, transforming each of these legislatures in their turn into an electoral body, draws the members of the Senate from them. Therefore the senators express, however indirectly, the result of universal suffrage; for the legislature that names the senators is not an aristocratic or privileged body that draws its electoral right from itself; it depends essentially on the universality of citizens; it is generally elected by them every year, and they can always direct its choices by filling it with new members. But it suffices that the popular will pass through this chosen assembly for it to be worked over in some way, and it comes out reclothed in more noble and more beautiful forms. The men so elected, therefore, always represent exactly the majority of the nation that governs; but they represent only the elevated thoughts that are current in the midst of it, the generous instincts that animate it, and not the small passions that often agitate it and the vices that dishonor it.[58]

On this basis, Tocqueville recommends and predicts more extensive use of two-stage elections as "the sole means of putting the use of political freedom within the reach of all classes of the people," without foundering "on the shoals of democracy."[59] And later still, when he takes up the growing sectional controversies of the 1830s,

58. Ibid., 1:191–92.
59. Ibid., 1:192.

he mentions, as one would have to, not the indirect election of senators, but Calhoun's and others' championing of the doctrine of nullification as the proffered instrument of protecting states' rights.[60]

A quarter-century later, John Stuart Mill debunked the general idea of two-stage elections. Taking his cues from the electoral college, as it had evolved by the mid-nineteenth century, he thought the likely outcome of such systems would be the reduction of the special electors to mere partisan ciphers, who would be chosen, not to exercise their own judgment, but to vote for one or another known candidate to whom they were pledged in advance. Alternatively, if the "the primary electors" (i.e., the ordinary voters) were to choose special electors without concerning themselves about who the ultimate officeholder will be, then

> one of the principal uses of giving them a vote at all is defeated: the political function to which they are called fails of developing public spirit and political intelligence; of making public affairs an object of interest to their feelings and of exercise to their faculties. The supposition, moreover, involves inconsistent conditions; for if the voter feels no interest in the final result, how or why can he be expected to feel any in the process which leads to it? To wish to have a particular individual for his representative in Parliament, is possible to a person of a very moderate degree of virtue and intelligence; and to wish to choose an elector who will elect that individual, is a natural consequence: but for a person who does not care who is elected, or feels bound to put that consideration in abeyance, to take any interest whatever in merely naming the worthiest person to elect another according to his own judgement, implies a zeal for what is right in the abstract, an habitual principle of duty for the sake of duty, which is possible only to persons of a rather high grade of cultivation, who, by the very possession of it, show that they may be, and deserve to be, trusted with political power in a more direct shape. Of all public functions which it is possible to confer on the poorer members of the community, this surely is the least calculated

60. Ibid., 1:375.

> to kindle their feelings, and holds out least natural inducement to care for it, other than a virtuous determination to discharge conscientiously whatever duty one has to perform: and if the mass of electors cared enough about political affairs to set any value on so limited a participation in them, they would not be likely to be satisfied without one much more extensive.[61]

The great exception to this rule is the U.S. Senate, for which Mill offers praise and an analysis comparable to Tocqueville's, but with a significant additional wrinkle:

> The case in which election by two stages answers well in practice, is when the electors are not chosen solely as electors, but have other important functions to discharge, which precludes their being selected solely as delegates to give a particular vote. This combination of circumstances exemplifies itself in another American institution, the Senate of the United States. That assembly, the Upper House, as it were, of Congress, is considered to represent not the people directly, but the States as such, and to be the guardian of that portion of their sovereign rights which they have not alienated. As the internal sovereignty of each State is, by the nature of an equal federation, equally sacred whatever be the size or importance of the State, each returns to the Senate the same number of members (two), whether it be little Delaware, or the 'Empire State' of New York. These members are not chosen by the popula-

61. John Stuart Mill, "Considerations on Representative Government," *Three Essays: On Liberty; Representative Government; The Subjection of Women* (New York: Oxford University Press, 1975), 295–96. Because Mill's focus is the possible reform of Parliament, he does not take into account considerations other than deference that may explain and justify the original constitution of the American Electoral College: the absence, in 1787, of an organized party system to advance nominees whose identities would be known nationally prior to a presidential election; the consequent possibility that a direct popular vote would scatter among several local favorites, none of whom might be a person of national stature; and the general inability of the people to recognize the qualities that make for an able executive officer, as distinguished from a legislative representative. See *Federalist* 68.

> tion, but by the State Legislatures, themselves elected by the people of each State; but as the whole ordinary business of a legislative assembly, internal legislation and the control of the executive, devolves upon these bodies, they are elected with a view to those objects more than to the other; and in naming two persons to represent the State in the Federal Senate, they for the most part exercise their own judgement, with only that general reference to public opinion necessary in all acts of the government of a democracy. The elections, thus made, have proved eminently successful, and are conspicuously the best of all the elections in the United States, the Senate invariably consisting of the most distinguished men among those who have made themselves sufficiently known in public life. After such an example, it cannot be said that indirect popular election is never advantageous. Under certain conditions, it is the very best system that can be adopted. But those conditions are hardly to be obtained in practice, except in a federal government like that of the United States, where the election can be entrusted to local bodies whose other functions extend to the most important concerns of the nation.[62]

Like Tocqueville, Mill points to the equality of the states in the Senate as the safeguard of state sovereignty, and the high quality of the senators as the important consequence of indirect election.[63] An

62. Mill, 297–98.

63. This is consistent with what he later says on the subject of whether it is a good idea in general to have a second chamber of a national legislature: "If one House represents popular feeling, the other should represent personal merit, tested and guaranteed by actual public service, and fortified by practical experience. If one is the People's Chamber, the other should be the Chamber of Statesmen; a council composed of all living public men who have passed through important political offices or employments. Such a chamber would be fitted for much more than to be a merely moderating body. It would not be exclusively a check, but also an impelling force. In its hands, the power of holding the people back would be vested in those most competent, and who would generally be most inclined, to lead them forward in any right course. The council to whom the task would be entrusted of rectifying the people's mistakes, would not represent a class believed to be opposed to their interest, but would consist of their own natural leaders in the path of progress.

ironic implication of Mill's argument is that insofar as national issues with which the Senate needs to deal may come to overshadow state and local issues, to that very extent will the ordinary functions of the state legislatures become obscured by their electoral function, and the legislators themselves become electoral ciphers, like their Electoral College counterparts—to the detriment of state self-governance![64]

A quarter-century later still, in 1888, Dr. (later Lord) James Bryce published the first edition of *The American Commonwealth*, a minutely descriptive work, of prodigious length, on American politics and society, which went through several revisions over the next three decades. (The 1914 edition came out shortly after the Seventeenth Amendment was adopted.) Bryce too offered similar, though not always consistent, observations about the U.S. Senate.

Perhaps because he writes primarily for a British audience, Bryce initially emphasizes the American system's federal features,[65] noting at one point that the early nineteenth-century senators, "re-

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No mode of composition could approach to this in giving weight and efficacy to their function of moderators. It would be impossible to cry down a body always foremost in promoting improvements, as a mere obstructive body, whatever amount of mischief it might obstruct." Ibid., 339–40.

64. Probably the most eminent example of this phenomenon was the Illinois election of 1858, in which the choice of state legislators was in large measure subsumed into the senatorial contest between Abraham Lincoln and Stephen Douglas. By 1906, Professor Haynes regarded the nationalizing tendency of American politics, and the consequent distraction of state legislators from their proper business, as one of the principal arguments to adopt direct popular election of senators. Nationalizing forces had transformed a loose federation into a great nation, such that the description of the senators as "ambassadors" was outdated. "The greater dramatic interest of national politics, particularly in relation to foreign affairs; the intense excitement of presidential campaigns . . . ; the greater wealth of federal patronage . . . ; the frequently recurring elections of congressmen" all have resulted in citizens voting at the behest of national parties. At one point, he even asserts (whether as his own conviction is unclear) that direct election would, by eliminating one locality's advantage over another's in the choice of Senators, remove the only incentive that state legislators have to gerrymander districts! Haynes, 160–61, 180–95, 266–67, 243–44, 183–84.

65. James Bryce, *The American Commonwealth* [orig. 1888; rev. ed. 1914] (Indianapolis: Liberty Fund, 1995), ch. 2.

garding themselves as a sort of congress of ambassadors from their respective states, were accustomed to refer for advice and instructions each to his state legislature."[66] But the context of this remark makes clear that he regards this datum as of essentially historical interest:

> The traditions of the old Congress of the Confederation, in which the delegates of the states voted by states, the still earlier traditions of the executive councils, which advised the governors of the colonies while still subject to the British Crown, clung about the Senate and affected the minds of the senators. . . . *So late as 1828*, a Senator after arguing strongly against a measure declared that he would nevertheless vote for it, because he believed his state to be in its favour.[67]

And he adds the following significant footnote, "A similar statement was made in 1883 by a senator from Arkansas in justifying his vote for a bill he disapproved. But the fact that from early days downwards the two senators from a state might (and did) vote against one another shows that the true view of the senator is that he represents the people and not the government of his state."[68] Again, when contrasting the Senate's relation to the president with that of the seventeenth-century Privy Council to the monarch, he observes generally that "there is all the difference in the world between be-

66. Ibid., 102–103. See also, on the Great Compromise at the Constitutional Convention: "The division of Congress into two houses supplied a means of settling the dispute which raged between the small and the large states. The latter contended for a representation of the states in Congress proportioned to their respective populations, the former for their equal representation as sovereign commonwealths. Both were satisfied by the plan which created two chambers in one of which the former principle, in the other of which the latter principle was recognized. The country remained a federation in respect of the Senate, it became a nation in respect of the House." Ibid., 167. Because, however, the original Virginia Plan already provided for a two-house national legislature, both parts of which would be proportioned to the states' respective populations or contributions to the national treasury, Bryce's characterization of *bicameralism* as a compromise surely exaggerates. Cf. Farrand, 1:20.
67. Bryce, 102–103; emphasis supplied.
68. Ibid., 103 n. 2.

ing advised by those whom you have yourself chosen and those whom election by others forces upon you."[69] But he does not take this potentially promising occasion to assert the Senate's control by or accountability to the state legislatures.

Bryce's thematic discussion of the Senate offers several relevant and interesting points: Indirect election "has helped to make the national parties powerful, and their strife intense, in [the state legislatures]. Every vote in the Senate was so important to the great parties that they are forced to struggle for ascendency [sic] in each of the state legislatures by whom the senators were elected."[70] The newly adopted (as of the 1914 edition) Seventeenth Amendment "may add immensely to the expense falling on candidates, as well as to the labour thrown on them in stumping the state; and if it causes senators to be less frequently reelected at the end of their term, it will reduce the element of long political experience heretofore present in it more largely than in the House."[71] The fact that senators vote as individuals means that "the vote a senator gives is his own and not that of his state."[72] Most significant, perhaps, for Rossum's thesis, "As the state legislatures sit for short terms (the larger

69. Ibid., 85.

70. Ibid., 89–90. Similarly, Michael Holt's 1,248-page study of the history of the American Whig Party, while documenting that their choice of U.S. senators often was an issue in election campaigns for state legislatures during the 1830s, 1840s, and 1850s, makes clear that the focus of attention in these campaigns was, not the preservation of state government autonomy, but rather the substantive issues of the day: internal improvements, banking, patronage, the scope of the Presidential veto power, and especially the extension of slavery to the western territories. Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (Oxford: Oxford University Press, 1999).

71. Bryce, 90. In a slightly muddled later passage that retains some of the language from the 1888 edition, Bryce observes that "the chances are almost even that [a member of the House of Representatives] will lose his seat at the next election." But he then notes, "In recent years reelection has grown more frequent, and in the Sixty-first Congress (1909–11), only 74 members out of 391 had not served before. Sixteen members had served during nine or more previous terms, i.e., for eighteen years or more." Ibid., 135. The effect of the two developments would be to make the two houses of Congress more alike.

72. Ibid., 92.

of the two houses usually for two years only), a senator has during the greater part of his six years' term to look for reelection not to the present but to a future state legislature, and this circumstance tends to give him somewhat more independence."[73] Further, the staggering of senatorial terms produces a stabilizing effect, both on policy and on the ethos of the body itself, into which new members are assimilated, and thereby implicitly detached from their "constituents":

> It is an undying body, with an existence continuous since its first creation; and though it changes, it does not change all at once, as do assemblies created by a singular popular election, but undergoes an unceasing process of gradual renewal, like a lake into which streams bring fresh water to replace that which the issuing river carries out. . . . An incidental and more valuable result [than enabling it to conduct or control foreign policy] has been the creation of a set of traditions and a corporate spirit which have tended to form habits of dignity and self-respect. The new senators, being only one-third, or less, are readily assimilated.[74]

Finally, under the heading of the relations between the two Houses, Bryce presents the following observation:

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73. Ibid.

74. Ibid., 93. Cf. also his comments on the instructional effect of the Senate's size: "A small body educates its members better than a large one, because each member has more to do, sooner masters the business not only of his committee but of the whole body, feels a livelier sense of the significance of his own action in bringing about collective action. There is less disposition to abuse the freedom of debate. Party spirit may be as intense as in great assemblies, yet it is mitigated by the disposition to keep on friendly terms with those whom, however much you may dislike them, you have constantly to meet, and by the feeling of a common interest in sustaining the authority of the body. A senator soon gets to know each of his colleagues—they were originally only twenty-five—and what each of them thinks of him; he becomes sensitive to their opinion; he is less inclined to pose before them, however he may pose before the public. Thus the Senate formed, in its childhood, better habits in discussing and transacting its business than would have been formed by a large assembly; and these habits its maturer age retains." Ibid., 104–105.

> Questions relating to states' rights and the greater or less extension of the powers of the national government have played a leading part in the history of the Union. But although small states might be supposed to be specially zealous for states' rights, the tendency to uphold them has been no stronger in the Senate than in the House. In one phase of the slavery struggle the Senate happened to be under the control of the slaveholders while the House was not; and then of course the Senate championed the sovereignty of the states. But this attitude was purely accidental, and disappeared with its transitory cause.[75]

VII

Concerning the development of proposals between 1826 and 1913 for what eventually became the Seventeenth Amendment, Rossum presents a meticulous account that is likely to make his book the standard reference source on this subject. The overall picture he paints is of a Congress and a country that became progressively overwhelmed by other concerns that eclipsed and obscured virtually all regard for federalism. Prominent among these concerns were the occasional inconvenience of politically deadlocked state legislatures failing to elect senators, the exaggerated perception that the indirect election process was shot through with bribery and corruption, and, most importantly, the irresistible imperative to install democracy wherever possible.

The first of these concerns was arguably a serious technical problem that could have been adequately addressed by an equally technical solution. The culprit here was an 1866 federal law that required a state's senators to be elected by a majority of the total number of state legislators, either by concurrent vote of each house or, that failing, by a joint vote of the two houses combined into a single body. This requirement of an absolute majority produced legislative deadlocks, owing to divided party control of the state legislatures or other causes, seventy-one times between 1885 and 1912.[76] A law that allowed election by plurality vote, either in the first instance or after a specified number of ballots had failed

75. Ibid., 168.
76. Rossum, 185–90.

to produce an absolute majority, would have provided a sufficient remedy. But limited, technical solutions could not satisfy the totalistic ideological demand for direct democracy. Similarly, Rossum, citing Todd Zywicki, maintains that only a tiny fraction of senatorial elections were demonstrably tainted by bribery and corruption.[77] Related to this charge was the populist characterization of the Senate as an aristocratic "millionaires' club," with the implication that admission could be purchased through bribery.[78]

Under the sway of the populist ideology of class conflict and the Progressive belief in "the redemptive powers of direct democracy,"[79] some states, beginning with South Carolina in 1888, adopted one or another version of "advisory" primary elections, with the intent of binding the state legislatures to popularly preferred senatorial candidates. Rossum notes that "by 1912, thirty-three states had introduced the use of direct primaries, and twelve states had adopted some form of . . . the 'Oregon System.'" Under this system, an "advisory" general election was held between the major parties' primary nominees, and candidates for the state legislature would be expected either to vote for the winner or to declare publicly, as part of their own election campaigns, that they did not consider themselves bound by the general election results.[80] But Rossum underestimates the significance of this datum to his general thesis. The U.S. Senate that finally acquiesced in the proposal that became the Seventeenth Amendment was already a substantially democratized body. That is, the amendment, rather than constituting a sharp break with the federal principle, was the culmination of a gradual process of drifting away from it that had by then been in the works for a quarter-century.

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77. Ibid., 191.

78. Ibid. In light of the prodigious cost of running a senatorial campaign today, especially in some of the larger states, and the advantage this factor gives to candidates of independent wealth, it would be interesting to compare the number of millionaires, gauged in constant dollars, in the Senates of 1908 and 2008, or the cost of promised legislation needed to gain popular election.

79. Ibid.

80. Ibid., 192–93. In the relevant Southern states, victory in the Democratic primary was, presumably, the practical equivalent of winning the general election.

Congressional consideration of direct election proposals during this period was generally responsive to growing popular opinion, including the opinion of an ever increasing number of state legislatures. It was also, as Rossum acknowledges, largely devoid of serious discussion of the federalism issue to which he attaches paramount importance. He finds only three exceptions in "the voluminous record": Rep. Franklin Bartlett and Sen. George F. Hoar in the Fifty-third Congress (1893) and Sen. Elihu Root in the Sixty-first Congress (1911).[81] (The case of Senator Hoar is equivocal. Rossum cites both a floor speech, in which Hoar expressly invoked the federalism rationale for indirect election, and his report on behalf of the Senate Committee of Privileges and Elections, a laundry list of objections to the proposed constitutional amendment which does not even mention state autonomy.[82]) One particularly telling index of this low level of concern is the repeated attempt by Southern members of successive Congresses to link direct election to a proposal to give the states total control over the manner of conducting senatorial elections—that is, to remove Congress's constitutional power to "make or alter such [State] Regulations."[83] As several Northern Congressmen noted, this stipulation would give the Southern states carte blanche to thwart black registration and voting. What states' rights meant for these Southerners was not general legislative autonomy, safeguarded by an appointed Senate, but the states' ability to set racially exclusionary voting standards.[84]

VIII

Rossum concludes his substantive argument by reviewing the development of a number of constitutional doctrines, including that of dual federalism, as judicially constructed substitutes for the superseded institutional safeguard for state autonomy that indirect

81. Ibid., 219. See also 199–201, 209–210. That is, only these three voiced the view that indirect election of senators was essential to preserve federalism. Others took note of federalism as a concern, but thought it not threatened by direct election.

82. Ibid., 219, 199–200.

83. Ibid., 198, 200, 203, 205–206, 208–209, 210, 211, 212–13; Constitution, Art. I, Sec. 4.

84. See also Haynes, 137–39, 248–52.

election of the Senate had supposedly provided. The rhetorical thrust of this chapter, as with his opening chapter, is a critique of some of the Supreme Court's recent decisions. But his generally correct overview of this familiar story[85] is colored by two exaggerated assumptions.

The first such assumption is a kind of constitutional application of Ockham's Razor, which excludes redundant remedies. That is, because the Senate, as originally constructed, was intended to be *the* institutional guardian of states' rights, the federal judiciary, enforcing constitutional limitations on the delegated powers of Congress, could not also have been intended to perform this function. This conclusion, of course, does not follow. One has only here to recall both Marshall's language at the start of his *McCulloch* opinion, quoted above,[86] and that Hamilton's classic explanation of judicial review presents it as an antidote, not only to "serious oppressions of the minor party in the community," but also to "dangerous innovations in the government."[87]

The other assumption has more to do with the attitude toward the judiciary of the Reconstruction Congress that drafted the text of the Fourteenth Amendment. Like Raoul Berger a generation ago, Rossum reads Section 5 of the amendment, which vests in Congress "power to enforce, by appropriate legislation, the provisions of this article," as implicitly discountenancing, if not outright precluding, judicial enforcement.[88] To be sure, the Supreme Court's prestige had suffered a severe blow as a result of the discredited *Dred Scott* decision,[89] and some language in an important post–Reconstruction Era case, *Ex parte Virginia*, suggests that, but for Section 5, "there might be room for argument that the [Fourteenth Amendment's]

85. See Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review*, 36 (1950): 1.

86. *Supra*, text at n. 50.

87. *Federalist* 78.

88. Rossum, 252–63. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977). Is it significant that Section 5 does not read "*the* power" or "*all* power to enforce etc."?

89. *Dred Scott v. Sandford*, 19 How. 393 (1857).

first section is only declaratory of the moral duty of the States."[90] On the other hand, the Supreme Court had, by 1867–68, when the Fourteenth Amendment was drafted and approved, been substantially reconstituted by President Lincoln's appointment of five new justices. As to the issue of the amendment's justiciability, I offer the following observation, which I had occasion to make some years ago, regarding a "crucial change" that took place in what was destined to become Section 1:

> Representative Bingham's original proposal read, "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." When this provision was discussed in Congress, the objection was voiced that whatever this Republican Congress might do pursuant to such authorization a future Democratic Congress might undo. Bingham's empowering text was thereupon referred to committee, where it was changed to the current language, which simply declares the inviolable existence of privileges and immunities of national citizenship. This change had the effect of placing the civil rights which the Thirty-ninth Congress wished to affirm beyond the reach of a future hostile majority by rendering them "self-enforcing." That is, by giving these privileges and immunities Constitutional status, Congress gave the task of enforcing them to the courts, no matter who might happen to control the Congress at any given time.[91]

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90. *Ex parte Virginia*, 100 U.S. 339 (1880), at 347, as quoted in Rossum, 255. There is more than an ounce of irony in the fact that in this case the Court upheld a provision of the Civil Rights Act of 1875, which made it a federal crime for state officials to exclude someone from a jury on the basis of race—arguably a significant intrusion on what had previously been the states' sphere of internal discretion. This act, like the Civil War amendments and other civil rights legislation of the period, had of course been approved by an indirectly elected U.S. Senate.

91. Jules Gleicher, "The Straying of the Constitution: Raoul Berger and the Problem of Legal Continuity," *Continuity: A Journal of History*, no. 1 (Fall

While it is relatively easy to pinpoint the (at least temporary) demise of dual federalism,[92] locating its beginning is a bit more elusive. Rossum seems to suggest that it and related constitutional doctrines came, at least implicitly, in response to the Seventeenth Amendment:

> The Supreme Court's initial reaction to this congressional expansion of national power at the expense of the states was to attempt to fill the gap created by the ratification of the Seventeenth Amendment and to protect federalism by invalidating congressional measures either on dual-federalism grounds or through its narrow construction of the Commerce Clause. . . . Perceiving the popularly elected Senate as no longer able to protect federalism, the Court undertook to perform that task itself, and during the period from the ratification of the Seventeenth Amendment in 1913 to its jurisprudential turnabout in the *Jones & Laughlin* case in 1937, it did exactly that, invalidating more federal statutes on federalism grounds during that quarter of a century than it had during the entire period prior to the ratification of the Seventeenth Amendment.[93]

One can, however, suspect that it began earlier, perhaps much earlier, than Rossum assumes. Arguably, the dual federalist approach can be traced to the accession of Roger Taney as Chief Justice Marshall's successor in 1835. The series of "dormant" commerce clause cases, in the second quarter of the nineteenth century, shows the justices struggling to discover a proper line of demarcation between state and national functions.[94] In the Reconstruction-era *Slaughter-*

1980): 99, at 106–107. See also *The Reconstruction Amendments' Debates*, ed. Alfred Avins (Richmond, VA: Virginia Commission on Constitutional Government, 1967), 160.

92. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

93. Rossum, 235. He cites only seven pre-Amendment invalidations of congressional measures between 1857 and 1911. Ibid., 268 n. 30.

94. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829); *New York v.*

house Cases, they applied a dual federalist approach to the area of individual rights, at least where Congress had not legislated on the subject.[95] And in 1895, the Court relied on the distinction between direct and indirect effects on interstate commerce to determine whether the Sherman Anti-Trust Act's prohibition on "conspiracies in restraint of trade" could be applied to a monopoly in manufacture.[96] In this case, they interpreted the law narrowly in order not to strike it down, but it is clear from the opinion that, but for this "saving" (arguably inaccurate) statutory construction, they would have declared it unconstitutional. Also relevant to the doctrine of dual federalism was the simultaneous development in the late nineteenth and early twentieth centuries of the idea of substantive due process, under which state economic and social legislation was, sporadically, disallowed as a violation of the "liberty of contract" said to be guaranteed by the Fourteenth Amendment's due process clause.[97] These parallel doctrines suggest that the fundamental informing principle of the constitutional cases of this era was less the preservation of federalism than the protection of private property rights from invasion by all levels of government.

Quite apart from the changed method of selecting U.S. senators, one can assign the upsurge of federal legislative and regulatory activity in the post–Seventeenth Amendment period to a number of causes, some of them in process over the half-century preceding the amendment's adoption: the transformation of a patchwork of juxtaposed local economies into an increasingly integrated national economy, especially by means of the network of transcontinental railways, and the consequent need for national regulation; a greater receptivity in post–Civil War public opinion to the application of national remedies to address national problems; and the enhanced ability of the Congress to raise and deploy revenue, following adop-

Miln, 11 Pet. 102 (1837); *License Cases*, 5 How. 504 (1847); *Passenger Cases*, 7 How. 283 (1849); *Cooley v. Board of Wardens*, 12 How. 299 (1852).

95. *The Slaughterhouse Cases*, 16 Wall. 36 (1873).

96. *United States v. E. C. Knight Company*, 156 U.S. 1 (1895).

97. *Mugler v. Kansas*, 123 U.S. 623 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905). A similar limitation on acts of Congress was promulgated under the Fifth Amendment's due process clause. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

tion, also in 1913, of the Sixteenth Amendment, which authorized the federal income tax.[98] Further, given the severity of the Great Depression, and the openness of popular opinion in the 1930s to greater and more novel government participation in the economy, one can seriously doubt that an indirectly elected Senate would have made any practical difference in addressing that national crisis.

The difficulties and confusions that Rossum finds in the Supreme Court's latter day revivals of the old and supposedly abandoned approaches, as well as some new ones, may stem less from their intrinsic incoherence than from the jostlings of perhaps as many as nine prima donnas, each with his or her peculiar "take" on the issues of our own times. That said, a decision such as that in *United States v. Lopez*,[99] in which the Court invalidated a federal law that criminalized mere possession of a handgun within 1000 feet of a school, does seem defensible on at least two grounds. First, the decision is not a broadside on Congress's power to regulate interstate commerce as such. As the opinion of the Court is at pains to point out, the precedents concerning laws that deal with economic activities and with noneconomic activities which exert a substantial effect on interstate commerce remain undisturbed.[100] And secondly, to rule differently with respect to gun possession, or similar noneconomic matters, because of its asserted nexus to interstate commerce, would effectively transform a government of enumerated powers into one of plenary power, and render the Constitution's enumeration a logical and practical absurdity.[101]

In the course of this chapter, Rossum offers some recommendations on what the Court, in light of his findings about the Seventeenth Amendment, should now do in the area of federalism:

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98. Rossum acknowledges the efficacy of other factors, mostly of twentieth century vintage. Rossum, 8 n. 9, 267 n. 3.

99. *United States v. Lopez*, 514 U.S. 549 (1995).

100. 514 U.S., at 558–64.

101. 514 U.S., at 584–89 (concurring opinion of Justice Thomas), cited by Rossum, at 247. This is, of course, not to say that an unenumerated power, even one specifically rejected for enumeration by the Convention, such as the power to establish corporations, could not legitimately be inferred as a means to some other enumerated power, as was done with the First Bank Bill. See Rossum, 141–44.

> A better approach [than that suggested in Justice Thomas's concurring opinion in *Lopez*] . . . would be for the Court forthrightly to announce that federalism died with the ratification of the Seventeenth Amendment, that the Court therefore is withdrawing explicitly from reviewing congressional power under the Commerce Clause, and that it will hereafter treat Commerce Clause questions as political questions, acknowledging in the language of *Baker v. Carr* that there are no "judicially discoverable and manageable standards for resolving" them and that the resolution of these questions was "constitutionally commit[ted]" by the framers to "a coordinate political department," i.e., to the Congress consisting of the House (elected by the people) and the Senate (whether elected indirectly by the state legislatures or directly by the people).[102]

It is more than a little ironic that *Baker v. Carr*, the case whose language he quotes on the judicial doctrine of "political questions" for the purpose of urging the Court to remove itself from commerce clause litigation, injected the federal judiciary into the arguably more politically sensitive area of state legislative reapportionment.[103] However this may be, his conclusion seems overdetermined. If the justiciability of commerce clause cases hinges on the availability of "judicially discoverable and manageable standards," then, either way, the correct conclusion would follow, no matter what the method of selecting U.S. senators. The Seventeenth Amendment might have removed an institutional restraint on Congress exercising its commerce power vigorously, but would by itself not have affected the judiciary's review power, however extensive or limited it may be, over the subject area of congressional regulation of commerce. Moreover, the task of finding workable standards in this area seems, on its face, perhaps as perplexing, but no less possible than that presented in the "dormant" commerce clause cases of the 1830s and 1840s. The analytical framework articulated by the Court in *Lopez* even bears a "family resemblance" to the

102. Ibid., 247–48.
103. *Baker v. Carr*, 369 U.S. 186 (1962).

two-step process enunciated in *Cooley v. Board of Wardens*.[104] One might expect exceptions, to the states' legislative power in the one subsequent line of cases and to Congress's in the other, to be rare, but accessible to reason when they occur.[105]

IX

Did the Seventeenth Amendment repeal federalism? Only if one exaggerates the degree to which indirect election of U.S. Senators was intended as federalism's bulwark, minimizes federalism's other institutional and cultural supports, and loses sight of the larger historical trends toward democratization and centralized power, of which the amendment was one of several incidental expressions. While Rossum skirts the edges of the first two excesses, his repeated reminders, drawn from Lincoln's "Lyceum Speech," of "the silent artillery of time"[106] betoken awareness of the broader context that makes his compilation of evidence richer than the thesis it is marshaled to demonstrate.

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104. 12 How., at 317–20.

105. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

106. Abraham Lincoln, "The Perpetuation of Our Political Institutions" (address to the Springfield Young Men's Lyceum, 1838), quoted in Rossum, 5, 220, 281.