

In Defense of Federalism: The Need for a Federal Institutional Defender of State Interests

INTRODUCTION

The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States have been interpreted by the United States Supreme Court to provide protection against arbitrary action by the federal and state governments, respectively.¹ When the high Court perceives such action by the president, Congress, or state governments, it strikes down that action as unconstitutional exercising its implied power of judicial review.² But which branch of the federal government responds when the arbitrary state action is the product of the federal judiciary? Arizona state officials have need to ask this question after the recent decision in *Ring v. Arizona*.³

The U.S. Supreme Court exerts a pervasive influence in the area of state criminal procedure, especially capital punishment.⁴ The Court's decisions concerning capital punishment over the last three decades have forced the states either to abandon capital punishment altogether or to formulate procedures and policies that conform to the dictates of those decisions.⁵ The State of Arizona elected the latter course and developed a procedure that met the demands of the Supreme Court.⁶ This procedure required the trial judge to conduct a separate sentencing hearing following a murder conviction to evaluate statutorily enumerated aggravating and mitigating factors. The procedure made a death sentence unavailable

1. *Nebbia v. New York*, 291 U.S. 502, 536 (1934). “[T]he function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.” *Id.*

2. *Id.*; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

3. 536 U.S. 584 (2002).

4. *Walton v. Arizona*, 497 U.S. 639, 657 (1990) (Scalia, J., concurring), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002).

5. *Id.* “Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the State’s administration of capital sentencing” *Id.*

6. *Ring*, 536 U.S. at 610 (Scalia, J., concurring). “What compelled Arizona (and many other States) to specify particular “aggravating factors” that must be found before the death penalty can be imposed was the line of this Court’s cases beginning with *Furman v. Georgia*.” *Id.* (citations omitted).

unless the judge found at least one aggravating factor.⁷ The Supreme Court upheld Arizona's capital punishment procedure against a direct constitutional challenge under the Sixth Amendment right to trial by jury in *Walton v. Arizona*.⁸

Nine years after the *Walton* decision, the Court reviewed a federal carjacking statute in *Jones v. United States*.⁹ This statute authorized escalating maximum sentences for carjackings involving serious bodily injury or death.¹⁰ The question presented in *Jones* was whether the statute should be interpreted to allow judges to find the factors necessary to trigger the increased penalties.¹¹ The Court answered that question in the negative.¹² The majority believed prior case law suggested that the Due Process Clause of the Fifth Amendment and the notice and jury guarantee clauses of the Sixth Amendment demanded that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."¹³ In order to avoid a possible conflict with these constitutional provisions, the majority interpreted the carjacking statute to require that each element that increased the maximum penalty be submitted to a jury.¹⁴ The *Jones* Court specifically distinguished *Walton* from the then-immediate case by reasoning that Arizona's capital punishment procedure did not authorize an increased maximum penalty for murder since Arizona law declared that maximum penalty to be death.¹⁵ Under the

7. *Id.* at 592-93. The enumeration of mitigating factors was not meant to be exclusive. *Id.* at 592 n.2. The burden of showing mitigating factors by a preponderance of the evidence rested with the defendant. *Walton*, 497 U.S. at 649.

8. 497 U.S. at 649. "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* at 647 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)).

9. 526 U.S. 227 (1999).

10. *Id.* at 229-30.

11. *Id.*

12. *Id.* at 251-52.

13. *Id.* at 243 n.6.

14. *Id.* at 251-52.

15. *Jones v. United States*, 526 U.S. 227, 251 (1999).

The Court [in *Walton*] characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available. We are frank to say that we emphasize this careful reading of *Walton*'s rationale

Id.

Jones rationale, the Arizona sentencing hearing determined only if the maximum available sentence should be applied.¹⁶

A year after *Jones*, the Court considered New Jersey's hate crime sentencing enhancement statute in *Apprendi v. New Jersey*.¹⁷ New Jersey law authorized an increase in the maximum penalty for a criminal offense if a judge determined by a preponderance of the evidence at a sentencing hearing that the offense was motivated by a purpose to intimidate persons based on their race, color, gender, handicap, religion, sexual orientation or ethnicity.¹⁸ The Court struck down the New Jersey sentencing enhancement by elevating its opinion in *Jones*, that any factor increasing the maximum penalty for a crime must be submitted to a jury, to the status of constitutional law.¹⁹ However, the Court again reaffirmed the continued constitutional vitality of *Walton*.²⁰

Two years after this second reaffirmation of *Walton's* continued constitutional legitimacy, the U.S. Supreme Court in *Ring v. Arizona* reversed *Walton* and held Arizona's capital punishment procedure in violation of the Sixth Amendment in light of its decisions in *Jones* and *Apprendi* – the same decisions that contained explicit assurances of *Walton's* viability.²¹ Such a dramatic reversal, which will again force the State of Arizona either to reconstruct its capital punishment system or abandon capital punishment altogether, smacks of the arbitrariness that both of the Due Process Clauses forbid.²²

The question, now particularized, is again presented: what recourse does the State of Arizona have against actions by the Supreme Court that Arizona perceives as unconstitutional? The brief answer, aside from rebellion or refusal to abide by the high Court's decision, is none.²³ This

16. *Jones*, 526 U.S. at 251.

17. 530 U.S. 466 (2000).

18. *Id.* at 468-69.

19. *Id.* at 490.

20. *Id.* at 496. "[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Id.*

21. *Ring v. Arizona*, 536 U.S. 584, 600-03, 609 (2002). The majority in *Ring* relied on the dissenting opinions in *Jones* and *Apprendi* to undermine the authority of the arguments made by the majorities in those opinions to reaffirm the legitimacy of *Walton*. *Id.* at 600-03.

22. *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

23. Although the Constitution provides the states with the ability to compel Congress to call a convention to consider constitutional amendments, it is "a cumbersome and unreliable strategy which has never been successfully accomplished." Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its*

comment explores this conundrum and offers two specific remedies for the reader's consideration: (1) the repeal of the Seventeenth Amendment and (2) a constitutional amendment providing a congressional override of federal judicial decisions. A brief review of the theory and structure of American government will help demonstrate that these proposals are consistent with the form and tenor of the Constitution.

I. CURRENT STRUCTURE OF AMERICAN GOVERNMENT

Judicial interpretation of the Due Process Clause is not the primary constitutional protection against arbitrary or other improper governmental action.²⁴ Judicial review is but one mechanism built into the structure of the American political order to keep the whole of the national government, and each of its branches, within its constitutionally prescribed role.²⁵ The president and Congress control other mechanisms to assert their interests and defend themselves and the public against improper conduct by another branch.²⁶ Through the intricate system of separation of powers, all of the branches of the federal government are placed in an arena of perpetual political competition where each branch can attempt to define for itself the scope of its authority and, simultaneously, resist the excesses and the encroachments of the other branches.²⁷ However, in the light of the problem presented above, this arrangement is flawed for two reasons: (1)

Implications for Current Reform Proposals, 45 CLEV. ST. L. REV. 165, 213 (1997).

24. See THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

25. THE FEDERALIST NO. 78, at 505 (Alexander Hamilton) (Modern Library College Editions 1964). The Supreme Court has a duty "to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* However, Justice Jackson recognized that judicial determination of the limits of the various branches of government is insufficient in itself to preserve the boundaries between the three branches of government. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). "[T]here was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' [The Court] may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." *Id.*

26. THE FEDERALIST NO. 48 (James Madison), NO. 73 (Alexander Hamilton).

27. THE FEDERALIST NO. 37 (James Madison), NO. 51 (Alexander Hamilton or James Madison). "[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches." THE FEDERALIST NO. 37, at 229 (James Madison) (Modern Library College Editions, 1964). The only way to define the boundaries of the three branches of the federal government and thereby keep each branch in its proper role is "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." THE FEDERALIST NO. 51, at 336 (Alexander Hamilton or James Madison) (Modern Library College Editions 1964).

the lack of a federal defender of state interests deprives the states of any benefit from the existing separation of powers scheme and (2) even if the states had such a defender, the Constitution provides inadequate mechanisms for that defender to challenge the improper exercise of judicial review.

Improper government action is a product of what *The Federalist* called faction—an ever present, unavoidable threat to popular government.²⁸ A faction is “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²⁹ Publius³⁰ identified the most enduring source of faction as the unequal distribution of property (*i.e.*, the tension between the rich and poor) and believed this faction to be the most destructive to a democratic society.³¹ Faction is most potent in a small republic where the number of interests in the community is correspondingly small, thus making the rich/poor faction more likely to dominate the public debate.³² Publius reasoned that the initial solution to this problem of government is to expand the sphere of governance to include as many different kinds of interests as possible, so that no one faction can claim the support of the majority of the citizenry.³³

28. THE FEDERALIST NO. 10 (James Madison).

29. THE FEDERALIST NO. 10, at 54 (James Madison) (Modern Library College Editions 1964).

30. Alexander Hamilton, John Jay, and James Madison wrote *The Federalist* under the pseudonym of Publius. MARTIN DIAMOND, AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT 38 (William A. Schambra ed., 1992) [hereinafter REPUBLICAN PRINCIPLES].

31. THE FEDERALIST NO. 10, *supra* note 29, at 56; MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 72 (1981) [hereinafter DEMOCRATIC REPUBLIC].

32. DEMOCRATIC REPUBLIC, *supra* note 31, at 72. The division over amount of wealth “leads to the class struggles that destroyed so many older democracies – the mortal combat of the few rich against the many poor.” *Id.*

33. THE FEDERALIST NO. 10 (James Madison).

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily they will concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . .

THE FEDERALIST NO. 10, *supra* note 29, at 60-61.

In the absence of a majority faction, ordinary majority rule controls the destructive effects of this vice.³⁴

Expanding the sphere of governance is only the first defense against the danger of faction. The second defense is the separation of powers.³⁵ In a democratic society, the institutions of government are presumably responsive to the will of the people.³⁶ As the people are likely to often be moved by the passions of the moment (and as some of those passions are occasionally contrary to the rights of others), those institutions must be capable of resisting the temptation to serve the majority passion of the moment.³⁷ The founders insulated the federal government from the whims of public opinion by differing as much as possible the times and methods of election for each branch of that government,³⁸ so as to create separate and distinct departments capable of resisting a branch that may succumb to a faction for a time.³⁹ Each branch of government possesses its own unique ambitions and interests and is equipped to exercise its powers and to defend itself against the usurpations of the other branches.⁴⁰ Thus, faction is kept in check first by incorporating as many interests into the body politic as possible to prevent a majority faction, and second by requiring any faction to control the three different branches of government simultaneously and for a long duration to effectuate its goals.⁴¹

34. *Id.* at 57.

35. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

36. See Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1141-42 (2000).

37. THE FEDERALIST NO. 63, at 410 (Alexander Hamilton or James Madison) (Modern Library College Editions 1964).

[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

Id.

38. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, *amended by* U.S. CONST. amend. XVII; U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII; U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1.

39. McGreal, *supra* note 36, at 1136.

40. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

41. See THE FEDERALIST NO. 10 (James Madison), NO. 51 (Alexander Hamilton or James Madison).

Publius placed Congress at the cornerstone of his separation of powers scheme.⁴² He believed the nature of the legislative branch to be at once the most powerful of the three departments of government and the most susceptible to the vice of faction.⁴³ The legislature is prone to predominate because its constitutional powers are more extensive and less subject to precise limitations than the powers granted to the executive and the judiciary.⁴⁴ Further, the legislative control over the purse strings of government gives the legislature great leverage over the other two branches.⁴⁵ Therefore, the first defense built into the separation of powers structure is the division of the national legislature into two separate branches—the House of Representatives and the Senate—with different modes of election.⁴⁶ Before Congress can act, a majority of the representatives of two distinct constituencies must concur in the proposed act.⁴⁷

The presidential veto and judicial review constitute the other major protections built into the structure of American government to guard against legislative misbehavior.⁴⁸ The president, answerable to a

42. See THE FEDERALIST NO. 48 (James Madison).

43. THE FEDERALIST NO. 48, at 322-23 (James Madison) (Modern Library College Editions 1964). Alexis de Tocqueville articulated the identical view nearly a half-century later. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 254 (Phillips Bradley trans., Everyman's Library 1994) (1835) [hereinafter DEMOCRACY I]. "The very essence of democratic government consists in the absolute sovereignty of the majority . . . Of all political institutions, the legislature is the one that is most easily swayed by the will of the majority." *Id.*

44. THE FEDERALIST NO. 48, *supra* note 43, at 323.

45. *Id.*

46. THE FEDERALIST NO. 51, *supra* note 27, at 338; see U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, amended by U.S. CONST. amend. XVII.

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

THE FEDERALIST NO. 51, *supra* note 27, at 338.

47. See THE FEDERALIST NO. 62, at 402 (Alexander Hamilton or James Madison) (Modern Library College Editions 1964). Under the original Constitution, Congress could pass no law without "the concurrence, first, of a majority of the people, and then, of a majority of the States." *Id.* However, with the ratification of the Seventeenth Amendment, the mode of senatorial election changed from state legislature appointment to popular election, thus changing the constituency of the Senate to be more like that of the House of Representatives. See U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII, § 1.

48. See THE FEDERALIST NO. 73, at 476 (Alexander Hamilton) (Modern Library

constituency distinct from that represented by either house of Congress, is given the limited authority to either prevent any legislative act from becoming law or to refuse to execute those laws that he may find constitutionally offensive.⁴⁹ Finally, the judiciary (not having a direct constituency and only subject to the checks and balances exercised by the president or Congress)⁵⁰ is allowed the discretion to refuse to administer duly enacted laws if that branch finds those laws to be inconsistent with the Constitution.⁵¹ Under this scheme, the cooperation of all three branches of government is required before any enduring direct federal action may be accomplished.⁵²

The purpose of the separation of powers scheme extends beyond controlling the excesses of the legislature. The checks and balances afforded by this system also provide Congress, the president, and the federal courts with the authority to perform their constitutionally designated responsibilities and permits each branch the ambition and the means to counter the encroachments of the other branches.⁵³ If Congress determines that the president or the judiciary is assuming or undermining its legislative powers;⁵⁴ if the president senses that Congress or the judiciary is interfering with his duties of faithfully executing the laws, of serving as the commander-in-chief of the armed forces, or of conducting foreign affairs;⁵⁵ or if the judiciary believes that the president or Congress

College Editions 1964); THE FEDERALIST NO. 78, *supra* note 25, at 505.

49. THE FEDERALIST NO. 73, *supra* note 48, at 477; *See* McGreal, *supra* note 36, at 1118, 1142. Publius stated that the presidential veto

not only serves as a shield to the Executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

THE FEDERALIST NO. 73, *supra* note 48, at 476-77. The president's constituency consists of the entire American people. McGreal, *supra* note 36, at 1142; *see* THE FEDERALIST NO. 68, at 443 (Alexander Hamilton) (Modern Library College Editions 1964).

50. McGreal, *supra* note 36, at 1143.

51. THE FEDERALIST NO. 78, *supra* note 25, at 506. "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.*

52. McGreal, *supra* note 36, at 1119.

53. THE FEDERALIST NO. 51, *supra* note 27, at 337. "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *Id.*

54. U.S. CONST. art. I, § 8.

55. U.S. CONST. art. II.

is threatening its authority to decide cases or controversies,⁵⁶ each of these federal branches is armed with the tools to resist such actions.

Herein lies Arizona's first problem with this system. The vast majority of criminal prosecutions in the United States occur under state law,⁵⁷ making the effective and efficient administration of criminal justice of paramount interest to the states.⁵⁸ However, the State of Arizona is defenseless to protect this interest from arbitrary interference by the federal judiciary because it is neither a participant in the separation of powers system nor a constituent of any of the existing participants.⁵⁹ The constituents of the House of Representatives and the U.S. Senate are the citizens of the states, not the governments of the states.⁶⁰ The president's constituency consists of the American people, not the governments of the states.⁶¹ Finally, the federal judiciary has no direct constituency to whom it answers.⁶² None of these federal officials owe their position to the states, and therefore none of the branches of the federal government have a vested interest in defending the states against improper actions by a federal branch.⁶³ Therefore, any state finding itself on the receiving end of arbitrary federal action meddling in its interests has no direct recourse in the structural protections currently provided by the Constitution.

II. REPEAL OF THE SEVENTEENTH AMENDMENT

The states need to be a constituent of one of the branches of the federal government if the Constitution is to protect their interests through

56. U.S. CONST. art. III, § 2.

57. In 1998, 99.6% of all criminal prosecutions in the United States were prosecuted under state law. *See* Apprendi v. New Jersey, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting).

58. *See id.* In 1998, a total of 14,681,021 criminal cases were filed in state and federal courts throughout the United States. *See id.* Only 57,691 of these cases were federal criminal filings. *See id.* Assuming that each of the fifty states filed the same number of criminal cases in 1998, each state had an approximate criminal caseload in that year of 292,466 cases, over five times the case load of the federal criminal courts. *See id.* From these numbers, it would appear that the states have a higher interest in criminal justice than does any branch of the federal government, including the judiciary.

59. *See* McGreal, *supra* note 36, at 1141-43.

60. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

61. THE FEDERALIST NO. 68, *supra* note 49, at 443. "[T]he Executive should be independent for his continuance in the office on all but the people themselves." *Id.*

62. McGreal, *supra* note 36, at 1143.

63. *See* THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

the existing separation of powers structure.⁶⁴ The selection of the branch best able to represent the states as political entities is greatly simplified by the fact that the U.S. Senate served in that capacity for 122 years before the ratification of the Seventeenth Amendment.⁶⁵ That amendment, ratified in 1913, significantly altered the structure of American government by requiring all U.S. senators to be popularly elected rather than selected by the legislatures of the several states.⁶⁶ By ratifying the Seventeenth Amendment, the states relinquished their representation in the U.S. Senate and left themselves vulnerable to abuses by the federal government.⁶⁷ The fact of the Senate's prior form makes that body the obvious and best choice for a federal institutional defender of state interests.

The founders designed the Senate for two purposes: (1) to divide Congress into two houses to weaken its predominance over the executive and the judiciary⁶⁸ and (2) to provide the states with a measure of self-defense against the federal government.⁶⁹ A change in the Senate's mode

64. See McGreal, *supra* note 36, at 1141-43.

65. See Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 704-05 (1999).

66. See U.S. CONST. art. I, § 3, *amended by* U.S. CONST. amend. XVII. It is important to note that the Seventeenth Amendment did not create the popular election of U.S. senators as most states at the time of the ratification of this amendment had already incorporated "democratic elements to their system for electing Senators." Zywicki, *supra* note 23, at 194.

67. Rossum, *supra* note 65, at 714-15. "Since 1913, there has been a profound increase in the number and intrusiveness of congressional measures invading the 'residuary sovereignty' of the states." *Id.* at 715.

68. It should be noted that *The Federalist* articulated the Senate's ultimate purpose as being a source of stability for the national government. THE FEDERALIST NOS. 62, 63 (Alexander Hamilton or James Madison). This purpose is an important aspect of weakening the dominance of the legislature since Publius expected the House of Representatives to be easily and continuously swayed by the factions of American society. *Id.* The Senate could be described as a quasi-antimajoritarian branch of government. Zywicki, *supra* note 23, at 182; THE FEDERALIST NO. 63, *supra* note 37, at 410.

69. THE FEDERALIST NO. 51, *supra* note 27, at 338; THE FEDERALIST NO. 62, *supra* note 47, at 402; JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 211 (Ohio University Press 1966) (1840) [hereinafter DEBATES]. Dr. Johnson of Connecticut took the floor of the Convention on June 29, 1787, and articulated what is now considered to be the basis of the Connecticut Compromise between those advocating and those opposing the election of Senators by the state legislatures:

The fact is that the States do exist as political Societies, and a [Government] is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence [*sic*]. . . . [A]s in some respects the States are to

of election to again make that body sympathetic to state interests will require only a minimal constitutional modification since a restoration of the Senate to its original form is all that is required.⁷⁰ The repeal of the Seventeenth Amendment would give the states access to the Senate's existing checks and balances against all the federal government branches, thus requiring no additional constitutional amendments to secure the states from federal interference.⁷¹ A repeal would have the additional benefit of fortifying the distinction between the House of Representatives and the Senate.⁷² The change in senatorial election made the Senate's constituency very similar to that of the House of Representatives, thus reducing the protection that the division of the legislature provided against faction.⁷³

The history of the Seventeenth Amendment provides further support for its repeal. The first call for changing the method of electing U.S. senators came in 1826.⁷⁴ Efforts to pass a constitutional amendment for this end were made periodically throughout the mid-nineteenth century.⁷⁵ The calls for direct election of senators increased dramatically in the 1870s and eventually evolved into a nationwide movement that culminated in the Seventeenth Amendment.⁷⁶ Despite the broad-based support for the amendment, scholars have been able to piece together only a few grievances that were supposed to be redressed by a change in senatorial election.⁷⁷ Among these were corruption and bribery in the senate election process,⁷⁸ state legislative deadlock on senatorial elections,⁷⁹ and the growth of a "deep-seated suspicion of wealth and influence."⁸⁰ Although

be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch [of Congress] the *people*, ought to be represented; in the *other* the *States*.

MADISON, *supra* (emphasis in original).

70. See U.S. CONST. art. I, § 3, *amended by* U.S. CONST. amend. XVII. A constitutional amendment repealing the Seventeenth Amendment would nullify that provision, thus restoring Article I to its original form. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

71. U.S. CONST. art. I, §§ 3, 7, 8.

72. See Zywicki, *supra* note 23, at 214-215.

73. *Id.*

74. Rossum, *supra* note 65, at 705.

75. See Zywicki, *supra* note 23, at 183; Rossum, *supra* note 65, at 705.

76. Zywicki, *supra* note 23, at 183.

77. See, e.g., Rossum, *supra* note 65, at 706-08; Zywicki, *supra* note 23, at 195-201.

78. Zywicki, *supra* note 23, at 196.

79. *Id.* at 198.

80. Rossum, *supra* note 65, at 708.

the Seventeenth Amendment addressed the second of these issues, history continues to demonstrate that popular election of public officials neither prevents bribery and corruption nor does it abate public suspicion of wealth and influence in American government.⁸¹ There is also compelling evidence suggesting that the complaints about legislative deadlocking were exaggerated.⁸² Most importantly, the Seventeenth Amendment's impact on federalism received scant attention during the congressional debates of the amendment.⁸³ As this amendment made a vital change in the structure of American government, and as no legitimate justification for the severity of that change was put forward, this amendment was an ill-considered measure in an era rich in constitutional modification.⁸⁴

The restoration of the power of the state legislatures to elect senators would again provide the states with a measure of influence in the functioning of the federal government, but would not transform the Senate into the servant of the state governments.⁸⁵ During the Constitutional Convention, James Madison and other founders shared a deep concern that the national government they were forming would be undermined by the power of the states.⁸⁶ Congress called the Constitutional Convention because the national government formed under Articles of Confederation

81. Zywicki, *supra* note 23, at 186. "There is widespread recognition in the literature that one important effect of the Seventeenth Amendment has been to increase the role of political organization and money in the election of Senators." *Id.* Senator Robert Torricelli's resignation during the 2002 New Jersey Senate campaign provides further evidence of the persistence of corruption in politics despite the popular election of Senators. See Evan Osnos & Jeff Zeleny, *Embattled Torricelli Quits N.J. Senate Bid; Ethics Scandal Puts Democrats in Bind*, CHI. TRIB., Oct. 1, 2002, § 1, at 1.

82. Zywicki, *supra* note 23, at 198-201. Professor Zywicki maintains that the number of states that deadlocked in the election of a Senator was small compared to the number of successful elections. *Id.* Perhaps more importantly, many of the states that experienced legislative deadlock were newly-admitted western states that were still developing their political institutions. *Id.* As these state legislatures learned from their mistakes, the number of deadlocks during Senate elections decreased. *Id.*

83. Rossum, *supra* note 65, at 711-12. "What is particularly noteworthy of the lengthy debate over the adoption and ratification of the Seventeenth Amendment is the absence of any serious or systematic consideration of its potential impact on federalism. . . . Almost no one (not even among the opposition) paused to weigh the consequences of the Amendment on federalism." *Id.*

84. See U.S. CONST. amend. XVI (ratified Feb. 3, 1913); U.S. CONST. amend. XVII (ratified Apr. 8, 1913); U.S. CONST. amend. XVIII (ratified Jan. 16, 1919, repealed 1933); U.S. CONST. amend. XIX (ratified Aug. 18, 1920).

85. See McGreal, *supra* note 36, at 1142.

86. DEBATES, *supra* note 69, at 30. In presenting the Virginia Plan to the Convention, Edmund Randolph enumerated the defects of the Articles of Confederation. *Id.* at 29. Among the defects Mr. Randolph listed was "that the federal government could not defend itself against the incroachments [*sic*] from the states." *Id.* at 30.

lacked the power to govern the Union effectively.⁸⁷ Madison sought to assure that the new government under the Constitution would not be subservient to the states.⁸⁸ The Virginia Delegation, of which Madison was a member, presented to the Convention a blueprint for the new Constitution that called for a divided national legislature, but did not provide for equal state representation in the Senate or for state election of senators.⁸⁹ Although Madison ultimately lost the fight on both of these counts, he did succeed in limiting state influence in the Senate as much as possible by winning non-violable six-year terms and per-capita voting in the Senate.⁹⁰

The non-violable six-year Senate term would be a formidable protection against states using the Senate simply to impair the functioning

87. The Call for the Federal Constitutional Convention (Feb. 21, 1787), in *THE FEDERALIST* 557 (Modern Library College Editions 1964). Hamilton's great dissatisfaction with the Confederacy is captured by the following excerpt:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. . . . [T]he United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

THE FEDERALIST NO. 15, at 89-90 (Alexander Hamilton) (Modern Library College Editions 1964) (emphasis in original).

88. *DEBATES*, *supra* note 69, at 293-95.

[Mr.] Madison expressed his apprehensions that if the proper foundation of [Government] was destroyed, by substituting an equality in place of a proportional Representation [in the Senate], no proper superstructure would be raised. . . . He reminded [the delegates] of the consequences of laying the existing confederation on improper principles. All the principal parties to its compilation, joined immediately in mutilating & fettering the [Government] in such a manner that it has disappointed every hope placed on it.

Id. at 293.

89. *Id.* at 31. The fifth resolution of the Virginia Plan read in part:

[Resolved] 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 the age of [___] years at least; to hold their offices for a term sufficient to ensure their independency

Id. at 31. Note that under this plan the state legislatures were to nominate candidates, but the House of Representatives would actually elect the members of the Senate. *Id.*

90. See *REPUBLICAN PRINCIPLES*, *supra* note 30, at 152; U.S. CONST. art. I, § 3, cl. 1.

of the federal government.⁹¹ The long term gives senators independence from their electors, allowing them the opportunity to develop a national perspective and a license to occasionally disagree with their electors.⁹² Further, during the course of a particular senator's term, intervening general elections would likely affect the composition of the state legislature.⁹³ The legislature that would decide whether to re-elect a particular senator would have the possibility of being different than the one that originally elected him.⁹⁴ Thus, a senator would be more likely to remain true to the state's best and general interests rather than to pursue the extreme agenda of a particular legislature.⁹⁵

The per-capita voting in the Senate also makes it less likely that the Senate would become simply an extension of the states.⁹⁶ Each state has two senators and each of those senators may cast their votes independently of the other.⁹⁷ This ability gives each Senator the opportunity to form independent legislative judgments.⁹⁸ If a state's delegation splits for any reason, that state's voice in the Senate is effectively neutralized.⁹⁹ Therefore, a state's delegation could be brought to bear in the Senate only if its two senators, insulated by long terms and likely elected by different legislative sessions,¹⁰⁰ decide that a particular action is in the best interest of their state and their nation.¹⁰¹

91. See McGreal, *supra* note 36, at 1142.

92. REPUBLICAN PRINCIPLES, *supra* note 30, at 174-75.

93. See AZ. CONST. art. IV, pt. 2, § 21. Under the Constitution of the State of Arizona, all state legislators serve two-year terms and are subject to a term limitation of four consecutive terms. *Id.* Therefore, in the course of an Arizona U.S. Senator's six-year term, the whole state legislature will experience three election cycles with the possibility of certain members being forced from their seats by term limits. *Id.*

94. See *id.*

95. See McGreal, *supra* note 36, at 1142.

96. REPUBLICAN PRINCIPLES, *supra* note 30, at 174-75.

97. *Id.* Under the Articles of Confederation, each state was permitted between two and seven representatives in Congress but allowed only one vote. ARTICLES OF CONFEDERATION, art. V, cl. 2, 4. The Articles also permitted a state to recall their representatives at will, a luxury denied the states under the Constitution. ARTICLES OF CONFEDERATION, art. V, cl. 1; REPUBLICAN PRINCIPLES, *supra* note 30, at 175.

98. REPUBLICAN PRINCIPLES, *supra* note 30, at 174-75.

99. See *id.*

100. The Constitution divides the membership of the U.S. Senate into three nearly equal classes so that only approximately one-third of the Senate is subject to re-election at any one time. U.S. CONST. art. I, § 3, cl. 2. In complying with this constitutional mandate, the Senate not only divided its membership into thirds, but also divided each state's senatorial delegation into different classes. See *U.S. Senate Across the Nation*, CHI. TRIB., Nov. 7, 2002, § 2, at 17 (showing that in 2002 no one state elected both of its U.S. senators). This arrangement denies the states the ability to select both their senators simultaneously, thus providing another protection against the states hijacking the U.S. Senate should the

Finally, most Senate action must also meet with the approval of the House of Representatives and the president before it can have any effect.¹⁰² Should the Senate succumb to some faction emanating from the state legislatures, such a faction would be checked by the House of Representatives, the president, and the Supreme Court.¹⁰³ Thus, any concern about the impact of repealing the Seventeenth Amendment is unfounded.

The repeal of the Seventeenth Amendment will not in itself provide the State of Arizona with a remedy against the arbitrary judicial action taken in *Ring v. Arizona*. Arizona has another serious problem with the existing separation of powers system. Even if the Senate acted as the states' advocate in that system, the current tools available to Congress to resist improper conduct by the federal judiciary are insufficient to protect against judicial overreaching on the federal level, let alone protecting the states.¹⁰⁴ Therefore, an effective remedy for Arizona and all the states of this Union that is consistent with the theory of separation of powers will require that Congress be given the additional necessary tool to resist improper action by the federal judiciary, namely, a congressional override of federal court decisions.¹⁰⁵

III. TWO-THIRDS CONGRESSIONAL OVERRIDE OF FEDERAL COURT DECISIONS

The restoration of the U.S. Senate as the federal institutional defender of state interests is insufficient to provide the states with the requisite protection they need against the pervasive influence of the federal judiciary.¹⁰⁶ Although the states would again have access to the checks and balances of the separation of powers system, the founders designed that system with primarily the legislative and executive powers in mind.¹⁰⁷

Seventeenth Amendment be repealed. See McGreal, *supra* note 36, at 1141-42.

101. See REPUBLICAN PRINCIPLES, *supra* note 30, at 174-75.

102. U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 2, cl. 2.

103. See THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

104. See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 115-17 (1996).

105. See *id.*

106. See *id.*

107. DEBATES, *supra* note 69, at 312, 326-27.

If it be a fundamental principle of free [Government] that the Legislative, Executive & Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised. There is the same & perhaps greater reason why the Executive [should] be

They paid relatively little attention to the shape and scope of the judiciary during the Constitutional Convention and left the vast bulk of the creation of the judicial department to the first Congress.¹⁰⁸ As a result, most of the tools made available to Congress to counter the designs of the judiciary are blunt weapons fit to address only the most egregious violations of constitutional principles.¹⁰⁹ If the states are to have a means of real self-defense against the federal judiciary through the Senate, then the Senate must have a means of proportionally challenging specific constitutional decisions rendered by the courts.¹¹⁰

Congress' existing checks and balances against the judiciary do not provide that body with the means to address its grievances against the courts with proportionate particularity.¹¹¹ At present, Congress has eight methods of expressing its displeasure with constitutional jurisprudence: (1) the Senate's participation in the appointment of all Article III judges;¹¹² (2) altering the number of Supreme Court justices and other judges;¹¹³ (3) restricting the jurisdiction of the courts;¹¹⁴ (4) conditioning judicial funding on favorable overturning of offending decisions;¹¹⁵ (5) impeaching and removing federal judges;¹¹⁶ (6) disestablishing the lower federal courts;¹¹⁷ (7) ignoring judicial decisions;¹¹⁸ or (8) amending the Constitution with the assistance of three-fourths of the states.¹¹⁹ In the context of Congress showing its occasional dissatisfaction with judicial conduct, each of these tools is either ineffectual to redress a particular grievance or overly potent for that purpose.¹²⁰

independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty.

Id. at 326-27 (emphasis in original).

108. Rossum, *supra* note 65, at 683.

109. Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 156 (1988).

110. See U.S. CONST. art. I, § 7.

111. See Smith, *supra* note 109, at 155.

112. U.S. CONST. art. II, § 2.

113. Smith, *supra* note 109, at 155.

114. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1868).

115. See U.S. CONST. art. I, § 8, cl. 1; THE FEDERALIST NO. 48, *supra* note 43, at 323. The Constitution prohibits Congress from adversely modifying judicial salaries. U.S. CONST. art. III, § 1.

116. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.

117. See U.S. CONST. art. I, § 8, cl. 9.

118. See W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1090 (1990).

119. U.S. CONST. art. V.

120. See Smith, *supra* note 109, at 155-56.

Presuming that the states elected the Senate and that Arizona's congressional delegation convinced Congress that the decision in *Ring v. Arizona* amounted to an arbitrary exercise of judicial authority, Congress would have insufficient means to challenge that specific abuse.¹²¹ None of the above enumerated congressional powers, save the amendment power, would have the effect of immediately changing the status of *Ring* as a binding precedent on all lower federal and state courts, and exercise of most of those powers would be counter-productive and even destructive to American government.¹²² The Senate's participation in the selection of federal judges provides no present relief against improper judicial action.¹²³ Restricting the Supreme Court's appellate jurisdiction to prevent the Court from hearing future state criminal appeals also would not change *Ring's* status as authoritative law.¹²⁴ The remedies involving the judicial budget, impeachment, disestablishment of lower courts, and ignoring judicial decisions are drastic measures that are evidently unfit to be employed by Congress to address its periodic disagreements with the Court. Congress requires a judiciary esteemed by the public and capable of administering its laws.¹²⁵ Congress cannot cultivate public respect for its laws and the branch administering them by directly undermining the judiciary's institutional integrity.¹²⁶ Finally, the Constitution is a poor place for Congress to catalog its specific disagreements with the federal judiciary.¹²⁷ Thus, Congress is forced to choose between either acquiescing to improper judicial action or forcefully attacking the judicial branch.¹²⁸

121. See *id.*

122. See BORK, *supra* note 104, at 114-17.

123. Smith, *supra* note 109, at 155. The Senate's role in confirming judicial nominees is not a sure method of shaping the judiciary since accurately predicting a jurist's future conduct for a lifetime is impossible. Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325, 329-30 (1995).

124. See BORK, *supra* note 104, at 115-17.

125. See DEBATES, *supra* note 69, at 340; THE FEDERALIST NO. 80, at 515 (Alexander Hamilton) (Modern Library College Editions 1964). "[T]he judiciary authority of the Union ought to extend to [all cases] which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation" THE FEDERALIST NO. 80, *supra*.

126. See THE FEDERALIST NO. 80 (Alexander Hamilton).

127. See THE FEDERALIST NO. 85, at 572-73 (Alexander Hamilton) (Modern Library College Editions 1964). Publius possessed "a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers . . ." *Id.*

128. See Smith, *supra* note 109, at 155-56.

An analogy to the legislative-executive relationship clarifies the nature of this condition.¹²⁹ The Constitution provides that a legislative enactment will become law either upon being passed by a majority of each house of Congress and signed by the president, or in the alternative, upon being passed by a majority of both houses of Congress, vetoed by the president, and subsequently passed again by a two-thirds majority of each house.¹³⁰ Suppose instead that the Constitution limited congressional reaction to a presidential veto to accepting the veto, attempting to force the president's submission by conditioning the executive's future funding on a change of mind, or impeaching and removing the president. Or suppose that the Constitution forced the president to either accept or veto legislative enactments for an entire session of Congress en masse. The result of either of these scenarios would be the same as that currently existing between Congress and the Supreme Court – a choice between acquiescence or severe attack.¹³¹ Instead, Article I provides a middle road where it is ultimately up to Congress to either bolster its proposals with the support of two-thirds of its membership in each house or to ratify the president's determination of the enactment's improvidence.¹³²

The Constitution's failure to allow Congress the same latitude in interacting with the judiciary may be the result of the founder's modest, and even uncertain, expectations of the federal judiciary.¹³³ In 1787, an independent national judiciary was a novel governmental concept and the founders may simply have lacked the practical experience to adequately anticipate that institution's nature.¹³⁴ The founders' lack of experience with the judiciary relative to their knowledge of legislative and executive power may explain the placement, brevity, and generality of the constitutional

129. See Baker, *supra* note 123, at 333-35.

130. U.S. CONST. art. I, § 7.

131. See Smith, *supra* note 109, at 155-56.

132. THE FEDERALIST NO. 73, *supra* note 48, at 480. "A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed." *Id.*

133. Rossum, *supra* note 65, at 683; Baker, *supra* note 123, at 328.

134. See DEMOCRACY I, *supra* note 43, at 98. Writing in the 1830s, Tocqueville commented:

I have seen republics elsewhere than upon the shores of the New World alone; the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans.

Id.

provisions creating the federal courts.¹³⁵ Publius' equally brief and placed treatment of the courts in *The Federalist* lends additional evidence to show the founders' potential lack of experience with an independent judicial power.¹³⁶ Perhaps more revealing is Publius' assertion that the judiciary would be a passive governmental actor virtually incapable of encroaching on the other branches.¹³⁷ Whatever the reason for the founder's giving reduced attention to the courts, *The Federalist's* expectation of a relatively benign judiciary formed before the adoption of the Bill of Rights and the Fourteenth Amendment.¹³⁸ It is these constitutional provisions that created the fertile ground for the judiciary to grow beyond its anticipated status as the least dangerous branch of government.¹³⁹

Publius opposed the adoption of a bill of rights to the federal constitution for two specific reasons: (1) a bill of rights would provide the federal government with a pretext to claim more powers than were granted¹⁴⁰ and (2) the impossibility of giving an all-encompassing

135. Rossum, *supra* note 65, at 683. The judiciary is the last of the three federal powers established by the Constitution. *Id.* Article III is by far the most brief and general of the three major articles of the Constitution. *Id.* Where Articles I and II provide detailed provisions for the qualifications of congresspersons and the president, for the respective powers those bodies are to exercise, and for the interaction between them, Article III provides no judicial procedure, no guidelines for its interaction with the other branches, or even qualifications for federal judges. *Id.* Under Article III, federal judges need not be citizens of the United States. *Id.*

136. See THE FEDERALIST NOS. 78-83 (Alexander Hamilton). Only six papers at the end of *The Federalist* are devoted to the judiciary branch (including NO. 83, which is devoted entirely to the topic of jury trials). *Id.* Six papers compared to fifteen devoted to Congress (NOS. 52-66) and eleven to the president (NOS. 67-77) provides further insight into Publius' level of concern for, and expertise in, the different branches of government.

137. THE FEDERALIST NO. 78, *supra* note 25, at 504. Publius maintained that, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.

Id. Publius further argued that the judiciary posed only an illusory threat to Congress since the judiciary would be unlikely to challenge the branch with the authority to impeach and remove them. THE FEDERALIST NO. 81, at 526-27 (Alexander Hamilton) (Modern Library College Editions 1964). However, history has shown impeachment to be an overly potent weapon for Congress to use in redressing its grievances against the judiciary. Smith, *supra* note 109, at 155.

138. See THE FEDERALIST NO. 84, at 559 (Alexander Hamilton) (Modern Library College Editions 1964).

139. See *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833); *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968).

140. THE FEDERALIST NO. 84, *supra* note 138, at 559.

definition to any particular right.¹⁴¹ At the time, Publius and the other founders were primarily concerned with abuses by Congress, as is evidenced by the first word in the First Amendment.¹⁴² In the case of the judiciary, the Bill of Rights and the Fourteenth Amendment have provided the federal courts with a very colorful pretext to declare themselves not only the guardian of the rights guaranteed, but also to provide the very definition of those rights.¹⁴³ As is evidenced in *Ring v. Arizona*, this arrangement allows the federal judiciary to strike down state legislation as unconstitutional with impunity, limited only by its own restraint.¹⁴⁴ In 1990, Arizona's capital punishment procedure did not offend the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments.¹⁴⁵ In 2002, after the Supreme Court redefined that right in *Jones* and *Apprendi*, the Court struck down that same procedure in its self-appointed role as the supreme protector of civil liberties.¹⁴⁶ The Supreme Court's exercise of its power of judicial review thus amounts to an unqualified veto over a wide range of federal and state action since Congress has no practical means to challenge specific exercises of that review.¹⁴⁷

The propriety of a qualification on judicial review may be established on the *The Federalist's* rationale for the limited executive veto.¹⁴⁸ Publius

[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id.

141. *Id.* at 560.

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.

Id.

142. U.S. CONST. amend. I. "Congress shall make no law . . ." *Id.*

143. See *Duncan*, 391 U.S. at 159.

144. See *Ring v. Arizona*, 536 U.S. 584, 608 (2002). The Court can abandon the doctrine of stare decisis whenever it determines that necessity and propriety require it. *Id.* In *Ring*, the Court limited its determination of necessity and propriety to asserting that the *Walton* and *Apprendi* decisions were irreconcilable, notwithstanding the majority opinions to the contrary in *Jones* and *Apprendi*. *Id.* at 600, 602, 608.

145. *Walton v. Arizona*, 497 U.S. 639, 649 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002).

146. See *Ring*, 536 U.S. at 608-09.

147. *Baker*, *supra* note 123, at 334-35.

148. See THE FEDERALIST NO. 73, *supra* note 48, at 477-80.

argued that the Constitution provided the president with a limited veto power over Congress for two reasons: (1) to provide the national executive with a means of self-defense and (2) to give the executive the opportunity to prevent the passing of bad laws by Congress “through haste, inadvertence, or design.”¹⁴⁹ The founders bestowed the president with the veto for this latter purpose not because they expected the president to possess more wisdom and virtue than Congress, but because they expected Congress to make mistakes.¹⁵⁰ The qualified veto provides the president with the opportunity to force Congress either to reconsider its proposed law and pass it again by a two-thirds margin in both houses, or to reject it. In this way, Congress, and not the president, always decides whether or not legislation should become law.¹⁵¹

The same reasoning is applicable to the exercise of judicial review by all levels of the federal judiciary.¹⁵² Unqualified judicial review cannot be justified on the basis that federal judges are more enlightened than the members of Congress or the president.¹⁵³ The propriety of judicial review as a veto on federal and state action must rest squarely and solely on the judiciary’s need to defend itself against incursions by these governmental bodies and the expectation that these bodies will occasionally make mistakes.¹⁵⁴ Therefore, that veto should be limited, as it is for the president, to forcing a reconsideration of the measure challenged.¹⁵⁵

149. *Id.* at 477.

150. *Id.*

The propriety of the [qualified Executive veto] does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn.

Id.

151. *Id.* at 480.

152. See Baker, *supra* note 123, at 334-35; Church, *supra* note 118, at 1090. A check against only the Supreme Court would be ineffectual for two reasons: (1) the Supreme Court decides only a limited number of cases, and therefore many questions of constitutional law affecting federal and state action are decided by the lower courts, and (2) the Supreme Court could avoid the Congressional override by simply not reviewing lower court decisions. See Church, *supra* note 118, at 1090.

153. THE FEDERALIST NO. 10, *supra* note 29, at 57. Publius specifically rejected the notion that the fate of American government should turn on presence of enlightened statesmen at the helm of any branch of government. *Id.*

154. See THE FEDERALIST NO. 73 (Alexander Hamilton).

155. *Id.* Qualified judicial review is not a new and novel idea. During the

Allowing Congress a two-thirds override of judicial review will provide a more amenable congressional check on the Court that will not undermine judicial independence.¹⁵⁶ The Constitution secures the independence of federal judges primarily by providing them with life tenure.¹⁵⁷ Judicial independence would be unimpaired by limited judicial review. Further, a qualification of this kind would leave the judiciary as independent of Congress as a limited veto leaves the president.¹⁵⁸ The president remains free to exercise his veto authority because the two-thirds threshold required for a congressional override is a formidable barrier to Congress' ability to quash an executive veto.¹⁵⁹ The same would be true of an override directed at the courts.¹⁶⁰

IV. CONCLUSION

Ring v. Arizona is only one example of the states' vulnerability to the robust exercise of judicial review. The pervasive influence of the Supreme

Constitutional Convention, Madison proposed the creation of a Council of Revision empowered to veto legislation before it became law. DEBATES, *supra* note 69, at 32, 461-62. This council was to be comprised of the president and the judges of the Supreme Court. *Id.* at 462. The objection of either the president or the Supreme Court would be sufficient to veto the legislation. *Id.* The legislature then had the option to override the veto by a two-thirds vote of each house of the legislature if either the president or the Supreme Court objected or by a three-fourths vote of both houses of the legislature when both the president and the court objected. *Id.* Although the Council of Revision was ultimately not included in the Constitution because the Founders did not wish to mingle the executive and judicial branches in this way, the debates on the Council are void of any objection to the legislative authority to override the proposed judicial veto. *See id.* at 61-66, 79-81, 336-43, 461-65.

156. *See* THE FEDERALIST NOS. 73, 78 (Alexander Hamilton).

157. THE FEDERALIST NO. 78, *supra* note 25, at 508.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Id.

158. *See* THE FEDERALIST NO. 73 (Alexander Hamilton).

159. THE FEDERALIST NO. 73, *supra* note 48, at 480.

It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in spite of the counterposing weight of the Executive. It is at any rate far less probable that this should be the case, than that such views should taint the resolutions and conduct of a bare majority.

Id.

160. *See id.*

Court extends beyond criminal law and procedure. The Court has stretched the Due Process Clause of the Fourteenth Amendment to incorporate most, but not all, of the Bill of Rights and their penumbral emanations against the states.¹⁶¹ If a state wishes to restrict pornography, its regulation will be upheld against a free speech challenge under the First Amendment only if it conforms to the precise guidelines of *Miller v. California*.¹⁶² If a state determines that school vouchers are in the best interest of their children, and if that voucher system allows parents to choose a parochial school, then that state must demonstrate that neither the purpose nor effect of that system is to advance religion.¹⁶³ If a state decides that neither the state government nor its subdivisions should provide a protected status based on sexual orientation, it will answer to the federal courts.¹⁶⁴ A list of all the federal constitutional prohibitions on state activity would fill many volumes. The point here is not to say whether the above cases, or any cases, were decided rightly or wrongly. It could be that the prohibition of sexually explicit material, creating school vouchers, or banning preferential protections for sexual orientation resulted directly from faction.¹⁶⁵ If so, the judiciary appropriately and effectively performed its job in each of these cases.¹⁶⁶ However, if the Court's action resulted from an improper factious motive, then the Court committed a great disservice to American government that currently cannot be countered by the states or Congress.¹⁶⁷

The importance of protecting the states from undue federal judicial control (or other federal control) extends far beyond protecting some abstract theory of government. Democracy depends on active citizen participation in government.¹⁶⁸ If the federal government is to be the only

161. *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) (providing a convenient, though now outdated, list of the specific rights that have been incorporated through the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

162. 413 U.S. 15, 24-25 (1973).

163. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002).

164. *See Romer v. Evans*, 517 U.S. 620 (1996).

165. *See THE FEDERALIST NO. 10* (James Madison).

166. *See THE FEDERALIST NO. 78*, *supra* note 25, at 506.

167. *See supra* Parts II-III.

168. DEMOCRACY I, *supra* note 43, at 95; 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (Phillips Bradley trans., Everyman's Library 1994) (1835) [hereinafter DEMOCRACY II]. "As soon as a man begins to treat of public affairs in public, he begins to perceive that he is not so independent of his fellow men as he had at first imagined, and that in order to obtain their support he must often lend them his co-operation." *Id.* at 102. "I believe that provincial institutions are useful to all nations, but nowhere do they appear to me to be more necessary than among a democratic people. . . . How can a populace unaccustomed to freedom in small concerns learn to use it temperately in great affairs?" DEMOCRACY I, *supra* note 43, at 95.

political entity capable of meaningfully discussing the major issues of the day, the opportunities for active citizenship will be very rare (and will be rarer still if real debate is limited to the federal courthouses). The federal government provides only 546 constitutional officials (435 congresspersons, 100 senators, 9 supreme court justices, one president, and one vice-president), though that number increases by a couple hundred when the total number of federal district and appellate court judges are included.¹⁶⁹ In a nation of more than 288 million people, that can hardly be said to constitute a government of the people.¹⁷⁰ The benefit of having states, counties, municipalities, and other political subdivisions is that they multiply dramatically the opportunities for citizens to participate in the administration of public affairs.¹⁷¹ However, the benefit of these divisions is greatly diminished if the participants are denied the ability to actually decide the issues confronting their communities.¹⁷²

The two constitutional amendments advocated above are ultimately offered as a means to facilitate and protect active citizen participation in American government. This is their sole aim. Unless the states are given a means to protect themselves against federal encroachment, the realm in which they can operate free from federal control will continue to diminish, and with it the opportunity for Americans to govern themselves in fact as well as in theory.

KORY A. ATKINSON

169. U.S. CONST. art. II, §1, cl. 1 (executive power vested in one president and provision made for one vice-president); see 2 U.S.C. § 2a(a) (2000) (apportionment of House of Representatives); U.S. CONST. art. I, § 3, cl. 1 (Senate composed of two senators from each state); 28 U.S.C. § 1 (2000) (establishing nine supreme court justices); 28 U.S.C. § 44 (2000) (establishing number of circuit judges for all circuit courts of appeals); 28 U.S.C. § 133 (2000) (establishing number of district judges for all district courts).

170. Peter Gorner, *U.S. Releases its Smallpox Outbreak Plan; Rapid Vaccination Needed*, *C.D.C. Says*, CHI. TRIB., Sept. 24, 2002, § 1, at 7 (“The Bureau of the Census estimates the U.S. population at more than 288 million”).

171. DEMOCRACY II, *supra* note 168, at 103. “[The American legislators] thought that it would be well to infuse political life into each portion of the territory in order to multiply to an infinite extent opportunities of acting in concert for all the members of the community and to make them constantly feel their mutual dependence.” *Id.*

172. DEMOCRACY I, *supra* note 43, at 90-91. “[The human will] must be free in its gait and responsible for its acts, or (such is the constitution of man) the citizen had rather remain a passive spectator than a dependent actor in schemes with which he is unacquainted.” *Id.*