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Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment

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I. INTRODUCTION

Federalism is hot. Courts are trying to preserve it.[1] Politicians are trying to reinvent it.[2] And academics are trying just to understand it.[3] Inspired by this renewed interest in the relationship between federal and state governments, I decided to undertake a fresh examination of the Seventeenth Amendment,[4] which requires

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1. See, for example, *United States v. Lopez*, 115 S. Ct. 1624, 1634, 131 L. Ed. 2d 626 (1995) (holding a federal criminal statute beyond Congress's commerce clause powers); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (debating whether States could impose term limits on members of the federal House and Senate); *New York v. United States*, 505 U.S. 144, 178 (1992) (holding that in some circumstances Congress cannot conscript state organs of government); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1128, 134 L. Ed. 2d 252 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding that Congress lacks authority under the Commerce Clause te abrogate eleventh amendment state sovereign immunity).

2. The Republican Congress's "Contract with America," for example, contains many provisions that involve a shift in power from federal to state governments. See Ed Gillespie and Bob Schellhas, eds., *Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey, and the House Republicans to Change the Nation* 19-20 (Random House, 1994). Republican presidential nominee Bob Dole carries and frequently displays a copy of the Tenth Amendment to demonstrate his political commitment te a vision of federalism that he says has been disregarded and should be restored.

3. See generally Symposium, *Federalism's Future*, 47 Vand. L. Rev. 1205 (1994); 1996 Ariz. L. Rev. (forthcoming) (symposium on federalism). Two excellent articles analyzing recent federalism decisions are Kathleen M. Sullivan, Comment, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 Harv. L. Rev. 78 (1995), and Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674 (1995) (discussing *United States v. Lopez*).

4. The Seventeenth Amendment, ratified on April 8, 1913, provides:

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

U.S. Const., Amend. XVII.

direct election—by the People of each State—of members of the United States Senate. After all, although direct election has not received extensive academic attention,[5] the amendment's removal of state legislatures from the federal electoral process would seem to have significantly reworked the Constitution's federal framework; state legislative election of Senators was seen in 1787 as a (if not the) central device for the protection of States' rights and interests.[6] And in fairly short order I identified some currently important federalism implications of the amendment. For example, much of the current flack over "unfunded" federal mandates[7] and federal "conscription" of state instrumentalities[8] is, I think, a result of state legislatures having been cut out of the electoral loop.[9]

But as my structural inquiry[10] into direct election became more systematic, I came to see that some of the Seventeenth Amendment's most important and heretofore unobserved implications concern not

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Article I, § 3, cl. 1 of the original Constitution, which the Seventeenth Amendment alters, had provided that "[t]he Senate of the Unitod States shall be composed of two Senators from each State, *chosen by the Legislature thereof*. . . ." (emphasis added).

5. There is, of course, some literature focusing on particular aspects of the Seventeenth Amendment. See, for example, Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 Harv. J. L. & Pub. Pol. 189 (1987) (discussing the ways in which indirect election was central to preservation of states' rights at the founding); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 Temple L. Rev. 629, 631 & n.16 (1991) (observing that "[l]aw review and political science commentary has . . . paid little attention to the Seventeenth Amendment" and analyzing the procedures that a Stato may constitutionally employ to fill a vacant Senate seat).

6. See, for example, Brooks, 10 Harv. J. L. & Pub. Pol. at 191-96 (cited in note 5).

7. See, for example, Unfunded Mandates Roform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, to be codified in scattered sections of 2 U.S.C.

8. See, for example, *New York v. United States*, 505 U.S. at 167 (declaring that although Congress is free to preempt state regulation directly, and may induce States to implement federal policy by offering them rewards and disincentives, Congress may not "commandee[r]" States "by directly compelling them to enact and enforce a federal regulatory program"). Similar "conscription issues" are being litigated regarding the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 922, 924, 925A (1994 ed.), and the National Voter Rogistration Act of 1993, 42 U.S.C. § 1973gg (1994 ed.) ("Moter Voter Act"). For two thoughtful (and sometimes opposing) discussions of the conscription issue, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rov. 1001 (1995); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rov. 1957 (1993).

9. Compare *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that but for cases construing the Eleventh Amendment to embody state sovereign immunity, stato governments might have declined to ratify the Seventeenth Amendment).

10. For a good general description of structural argument in constitutional law, see Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Louisiana State U., 1969). For examples of structural arguments, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203 (1995); Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995).

federalism, but rather separation of powers—the relationships and processes of the three co-equal federal branches. Although it does so indirectly, the Seventeenth Amendment alters and casts important light on the dynamic between organs *within* the federal government. As James Madison keenly suggested in Federalist No. 51,[11] the two great themes of the Constitution's design—federalism and separation of powers—are intricately and interestingly related.[12] And when we enact structural changes in one of these two areas, we simply cannot ignore the spillover effects in the other.

In this Article, I identify and begin to explore three ways in which direct election bears on important separation of powers questions. First, I argue that direct election systematically reduces rotation between the Senate and Executive Branch offices. This is so because involvement of the People of each State makes more difficult deals by which Senators leave the Senate voluntarily to perform other public service on the implicit understanding that they will be reelected to the Senate when openings present themselves. Put another way, because the Seventeenth Amendment introduces new "transaction costs," certain kinds of rotation arrangements have become harder to fashion.

In particular, I posit that direct election systematically reduces the ease with which Senators can sandwich senatorial tenures around presidential Cabinet service. I test this hypothesis against historical experience, and suggest some potential implications that the reduction in interbranch rotation occasioned by the Seventeenth Amendment might have on constitutional processes—such as judicial appointment—in which both the President and the Senate have roles.

Second, I examine constitutional issues surrounding congressional delegation of federal lawmaking power. Although delegation questions are most often analyzed in the congressional/presidential (that is, Executive Branch) context, the Supreme Court has over the years had to resolve claims that Congress has unconstitutionally given away the farm to States. The reasoning the Court used in rejecting such claims in cases in the 1940s and 1950s illuminates the essence of the nondelegation principle. These decisions suggest that much of the concern over delegation involves the difficulty in retrieving power once it has been given. Before the advent of direct election, state legislatures—which enjoyed exercising discretion that Congress

11. See Federalist No. 51 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 320 (Mentor, 1961).

12. Id. at 323.

had delegated to them—might have used their electoral clout in the Senate to defeat subsequent congressional efforts to curtail the initial delegation. But after the Seventeenth Amendment, this reciprocal agency problem—where the Senate is in effect an agent of States, and States are acting as agents of the federal government—dissolves. As a result, we (and the Court) are now much less concerned about Congress conferring broad discretion to the States to implement federal programs.

Once we see—through our look at post-seventeenth amendment cases—that the nondelegation doctrine is concerned in significant part with the structural difficulties in the reclamation of delegated authority, we are in a position to think more critically about the way the nondelegation doctrine ought to operate in the separation of powers setting. Nowhere is the power retrieval problem greater than in the Oval Office, where the President clearly wears two hats: beneficiary of discretionary authority created by statute and legislative participant (through the veto) in subsequent congressional efforts to rein in that discretionary authority.

For those who believe that the exercise of power has a corrupting influence (and I think the Framers had that belief), this dual role creates real nondelegation concerns. Thus, the point is not merely that the President may have an incentive to interpret delegated authority broadly; his selfish desire to retain delegated power may inform the exercise of his veto and make subsequent retrieval efforts difficult. And even if the nondelegation doctrine is, as a practical matter, difficult to *enforce* against the federal executive, once we see clearly the retrieval difficulty's centrality to the nondelegation concern, we may look at doctrines such as *Chevron*[13] deference to agency interpretations of statutes much more skeptically. As between courts and executive agencies, we may prefer the former as recipients of delegated interpretive authority because courts lack a formal say in efforts to reclaim delegated power. Thus, our peek at the Seventeenth Amendment and federalism gives us insight into the differences between the federal executive and judiciary.

Third, the Seventeenth Amendment may have a fair bit to do with the expanded role of the Supreme Court endorsed over the last generation by academics such as Alexander Bickel. In his famous *Least Dangerous Branch*,[14] Professor Bickel argues that the Court

13. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

14. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale U., 2d ed. 1986).

ought to serve as the primary interpreter of the Constitution and guardian for society's enduring values.[15] My sense is that much of the function Professor Bickel would assign to the Court was initially intended for the Senate. This function explains the Senate's six-year term, its staggered turnover, its age and residency requirements, as well as the original Constitution's provision for indirect Senate election. A question naturally arises, then, as to whether by reducing the Senate's political insulation and thereby increasing susceptibility to private interest group pressures, the Seventeenth Amendment renders the Senate unable to play its intended role. This arguable impact of the Seventeenth Amendment on the relationship between the Court and Congress thus requires exploration. In the end, then, my analysis of the Seventeenth Amendment informs the executive/congressional relationship, the executive/judicial relationship, and the congressional/judicial relationship.

My analysis proceeds as follows. Part II provides a brief background of the events leading up to the enactment of the Seventeenth Amendment. Part III discusses how direct election may reduce rotation (and thus interaction) between the Senate and the Cabinet. Part IV analyzes the Seventeenth Amendment's effects on congressional delegation of federal power to States. This Part then applies the analysis to shed light in the separation of powers setting on the relative suitability of federal courts, as opposed to federal agencies, to determine the scope of congressionally-created agency authority. Part V then examines how direct election may undergird modern justifications for an expanded role of the Supreme Court vis-à-vis the Senate.

II. THE ROAD TO DIRECT ELECTION

Most historians and legal commentators agree on the basic story of Senate election methods. In 1787, the Framers and ratifiers of the original Constitution chose legislative election largely to safeguard the existence and interests of the state governments. Indeed, the legislative election device was explicitly linked to the famous Madisonian compromise by which the States were given equal suffrage in the Senate.[16]

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15. Id. at 24-25.

16. See Vikram David Amar, Note, *The Senate and the Constitution*, 97 Yale L. J. 1111, 1128 (1988) (discussing the origin of the legislative election); Max Farrand, *The Framing of the Constitution of the United States* 110-12 (Yale U., 1913) (same).

Roger Sherman of Connecticut summed up the thinking of the Philadelphia Convention when he remarked:

> If it were in view to abolish the State [Governments] the elections ought to be by the people. If the State [Governments] are to be continued, it is necessary in order to preserve harmony between the National and State [Governments] that the elections to the former [should] be made by the latter.[17]

Proponents of legislative election also relied on a secondary (and less oft-invoked) justification—the notion that state legislatures would serve as filters of popular passion and elect a better class of people to the Senate than would be produced by direct election. As James Madison observed in Federalist No. 62,[18] the selection of Senators by state legislatures has the advantage of "favoring a select appointment."[19]

The move from legislative to direct election, which began in the early to mid-nineteenth century and built up steam with the coming of the Progressive Era, was driven by a variety of sentiments, including: (1) the perception that bribery and corruption had tainted the state legislatures' choice of Senators; (2) the related belief that private interest groups dominated state legislatures to the point where senatorial choices did not adequately represent ordinary citizens; (3) the dissatisfaction with deadlocks in state legislatures that delayed the filling of vacant senatorial seats; and (4) the feeling that state legislators were spending too much time on the "national" matter of senatorial selection, thus leaving local matters untended.[20]

State legislative corruption and special interest group control were perhaps the greatest evils associated with indirect election.[21] The state legislatures were tainted by their reliance on powerful and narrowly private influences, and this taint carried over to the Senators selected as well. Direct election, argued reformers in the late nineteenth and early twentieth centuries, would purify the process by extending the vote to far more people than could possibly be controlled or corrupted. Direct election, it was urged, would thus

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17. James Madison, *Notes on the Debates in the Federal Convention of 1787* at 74 (Ohio U., 1966).

18. Federalist No. 62 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 376 (Mentor, 1961).

19. Id. at 377.

20. See Little, 64 Temple L. Rev. at 636-42 (citod in note 5) (discussing the history of the Seventeenth Amendment). See also Brooks, 10 Harv. J. L. & Puh. Pol. at 198-208 (cited in note 5) (same); George H. Haynes, *The Election of Senators* 100-240 (1906) (same).

21. Brooks, 10 Harv. J. L. & Pub. Pol. at 200 (cited in note 5); Little, 64 Temple L. Rev. at 640-42 (cited in note 5).

improve the makeup of the Senate. It would also improve the state legislatures by removing one source of their corruption.[22]

Popular election, its proponents insisted, would also accord better with the democratic ideals on which the Constitution was founded. The belief that state legislatures, acting as filters, would choose "wiser" or "better" Senators was obsolete by the Progressive Era. One hundred years of popular election of officials, both at the state and federal levels, had demonstrated that the electorate was "worthy of higher trust."[23]

Opponents of popular election argued that the charges of corruption in the indirect election process were exaggerated, that popular election would in fact increase the influence of interest groups, and that direct election would reduce the deliberative character of the Senate.[24] Some—although surprisingly few—also pointed out that popular election would reduce the ability of the Senate to represent and protect the interests of States *qua* States.[25]

These, then, were the forces that culminated in the Seventeenth Amendment's adoption in 1913. But no discussion—even a brief one like this—of the Seventeenth Amendment's history would be accurate without the observation that the Seventeenth Amendment was but one of a variety of legal devices that comprised a broad, albeit imperfectly orchestrated, movement toward popular control. Indeed, by the time of the amendment's ratification, its need was in doubt. That is, other direct election devices were proceeding apace and becoming the laws of the land even without constitutional change.

Throughout the 1890s and by the early 1900s, various States were devising more or less effective means of limiting state legislators' discretion in their choice of Senators. The most sophisticated and effective device, the so-called Oregon Plan, was a *state* constitutional amendment that bound state legislators to elect the Senator who gained the greatest electoral support from the State's general electorate.[26] By 1909, Nebraska and Nevada had copied this design, and I think it fair to say that even without ratification of the

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22. Haynes, *The Election of Senators* at 185-200 (cited in note 20).
23. Brooks, 10 Harv. J. L. & Pub. Pol. at 201 (cited in note 5).
24. Haynes, *The Election of Senators* at 200-20 (cited in note 20).
25. Id. See also Brooks, 10 Harv. J. L. & Pub. Pol. at 204 (cited in note 5).
26. Ronald D. Rotunda, *The Aftermath of* Thornton, 13 Const. Commentaries 201, 206-10 (1996).

Seventeenth Amendment, direct election would be with us today in most if not all States.[27]

In reality then, the Seventeenth Amendment was a formalizing final step in an evolutionary process.[28] To be sure, the amendment's acknowledgment of an already-existing condition has made that condition more impervious to alteration, and has symbolic meaning as well. But it would be a mistake to minimize the force and effect of state constitutional law innovations. Indeed, throughout this Article, I refer to "direct election" and the Seventeenth Amendment almost interchangeably, recognizing fully that the former's existence doesn't depend exclusively on the latter.

Unlike its basic history, the Seventeenth Amendment's implications have not been systematically explored. Some observers have commented on the way in which the amendment facilitates the aggrandizement of federal power at the expense of the States, an effect that may not have been fully appreciated during the direct election movement.[29] I will have a few words to say about that later. My larger goal in this Article, however, is to identify and explore unobserved effects, particularly effects relating not just to federalism, but also to separation of powers.

III. THE SEVENTEENTH AMENDMENT'S EFFECTS ON SENATORIAL/EXECUTIVE ROTATION

In last year's important term limits decision,[30] Justice Thomas touched on the Seventeenth Amendment, observing that "it is easier to coordinate a majority of state legislators than [it is] to coordinate a majority of qualified voters [of the State]."[31] Few would deny the truth of Justice Thomas's observation; indeed, a generation of law and economics scholars have documented how organizational and mobilization efforts can be frustrated by the size and diversity of a group. As Professor Ackerman has pointed out in a related context, large, diffuse, and anonymous groups are much harder to organize than are small, discrete, and insular ones.[32]

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27. Id. at 209.
28. Brooks, 10 Harv. J. L. & Pub. Pol. at 206 (cited in note 5).
29. Id. at 204-06.
30. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).
31. Id. at 1892 (Thomas, J., dissenting).
32. Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 723-28 (1985).

Justice Thomas's Seventeenth Amendment observation—commonsensical though it may be—leads to a number of important insights. Some of them sound in federalism. Consider, for example, the debate that has raged ever since the founding over whether States enjoy the power to "instruct" their Senators. In the First Congress, for instance, many States attempted to direct their Senators on how to vote on specific pieces of legislation. Many Senators rejected these efforts. Senator Jacob Read of South Carolina proclaimed that "on great national points, he did not consider himself as a Representative from South Carolina, but as a Senator for the Union."[33] The two Senators from North Carolina "proved themselves out of harmony with the policies of the[ir] [State]."[34] Senator John Henry of Maryland "refused to obey instructions from the Maryland Assembly to vote for opening the Senate's doors."[35] And Senator Ralph Izard of South Carolina "refused to accept the theory that [he was] subject to instructions from the legislature."[36]

These Senators were right in thinking their proper outlook to be a national one. Most importantly, Senators could point to many structural differences between the Constitution and the Articles of Confederation that made the Senate a national body. First, Senators were to vote individually, not as part of a block from each State. Second, Senators were unrecallable. Third, Senators were paid from the national treasury, not from the treasury of their home States.[37]

Whatever may be said of the intellectual merits of the instruction debate in the early nineteenth century, the Seventeenth Amendment altered the stakes a century later. For as logistically difficult as it might be for state legislatures to instruct their Senators periodically, it would be much more difficult for the People of each State to organize to do so.[38] Even with the technology available at the

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33. 5 Annals of Congress 20 (Dec. 11, 1795). See generally *The United States Senate 1787-1801*, S. Doc. No. 64, 87th Cong., 1st Sess. 154-74 (1961) (citing many other examples of Senators disregarding instructions from state legislators).

34. S. Doc. No. 64 at 163 (cited in note 33).

35. Id. at 169.

36. Id. See also the remarks of Thomas Jefferson with respect to the Senate: "I had two things in view: to get the wisest men chosen and to make them perfectly independent when chosen." Julian P. Boyd, ed., 1 *The Papers of Thomas Jefferson* 503 (Princeton U., 1950).

37. Amar, 97 Yale L. J. at 1117 n.32 (cited in note 16).

38. This is not to say that such organizational costs were thought by everyone to be insurmountable. Indeed, the First Congress considered (and ultimately rejected) a constitutional amendment that would have explicitly entitled constituents to "instruct" their representatives in Congress about how to voto. See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539, 1559 n.113 (1988). This amendment was directed primarily, if not exclusively, at members of the House, who would be instructed by the People. Some opponents and proponents of the measure questioned how practical any instruction power

end of the nineteenth century (or today, for that matter), there is no doubt that the power to instruct would be more potent in the hands of a legislative body that meets regularly to decide and vote upon the interests of the State than in the hands of millions of unorganized and diffuse citizens.

Justice Thomas's observation is relevant not just to federalism matters, however. It also has separation of powers implications. To appreciate this, we must first remember that organizational difficulties (and other transaction costs) plague not only efforts by one group to monitor and control another; transaction costs also make more difficult (and thus less likely) the formation of bargains that may benefit both groups.[39] And as law and economics scholars have repeatedly suggested, significant transaction costs may arise simply from the sheer size of one of the two bargaining groups.[40]

What types of deals might benefit both Senators and the States from which they come—deals that the Seventeenth Amendment would seem to make more difficult? One kind involves service by sitting Senators in other governmental posts, especially other federal posts. Such service might enhance the experience, prestige, and career paths of individual Senators, and at the same time enable them to continue serving their States' interests.[41] Indeed, a particular kind of deal—by which a Senator would leave the Senate to serve in a presidential administration only to be returned to the Senate when another opening was available—would be a win-win situation for the Senator and her State. But because this kind of deal depends on the relative stability, predictability, and small size of state legislatures

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would be, given the size and diversity of the People, and most in Congress envisioned that the power—if granted—would be used only sparingly. But most of the discussion did not dwell on the practicality, but rather the propriety, of instruction. In the debates, James Madison and others made clear their view that the legislature's task called for deliberation and that this task was inconsistent with a right to instruct. The remarks of Senator Sherman are instructive:

> The words [of the amendment] are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to the just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.

Jospeh Gales, ed., 1 Annals of Congress 735 (Gales & Seaton, 1834).

39. See, for example, Douglas Laycock, *Modern American Remedies* 371 (Little, Brown, 2d ed. 1994).

40. Id.

41. Consider, for example, how an eightoenth century State might have an interest in internal improvements, or tariffs, that would be furthered by having its Senators serve in the Cabinet. Today, consider how States might have public works projects or disaster aid needs that might be served by having representation in the Cabinet.

(who can make good on their implicit agreements), direct election would seemingly reduce the likelihood of such deals being struck. It is obviously harder for a Senator to contemplate leaving the Senate to serve a President if the expectation of reinstallment in the Senate is based on a prediction of the electorate rather than the implicit (and of course legally unenforceable) agreement of a legislative majority—even one that may not be around when contract performance is sought. And, in fact, the numbers seem to confirm my hypothesis. Although I have not undertaken an exhaustive statistical analysis, a few quantitative observations should suffice to make my point and suggest the worth of further inquiry.

To begin with, scores of people who have served in the Senate have, at some time in their careers, also worked in the federal Executive Branch.[42] By my count, about fifty United States Senators have followed service in the Senate directly[43] with service in a presidential Cabinet—the most important and influential executive service. Significantly, the great majority of these fifty examples of interbranch rotation, forty-one, occurred before the turn of the twentieth century, the direct election movement, and the Seventeenth Amendment. This is true even though the Senate and the Cabinet have both grown in size throughout the 1900s. These size increases, one might think, would ordinarily result in a *greater* absolute number of interbranch crossovers.[44] Much more remarkably, *every one* of the thirteen Senators who have followed Senate service with Cabinet service only to return to the Senate within three years after the conclusion of their Cabinet stints *predated the advent of direct election.*[45] Thus, the kind of deals I posit seem to have been *infinitely* more common pre-Seventeenth Amendment. Moreover, putting aside comparisons with the post-seventeenth amendment world, return to the Senate following Cabinet service was a pretty good bet in its own right for a nineteenth-century Senator: Of the twenty-eight Senators who went from the Senate to the Cabinet who did *not* return to the Senate, a sizable chunk, eleven, were either dead or over sixty years old upon

42. See Robert C. Byrd, 4 *The Senate, 1789-1989: Addresses on the History of the United States Senate* 231 table 1-19, 254 table 1-34 (U.S. G.P.O., 1992) (compiling the names of Senators who served as Cabinet members (table 1-19) and those who resigned during their term of office (table 1-34)).

43. In a few cases, there was a lag time of about a year between Senate and Cabinet service. Id.

44. Of course, the increased size of the Cabinet may have reduced the prestige of Cabinet service and thus discouraged Senators from serving there. But the increased size of the Senate could have reduced its prestige as well.

45. Byrd, 4 *The Senate* at 231 table 1-19, 251 table 1-34 (cited in note 42).

completion of Cabinet service. Subtracting these eleven from the forty-one Senators who went directly to the Cabinet leaves thirty Senators who might have seriously contemplated a return to the Senate. And of these thirty, thirteen (or forty percent) in fact returned.

None of this is to say that sandwiching Senate service around Cabinet service would be impossible in today's direct election world. In fact, one Senator who left the Senate for the Cabinet in the twentieth century, Senator Knox, did return to the Senate, five years after leaving the Executive Branch.[46] The claim I am making, however, is only that the bargaining, informational, and transaction costs associated with direct election tend to *reduce* interbranch rotation arrangements between Senate and Cabinet. And that claim does seem to be borne out by the (admittedly general) statistics I have adduced.[47]

What are we to make of all this? The reduction in cross-fertilization between the Executive Branch and the Senate resulting from direct election would seem to have implications for those areas in which the President and Senate are called upon to participate in constitutional processes. Two such processes are judicial appointments and treatymaking. As to appointments, some scholars in the last decade have lamented the decline in "advice" rendered by the Senate to the President today.[48] Although there are undoubtedly a variety of causes for this decline, surely it is plausible to think that the reduction in interbranch rotation brought on by direct election is one of them. That Senators who have served in Cabinets would feel more comfortable proactively providing guidance and information to the President or the Department of Justice seems natural. The same should be true in the treaty-making context. In this regard, it is noteworthy that a number of nineteenth century Senators who sandwiched Senate service around Cabinet stints served as Secretaries of State and/or War.[49] Indeed, among this group were

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46. Id.

47. There have, of course, been other changes during the twentieth century that may have made Senate/Cabinet rotation more difficult. One such change is the decline in the power of political parties. Indeed, if party bosses were as strong teday as they were in the nineteenth century, then even deals involving the "People of each State" might be feasible and somewhat enforceable.

48. See generally Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (Random House, 1985); Michael Stokes Paulsen, Book Review, *Straightening Out* The Confirmation Mess, 105 Yale L. J. 549 (1995).

49. Byrd, 4 *The Senate* at 231 table 1-19, table 1-20 (cited in note 42).

such notable Secretaries of State as John Calhoun and Daniel Webster.[50]

Of course, the implications I posit here are necessarily tentative, and suggest the benefit of more historical and empirical inquiry. In the end, though, I think we have not been cognizant enough of the possible value of "revolving door" traditions and devices that may in some respects facilitate deliberative and cooperative government.

Another potential consequence of the reduction in rotation between federal offices occasioned by the Seventeenth Amendment relates to the term limits debate occupying center stage in modern American politics. Some advocates of term limits want people to rotate out of public service altogether; others especially dislike long incumbencies in particular offices. In some sense, then, the need for and desirability of term limits may be linked with the effects of the Seventeenth Amendment. Put another way, perhaps term limits ameliorate one of the unintended and undesirable effects of direct election—the reduction in rotation. And perhaps those who favor term limits might want to revisit the direct election question.[51]

IV. THE SEVENTEENTH AMENDMENT AND THE DELEGATION OF LAWMAKING AUTHORITY

In this Part of the Article, I begin with a brief general discussion of the nondelegation doctrine as it has applied between the Congress and the President. I then shift the focus to the nondelegation doctrine as it applies in the federal/state context, and to the implications the Seventeenth Amendment has had in this area. We will then be in position to apply the lessons learned from the federal/state context to separation of powers questions.

A. Delegation Introduced

Under the Necessary and Proper Clause of the Constitution,[52] each constitutionally-granted congressional power "implies a power

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50. Id.

51. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1071 n.98 (1988) ("Repeal of the Seventeenth Amendment might help to both reinvigorate state governments, *and enhance national governmental deliberations.*") (emphasis added). Of course, any repeal of the Seventeenth Amendment, to be meaningful, would also have to disable States from enacting versions of the "Oregon Plan." See notes 26-27 and accompanying text.

52. U.S. Const., Art. I, § 8.

[to create] authority under it sufficient to effect its purposes."[53] Congress may not, however, delegate its legislative powers to the executive. For at least 150 years, the Supreme Court's decisions have been sprinkled with categorical statements that Congress may not relinquish any of its powers to enact legislation through grants to federal administrators. The first Justice Harlan's statement of this nondelegation doctrine in *Field v. Clark*[54] is typical: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[55]

The Supreme Court has twice struck down federal legislation as violative of this nondelegation principle. In *Panama Refining Co. v. Ryan*,[56] the Court's decision to invalidate section 9(c) of the National Industrial Recovery Act—a congressional delegation to the executive of the power to exclude from interstate commerce certain oil products—followed from its conclusion that Congress had stated no policy, nor fixed any triggering circumstances, to guide the President's actions: "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[57]

Four months later, the Court struck down section 3 of the same act in *Schechter Poultry Corp. v. United States*[58] as also violative of nondelegation principles. Justice Cardozo, who had dissented alone in *Panama Refining*, wrote in *Schechter* that "[t]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant."[59]

Since *Schechter*, however, the Court has not invalidated a single congressional delegation of legislative authority to an administrative agency or the President. Indeed, many grants of authority have been upheld despite plausible arguments that they were broader than those struck down in 1935.[60] In 1974, when Justice Douglas's

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53. *Lichter v. United States*, 334 U.S. 742, 778 (1948).
54. 143 U.S. 649 (1892).
55. Id. at 692.
56. 293 U.S. 388 (1935).
57. Id. at 430.
58. 295 U.S. 495 (1935).
59. Id. at 551 (Cardozo, J., concurring).
60. See, for example, *Arizona v. California*, 373 U.S. 546, 589-90 (1963) (upholding standardless grant of power to the Secretary of Interior to apportion waters of the Colorado River).

majority opinion construed the fee-setting authority of a federal agency narrowly so as to avoid nondelegation problems, Justice Marshall wrote:

> The notion that the Constitution confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes. . . . The doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary—if not more so. It is hardly surprising that the Court, until today's decision, has not relied upon [*Schechter*] almost since the day it was decided.[61]

Despite Justice Marshall's gloomy predictions, there has been, in some quarters, a renewed interest in the nondelegation doctrine in the congressional/executive context. In *American Textile Manufacturers Institute, Inc. v. Donovan*,[62] then-Justice Rehnquist, in a dissent joined by Chief Justice Burger, argued that section 6(b)(5) of OSHA "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature."[63] Justice Rehnquist insisted that he was not being naive or unrealistic and that he understood how hard the lines would be to draw in this area of constitutional law:

> I do not mean te suggest that Congress, in enacting a statute, must resolve all ambiguities or must "fill in all the blanks." Even the neophyte student of government realizes that legislation is the art of compromise . . . . [But the typical compromise] is a far cry from this case, where Congress simply abdicated its responsibility for the making of a fundamental and most difficult policy.[64]

Aside from these explicit references to a resurrection of the non-delegation doctrine, there are other good reasons to believe that some members of the modern Court may be amenable to just such a revitalization. Most importantly, the Court during the 1970s and 1980s announced a series of decisions that to some signaled a "formalistic" approach to separation of powers problems, and perhaps moved the Court toward the rule that branches may blend their powers only where affirmatively permitted by the Constitution.[65] This

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61. *National Cable Television Assoc. Inc. v. United States*, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting).

62. 452 U.S. 490 (1981).

63. Id. at 543.

64. Id. at 547.

65. See generally Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L. J. 1766 (1985) (discussing formalist trend in Court opinions).

formal, tripartite reading of the Constitution can be seen by examining three cases in particular.

In *Buckley v. Valeo*,[66] the Court invalidated the appointment procedure of the independent Federal Election Commission ("FEC").[67] In so doing, the "Court gave an expressly formalist interpretation of the appointments clause."[68] Arguing that the three branches of government set up by the Constitution must remain "largely separate,"[69] the Court struck down a scheme in which appointment authority was shared by members of more than one branch. Moreover, the Court itself recognized that it was being formalistic. While noting that the court of appeals had characterized the argument based upon the appointments clause as "strikingly syllogistic" (or formalistic), the Court nonetheless relied upon this argument to hold the law unconstitutional.[70]

This formalist trend continued in *INS v. Chadha*,[71] in which the Court declared the legislative veto to be unconstitutional because it did not conform to the requirements of bicameralism and presentment that the Constitution provides for legislation.[72] The Court began its discussion of separation of powers by noting that "[t]he Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure . . . that each Branch of government would confine itself to its assigned responsibility."[73]

In relying on the text of the constitutional clauses relating to legislation, the Court "indicat[ed] a rejection, without even an assessment of practical desirability, of an institutional arrangement not [contemplated] by the Constitution."[74] The Court noted that although adherence to constitutional text and structure can result in burdens that "seem clumsy [and] inefficient," nevertheless, it had "not yet found a better way to preserve freedom than by making the exercise

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66. 424 U.S. 1 (1976).
67. Id. at 143.
68. Swire, 94 Yale L. J. at 1776 (cited in note 65).
69. "[T]he intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another." *Buckley*, 424 U.S. at 120. Commentary has noted tbat the "further suggestion in *Buckley* that the branches need not be 'hermetically sealed,' [424 U.S.] at 121, was later interpreted to mean that each branch should 'as nearly as possible . . . confine itself to its [constitutionally] assigned responsibility.'" Swire, 94 Yale L. J. at 1776 (citod in note 65) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).
70. See *Buckley*, 424 U.S. at 119, 140-01.
71. 462 U.S. 919 (1983).
72. Id. at 959.
73. Id. at 951.
74. Swire, 94 Yale L. J. at 1778 (cited in note 65).

of power subject to the carefully crafted restraints spelled out in the Constitution."[75]

Finally, in *Bowsher v. Synar*,[76] in which the Court struck down provisions of the Gramm-Rudman Budget Deficit Control Act,[77] the Justices also displayed a formalistic bent. Consciously relying on the precedent of the two cases discussed above,[78] the Court struck down the blending of congressional and executive powers by disallowing the congressional removal of executive officials. Quoting *Humphrey's Executor v. United States*,[79] the Court wrote: "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control . . . of the others has often been stressed and is hardly open to serious question."[80]

The Court's formalist trend, however, has not been unswerving. Indeed, two of the most recent separation of powers cases handed down by the Court—*Morrison v. Olson*[81] and *Mistretta v. United States*[82]—reject formal separation of powers arguments in upholding, respectively, the federal independent prosecutor statute[83] and the Federal Sentencing Commission.[84] As Professor Sullivan has observed, these recent

> separation-of-powers decisions have tended toward functional analysis. In *Morrison v. Olson*, the Court allowed "independent counsel" to investigate and prosecute executive branch officials, reasoning that Congress had not "*unduly* trammel[led] on executive authority" or "*unduly* interfer[ed] with the role of the Executive Branch" by granting prosecutorial authority to appointees whom the President does not select and may not remove at will. Similarly, in *Mistretta v. United States*, the Court upheld Congress's delegation of authority to draft sentencing guidelines to a sentencing commission composed in part of federal judges appointed by the President, reasoning that this structural innovation did not *excessively* aggrandize the power of any branch against another.

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75. *Chadha*, 462 U.S. at 959.
76. 478 U.S. 714 (1986).
77. Id. at 735-36.
78. Both cases were cited and discussed at the very outset of the Court's discussion of the merits of the case. *Bowsher*, 478 U.S. at 721-26.
79. 295 U.S. 602 (1935).
80. *Bowsher*, 478 U.S. at 725 (citation omitted).
81. 487 U.S. 654 (1988).
82. 488 U.S. 361 (1989).
83. *Morrison*, 487 U.S. at 696-97.
84. *Mistretta*, 488 U.S. at 412.

> On this functionalist approach, the legislative branch may trench upon the executive, as long as it does not trench too far.[85]

Justice Scalia—who dissented in both cases—forcefully reminded the Court in *Mistretta* that its decision in that case was inconsistent with the trilogy from the previous decade.[86]

In the end, then, we are left with some recent cases reflecting a formalist, strict approach to separation of powers, and others reflecting a functional, forgiving approach. This tension creates uncertainty as to the vitality of the nondelegation doctrine in the separation of powers context. In part because the line between lawmaking and law administering is so difficult to draw, most observers are rightfully pessimistic about a serious resurrection of the doctrine.[87]

B. Delegation to States

Analysis of federal delegation of lawmaking power to the States begins[88] with *Gibbons v. Ogden*.[89] In now-famous dicta, Chief Justice Marshall rejected the argument that the state law regulation of domestic port pilots at issue was valid on the ground that Congress had authorized concurrent regulatory authority.[90] The argument failed, according to Marshall's reasoning, because Congress could not enable States to legislate when the Constitution disabled them from doing so.[91] Such prospective empowerment would in effect constitute a delegation of federal legislative authority back to the States.[92] Congress could adopt federal laws that track existing state laws, but could not relinquish its lawmaking powers.[93]

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85. Sullivan, 109 Harv. L. Rev. at 94-95 (cited in note 3) (citations omitted).

86. *Mistretta*, 488 U.S. at 413-20 (Scalia, J., dissenting).

87. This is not to say that commentators are happy about this result. People as far apart politically as John Hart Ely, see *Democracy and Distrust* 131-34 (Harvard U., 1980), and Gary Lawson, see *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237-41 (1994), have urged the revitalization of the nondelegation doctrine in the federal executive context.

88. Some of the analysis here tracks and builds upon William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387 (1983).

89. 22 U.S. (9 Wheaton) 1 (1824).

90. Id. at 207.

91. Id.

92. Id. at 207-09.

93. Id. at 207. Chief Justice Taney made this same distinction, between legitimate adoption and impermissible delegation, in *Thurlow v. Massachusetts*, 46 U.S. (5 Howard) 504, 570-75 (1847) (Taney, C.J., concurring).

The Court applied Chief Justice Marshall's distinction between federal adoption of state laws and federal delegation of lawmaking power again when it decided *Cooley v. Board of Wardens.*[94] Pennsylvania had enacted a statute regulating pilots in the port of Philadelphia. In determining the scope of legitimate state authority, Justice Curtis applied Chief Justice Marshall's *Gibbons* reasoning. If the statute had been in existence at the time of congressional enactment in 1789, Justice Curtis observed, then Congress could be said to have adopted it as a law of the United States.[95] State laws passed after the congressional act of 1789, on the other hand, could not, as a metaphysical matter, have been adopted.[96] Nor, Justice Curtis stated, could the congressional act "[have] confer[red] upon [the States] power . . . to legislate," because that would amount to an unconstitutional delegation by Congress.[97] Justice Curtis's opinion, in the words of Professor Cohen, "assumed the [delegation] point too obvious to merit discussion."[98]

Taken together, *Gibbons* and *Cooley* identify two related but distinct areas in which important issues of federal legislative delegation to the States can arise.[99] The first of these involves federal incorporation or "adoption" of state laws; the other involves attempts by Congress to consent to or authorize state acts that would otherwise violate the Constitution.

1. Federal Incorporation of State Law

Federal incorporation of state law occurs when the laws of one or more of the several States are subsumed into and become the laws of the United States.[100] Federal incorporation can take a number of

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94. 53 U.S. (12 Howard) 299 (1851).

95. Id. at 317-18.

96. Id.

97. Id. See also Chief Justice Taney's opinion in *The License Cases*, 46 U.S. (5 Howard) 504, 580 (1847).

98. Cohen, 35 Stan. L. Rev. at 394 & n.40 (cited in note 88). See also James D. Barnett, *The Delegation of Legislative Power by Congress to the States*, 2 Am. Pol. Sci. Rev. 347, 377 (1908) (describing as "accepted doctrine" the notion that Congress may not delegate lawmaking authority te the States).

99. Congressional delegation to the States frequently involves delegation to state *legislative bodies* so that representative bodies are making the "hard policy choices." Tbese state bodies, however, do not represent the People of the United States—the People who created the Constitution and entrusted its legislative powers to Congress. If Congress cannot delegate its legislative powers because only Congress is politically accountable to the People who consented to federal legislative power, then there is a delegation issue.

100. Unlike state incorporation of federal law, federal incorporation of state law has not been systematically discussed in the legal literature. Professor Cohen's thoughtful and thought-provoking piece, see note 88, is probably the most thorough. For general background, see Henry

forms. The United States Constitution itself incorporates by reference some laws of each State of the Union. Article I, section four, for example, reads, in relevant part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[101] Thus, federal elections depend on the laws of the States, even though these laws may change over time. Nor is this provision the only, or the most important, example of constitutional incorporation. An individual's interest in property under the Fifth and Fourteenth Amendments depends upon state law, as the Court recognized when it decided the companion cases of *Perry v. Sindermann*[102] and *Board of Regents v. Roth*.[103] As the Court explained in *Roth*:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement te those benefits.[104]

The Framers of our Constitution clearly recognized that the States would perform this function of defining interests to be protected by the new Constitution. In the Federalist No. 17,[105] Alexander Hamilton noted:

> There is one transcendent advantage belonging to the province of the State governments .... [They will remain] the immediate and visible guardian of life and property, ... regulating all those personal interests and familiar con-

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M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 529 (1954); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 810 (1957). For a discussion of the prohlems raised by the converse situation, see Samuel Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 Yale L. J. 1 (1947); Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498 (1953).

101. U.S. Const., Art. I, § 4.

102. 408 U.S. 593 (1972).

103. 408 U.S. 564 (1972). Each case involved a due process claim by a nontenured college teacher to a hearing where he might be informed of and challenge the grounds of his nonretention. Professor Sindermann, unlike Professor Roth, won his case, because—according to the Court—Sindermann alleged that his interest in continued employment, "though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration." *Sindermann*, 408 U.S. at 599. Sindermann offered to prove that he had "no less a 'property' interest in continued employment than a formally tenured teacher" at colleges with a tenure system. Id. at 601.

104. *Roth*, 408 U.S. at 577 (emphasis added). See also *Parratt v. Taylor*, 451 U.S. 527, 529 n.1 (1983) (reiterating the principle that stato laws define property rights).

105. Federalist No. 17 (Hamilton), in Clinten Rossiter, ed., *The Federalist Papers* 118 (Menter, 1961).

> cerns to which the sensibility of individuals is more immediately awake, . . . impressing upon the minds of the people affection, esteem, and reverence towards the government.[106]

Although these federally-protected property interests may change over time as the laws of the States evolve, the resulting *in futuro* aspect of the federal incorporation, unlike that discussed below, does not raise nondelegation concerns. Precisely because this "prospective incorporation" was provided for and contemplated by the Constitution, it cannot be said to violate the Constitution in any way. Moreover, this incorporation does not involve a legislative power granted to Congress; although the incorporation is federal, it is not congressional. The People, when they ratified the Constitution, did not give up their power to have States define property interests, even though these interests would be protected by the federal Constitution.

From time to time, Congress, exercising its legislative powers, will incorporate specific state laws into federal law. The Court has, on numerous occasions, come across these federal statutes and has never questioned their legitimacy.[107] Because Congress, in this realm, is enacting *static* state laws, there are no serious delegation issues. That Congress should be allowed the convenience of enacting statutes through incorporation by reference, instead of setting them out in full, seems obvious.[108] That Congress is not bound by subsequent changes in these state laws in the future is equally obvious, and turns out to be extremely important for nondelegation purposes.

Nondelegation questions do arise where Congress simply incorporates state laws as they are and as they may change *in futuro,*

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106. Id. at 120. See also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1507 & n.316 (1987) (arguing that the Constitution protects interests created by state law).

107. See, for example, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924); *Engel v. Davenport*, 271 U.S. 33, 38 (1926); *Alton R.R. Co. v. United States*, 315 U.S. 15, 19 (1942).

108. See Mermin, 57 Yale L. J. at 8 (cited in note 100) (discussing congressional adoption of state laws). Professor Mishkin also argues that the federal system contemplates that the national government will take advantage of existing state laws:

> When federal law . . . turns to take up itself the task of affirmative governance of private activity, it might be supposed that state law would cease to play a significant part—save only at the periphery marking the outer bounds of federal power. Precisely the contrary is true. It is in this sphere that the essential incomplete and interstitial nature of federal law is most conspicuously revealed. . . . This pattern reflects deep values of our federal system—not that action of the central government represents an intrusion upon an otherwise perfect system, but rather that Congress legislates against a background of *existing* state law. Indeed, Congress has at times legislatively recognized and taken advantage of this fact; on various occasions when its power to displace state law would be unquestionable, it has specifically adopted that law as a federal rule.

Mishkin, 105 U. Pa. L. Rev. at 811 (cited in note 100) (internal quotation marks and citations omitted) (emphasis added).

without guidelines. The concern here is that Congress has allowed the States to bind it without any control over what the States may do. Some of these "prospective" congressional incorporations strengthen state law by attaching additional consequences to its breach,[109] while others apply state law to persons who would otherwise not be subject to it.[110]

Throughout the nineteenth century, several federal courts interpreted federal incorporation enactments statically so as to avoid nondelegation problems. For example, the Process Act of 1792, the original predecessor to the Federal Rules of Civil Procedure, was interpreted as incorporating only state laws in effect at the time the act was passed.[111] Federal statutes incorporating state rules of evidence and criminal procedure were construed in a similar way.[112] As Justice Story, then sitting as a circuit judge, put the point in 1838:

> Hitherto, the judicial construction of the acts of [C]ongress, which have adopted state laws, . . . has uniformly been, that they applied to the state laws then in force. . . . I must confess, that I entertain very serious doubts, whether [C]ongress does possess a constitutional authority to adopt prospectively state legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power.[113]

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109. See, for example, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(1)(A) (1994 ed.) ("RICO") (using state law crimes for definition of federal offenses); 18 U.S.C. § 13 (1994 ed.) (using state law to define federal crimes in federal enclaves). See also Federal Torts Claims Act, 28 U.S.C. § 2674 (1994 ed.) (authorizing suits against federal officials to the same extent private individuals would be liable under state law).

110. See, for example, F.R.C.P. 4(c)(2)(C)(i) (linking federal service of process rules to those of the states); 42 U.S.C. § 416(f) (1994 ed.) (defining "husband" for federal social security purposes by reference to state law). For general background on Federal Rule of Civil Procedure 4, see Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183 (1987).

111. See, for example, *United States Bank v. Halstead*, 23 U.S. (10 Wheaten) 51, 59 (1825) (finding that adoption of the forms of modes of process "*now* used and allowed in the Supreme Courts of the several States" covered "State systems then in actual operation, well known and understood").

112. See, for example, *United States v. Reid*, 53 U.S. (12 Howard) 361, 366 (1851) ("[T]he rules of evidence in criminal cases, are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed."). See also *Wayman v. Southard*, 23 U.S. (10 Wheaton) 1, 39 (1825) (recognizing that the Process Act of 1792 adopted the modes of process used by the States at that time and subjected the modes "to such alterations and additions" as the courts of the United States deem proper). Some of the statutes involved in these cases, as well as similar federal laws, were amended during the latter half of the nineteenth century to require that federal practice conform to state law in effect at the time a lawsuit was initiated, even if state law had evolved since the most recent congressional action. No such "prospective" incorporation was ever directly ruled on by the Supreme Court. For a good general discussion, see Charles Warren, *Federal Process and State Legislation*, 16 Va. L. Rev. 546, 557-70 (1930).

113. *United States v. Knight*, 26 F. Cases 793, 797 (No. 15,539) (D. Me. 1838) (citations omitted).

Some seventy years later, in 1906, another circuit judge arrived at the same conclusion. In interpreting a federal statute providing for punishment of a federal crime in the same way that a person would be punished for a similar crime under state law, Judge Adams stated:

> [This Act of 1903] does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota . . . .[114]

Thus, while prospective incorporation of state laws has never been held unconstitutional by the Court, substantial jurists have advanced theoretical and historical reasons for thinking that it violates nondelegation principles.

The most recent and most important judicial contribution to the discourse came in 1958 from the Supreme Court's decision in *United States* v. *Sharpnack*.[115] The case concerned a challenge to a federal criminal conviction under the 1948 Assimilative Crimes Act, which defined the criminal law governing federal enclaves located within state boundaries. Exercising its power of "exclusive legislation" over such enclaves, Congress had traditionally incorporated the state criminal law of the State in which each enclave was located.[116] Heeding the concern over delegation reflected in *Cooley*, *Gibbons*, and other cases discussed above, Congress repeatedly revised its assimilative crime laws to adopt those state laws in effect at the time of each of the federal revisions. These revisions took place in 1866, 1874, 1898, 1909, 1933, 1935, and 1940.[117] Federal courts interpreted each of these federal enactments as incorporating only those state laws on the books at the time of the most recent congressional action.[118]

In 1948, Congress revised its assimilative crimes law to provide that:

> Whoever . . . is guilty of any act or omission which . . . would be punishable if committed or omitted within the jurisdiction of the State . . . in which [the federal enclave] is situated, *by the laws thereof in force at the time of such act or*

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114. *Hollister v. United States*, 145 F. 773, 779 (8th Cir. 1906).
115. 355 U.S. 286 (1958).
116. Id. at 291-92.
117. Id.
118. See, for example, *United States v. Paul*, 31 U.S. (6 Peter) 141, 142 (1832) (holding that the March 3, 1925 act providing for the punishment of crimes is "limited to the laws of the several states in force at the time of its enactment").

> *omission*, shall be guilty of a like [federal] offense and subject to like punishment.[119]

As the Court in *Sharpnack* noted, "[t]his assimilation applies whether the state laws are enacted before or after the Federal Assimilative Crimes Act and at once reflects every addition, repeal or amendment of a state law."[120] Such prospective adoption, argued Mr. Sharpnack and dissenting Justices Douglas and Black, was tantamount to an unconstitutional abdication of federal legislative authority. As Justice Douglas put it,

> The vice [on which the Court invalidated the statute at issue] in the *Schechter* case was not that the President was the one who received the delegated authority, but that Congress had abdicated the lawmaking function. The result should be the same whether the lawmaking authority, constituted by Congress, is the President or a State.[121]

Justice Burton's majority opinion rejected this delegation attack, implicitly rejecting Douglas's suggestion that identity of the delegate is irrelevant. The majority's reasoning is revealing:

> Rather than being a delegation by Congress of its legislative authority to the States, [the 1948 Act] is deliberate continuing adoption by Congress for federal enclaves of such . . . offenses and punishments as shall have been already put in effect by the respective states for their own government. *Congress retains the power to exclude a particular state law from the assimilative effect of the Act.*[122]

Thus, the prospective adoption does not constitute a delegation because Congress remains free to withdraw the power being exercised by the States if Congress disapproves. The opportunity to reclaim the delegated authority, under the Court's reasoning, dissolves the delegation issue. This kind of response to a delegation attack, it should be noted, is not one that the Court has ever made in the cases dealing with grants of power to the President. This response, as we will see, may reveal important differences between the President and the States with regard to the receipt of congressionally-created power.

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119. *Sharpnack*, 355 U.S. at 292 (emphasis added).
120. Id.
121. Id. at 298 (Douglas, J., dissenting).
122. Id. at 294 (emphasis added).

2. Congressional Consent to Otherwise Unconstitutional Legislation

The second context in which state nondelegation issues might arise involves congressional "consent" to state legislation that would otherwise be unconstitutional. Article I, section ten, of the Constitution sets forth a list of activities in which States may engage only with congressional consent.[123] Moreover, the so-called dormant commerce clause jurisprudence permits Congress to consent to state activities that would otherwise violate the Commerce Clause.

Such congressional consent can take the form of either retrospective or prospective permission. The language from *Gibbons* and *Cooley* suggests that prospective consent raises a delegation concern. Arguably, it is this concern that explains the Court's two different decisions in the *Wheeling Bridge Cases*.[124]

In 1852, the Supreme Court decided the first of these two cases, holding that a state-built bridge across the Ohio River near Wheeling constituted an unlawful obstruction to navigation.[125] Congress subsequently enacted a law giving its blessing to the improvement. The Court, in the second *Wheeling Bridge* case, upheld the congressional statute and thus the lawfulness of the bridge.[126] As Professor Cohen has pointed out, "[s]trictly speaking, these [two] cases did not involve congressional overruling of a *constitutional* decision."[127] The first case was based on the terms of an interstate compact that the Court construed as equivalent to a federal statute, the terms of which Congress was surely free to change.[128]

Even had the first *Wheeling Bridge* decision been based on dormant commerce clause principles, the second case would have been correct in its implicit rejection of a delegation attack because

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123. This section reads in relevant part:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspecting Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject te the Revision and Controul of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Const., Art. I, § 10.

124. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 Howard) 518 (1852) ("*Wheeling Bridge I*"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 Howard) 421 (1856) ("*Wheeling Bridge II*").

125. *Wheeling Bridge I*, 54 U.S. at 518.

126. *Wheeling Bridge II*, 59 U.S. at 421.

127. Cohen, 35 Stan. L. Rev. at 395 (cited in note 88) (emphasis added).

128. Id.

Congress knew what it was getting into when it ratified the bridge. That was not true in *Cooley*, in which the Pennsylvania pilot law in question was passed *after* the congressional action that purported to permit state regulation in the field. The delegation problem arose in *Cooley* because Congress was arguably authorizing otherwise unconstitutional state laws that (unlike the bridge in the *Wheeling Bridge Cases*) had not yet been made.[129]

Just as *Sharpnack* is the crucial turning point in the "incorporation" strand of cases, the seminal case in the "consent" line is *Prudential Ins. Co. v. Benjamin*,[130] decided in 1946. In short, the Court there effectively held that Congress's power to remove commerce clause restrictions prospectively is unlimited.[131]

Prudential involved a South Carolina tax on insurance premiums that applied only to out-of-staters. The Court assumed, arguendo, that the tax was discriminatory for the purposes of the Dormant Commerce Clause and would have been unconstitutional but for congressional consent.[132] This consent came in the form of the McCarran-Ferguson Act, which was enacted before the South Carolina tax and

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129. In a pair of cases decided at the end of the nineteenth century, the Court appeared to retreat from the *Cooley* framework. In *Leisy v. Hardin*, 135 U.S. 100, 125-26 (1890), the Court held that the Constitution forbids, in the absence of congressional assent, state laws that prohibit sales of some liquor that had been imported from other States and sold in its original package, but that failed to comply with in-state liquor regulations. Congress responded to this decision by enacting the Wilson Act, which seemed to provide prospective consent/incorporation. The act provided:

> [A]ll fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Wilson Act, ch. 728, 26 Stat. 313 (1890), currently codified at 27 U.S.C. § 121 (1994 ed.).

This law, then, purported to authorize States to apply laws whose application would otherwise be unconstitutional, even though these state laws may not have been made at the time of federal enactment. In *In re Raher*, 140 U.S. 545 (1891), the Court upheld the Wilson Act against a delegation challenge. Id. at 562. As Professor Cohen has observed, in doing so the Court might be seen as having cast doubt on the intellectual integrity of the *Cooley* approach. Cohen, 35 Stan. L. Rev. at 396-97 (cited in note 88). But as Professor Cohen also points out, there is another way to read *Leisy* and *Raher*. Id. at 397. In *Whitfield v. Ohio*, 297 U.S. 431, 439-40 (1936), the Court made clear that *Leisy* was simply wrong in suggesting that Iowa's nondiscriminatory regulation of imported liquor was unconstitutional absent congressional consent. If congressional consent was never even needed, then the question whether Congress *can* consent—consistent with nondelegation principles—never arises.

130. 328 U.S. 408 (1946).

131. Id. at 429-30.

132. Id. at 429 ("And for present purposes we assume that the tax would be discriminatory in the sense of Prudential's contention and that all of its business done in South Carolina and affected by the tax is done 'in' or as part of interstate commerce.").

which declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[133]

In upholding the state statute, the Court construed the federal act as a blanket consent to all state regulation of the field of insurance. The Court, per Justice Rutledge's majority opinion, sidestepped the delegation problems by characterizing the scheme as a joint venture of the federal and state governments.[134] The state legislation was validated by congressional consent because delegation principles do not prohibit the exercise of "all the power of government residing in our [system]."[135] Like other commentators, I think the language is important enough to set out more fully:

> The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.
>
> *This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.* Here both Congress and South Carolina have acted, and in complete coordination, te sustain the tax. It is therefore reinforced by the exercise of all the power of government residing in our scheme. Clear and gross must be the evil which would nullify such an exertion, one which could arise ouly by exceeding beyond cavil some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.
>
> In this light the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce

133. Act of Mar. 9, 1945, ch. 20, 59 Stat. 33 (1945).
134. *Prudential*, 328 U.S. at 438.
135. Id. at 436.

> clause, in letter or spirit, is presented. Nor is contravention of any other limitation.[136]

In short, the Court's answer to the delegation attack was to deny the existence of a delegation problem at all—to "reject Chief Justice Marshall's *Gibbons*" reasoning.[137] In the Court's view, when the Constitution deprives States but not Congress of authority over certain areas, it does not restrict the "coordinated exercise" of federal and state authority. Put another way, if Congress can do something alone, Congress can consent (even prospectively) to having the States do it instead.

As Professor Cohen has correctly observed, the Court's theory sweeps broadly: Congress may remove all constitutional limits on States when those limits are wholly inapplicable to Congress—that is, when they stem solely from divisions of power within the federal system.[138] Under this approach, Congress would be able to authorize States to enact legislation that runs afoul not just of dormant commerce clause principles, but of any limitation the Constitution imposes on States but not Congress.[139] Even if, as some commentators have suggested, the Court should retreat from its dormant commerce clause jurisprudence,[140] the *Prudential* approach would remain important in other contexts when States but not Congress are constitutionally disempowered. "Thus, the issue in each case concerns the constitutional limits on *congressional* power."[141]

It is important to note that the Court's response to the delegation argument in *Prudential* was, like its response to the delegation attack in *Sharpnack*, one that the Court has never invoked in the congressional/presidential setting. The Court has never suggested that if the Constitution permits Congress to enact a particular law, Congress could—consistent with nondelegation principles—simply consent to the President making the law instead, as part of a "coordinated exercise" of congressional and executive authority. Indeed, that is precisely what the nondelegation doctrine purports to forbid. Put another way, the nondelegation doctrine in the federal/executive context prevents Congress from consenting to

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136. Id. at 434-36 (emphasis added).
137. Cohen, 35 Stan. L. Rev. at 399 (cited in note 88).
138. Id. at 400.
139. Id.
140. See, for example, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425 (1982).
141. Cohen, 35 Stan. L. Rev. at 400 (cited in note 88).

presidential lawmaking, even though that ban on lawmaking is obviously "wholly inapplicable"[142] (to use Professor Cohen's words) to Congress itself.

Why has the nondelegation concern dissolved in the federalism context? As Professor Gunther has put the question: "[According] [t]o the *Cooley* Court, congressional 'consent' authority was questionable; to Justice Rutledge a century later [in *Prudential*], the authority was clear. Why? . . . What . . . justifies congressional authority today?"[143] It turns out that *Sharpnack* provides a crucial clue, but a complete answer requires us to go back to the foundations of the nondelegation doctrine itself.

C. Theories Underlying a Nondelegation Concern

The nondelegation doctrine is said to have both textual and theoretical underpinnings. Textually, Article I, section one of the Constitution provides that "*All* legislative Powers herein granted *shall* be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[144] The theoretical justifications of the nondelegation doctrine stem from "implicit constitutional requirements of consensual government under law."[145] As Professor Tribe has observed, American political theory finds legitimacy of government in the "supposed consent of the governed."[146] This notion of consent presupposes the possibility of tracing governmental exercise of power to a choice made by a "representative" branch that is "politically and legally responsible" to the People.[147] Thus, the valid exercise of a congressionally created power depends upon the prior "adoption of [a] declared policy by Congress and its definition of the circumstances in which its command is to be effective . . . ."[148]

Both the textual and theoretical justifications for a nondelegation principle are open to question. First, it is not clear why the term

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142. Id.

143. Gerald Gunther, *Constitutional Law* 303 (Foundation Press, 12th ed. 1991).

144. U.S. Const., Art. I, § 1 (emphasis added).

145. Laurence H. Tribe, *American Constitutional Law* § 5-17 at 364 (Foundation Press, 2d ed. 1988).

146. See id. See also Jerry L. Mashaw, *Administrative Law; The American Public Law System, Cases & Materials* 24 (West, 1985); John Hart Ely, *Democracy and Distrust* 134 (Harvard U., 1980); Robert A. Dahl, *Democracy in the United States: Promise and Performance* (Rand McNally, 3d ed. 1976); J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575, 585-86 (1972).

147. Tribe, *American Constitutional Law* at 364 (cited in note 145).

148. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 144 (1941).

"vested" in Article I means nondelegable. After all, Article II provides that "[t]he executive Power shall be vested in *a President* of the United States of America,"[149] and yet no one doubts that the President may transfer executive authority to his underlings in the Executive Branch.[150] This is true even as to presidential powers that the Constitution itself (as opposed to congressional legislation) assigns to the President.

Moving from text to theory, why does the "traceability" requirement foreclose delegation? Why can't we "trace" congressional delegations to the President back to Congress and hold it accountable accordingly? After all, as I just observed, the President delegates executive authority to unelected underlings, and yet we seem to believe that *his* accountability suffices under American democratic theory. Nor did "accountability" prohibit the People of the United States from delegating some of their sovereign power of self-determination to the federal government by ratifying the Constitution. The fact that the People have given temporary authority to federal institutions to govern on their behalf does not, under American democratic theory, mean that sovereignty has been "divested" from the People and impermissibly delegated to the government.[151]

Some might respond to my analogies by pointing out that the People are free to reclaim the power they have given to federal institutions through constitutional amendment,[152] and that the President is free to reclaim authority he has given to his underlings at will. This is all true enough, but it suggests that delegations of power are not problematic per se, but that what might be driving at least part of the nondelegation concern is the ability (or inability) to reclaim power once delegated. This possibility is supported by seminal work done at the beginning of this century by Professors Patrick W. Duff and Horace E. Whiteside.[153] These scholars attempted to uncover the origins of the latin nondelegation maxim, "delegata potestas non potest delegari," which most people understand to mean "delegated power may not be redelegated."[154] Their groundbreaking historical research established that the earliest forms of the common law

149. U.S. Const., Art. II, § 1, cl. 1 (emphasis added).

150. For a discussion of such delegability, see Amar and Amar, 48 Stan. L. Rev. at 119-21 (cited in note 10).

151. See generally Amar, 55 U. Chi. L. Rev. at 1055 (cited in note 51).

152. See id. at 1055-56.

153. Patrick W. Duff and Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 16 Cornell L. Q. 168 (1929).

154. Id. at 168-71.

agency nondelegation maxim—thought by many to explain much of the American constitutional nondelegation concern—were phrased somewhat differently: Delegated authority cannot "be so delegated, *that the primary (or regulating) power does not remain with the King himself.*"[155] As Professors Duff and Whiteside conclude, the concern is that the "King's power not [be] diminished by its delegation to others."[156] Professors Duff and Whiteside thought that their discovery "annihilated" the nondelegation doctrine as currently understood.[157] Whether or not this is an overstatement,[158] Professors Duff and Whiteside's suggested formulation does refocus attention on one key aspect of the delegation problem: that delegation is more problematic when it is harder to reclaim.[159]

D. The Role of Direct Election

Retrieval of delegated power by Congress might be difficult in a variety of settings and for many reasons. Institutional inertia and a crowded legislative agenda would make retrieval somewhat costly in any case, which suggests that the delegation problem can never be *completely* dissolved. To appreciate how the Seventeenth Amendment is relevant to all this, consider yet another impediment to congressional retrieval of power: interference by the delegate, or recipient, of the authority. The Framers realized, indeed obsessed over, the prospect that beneficiaries of authority enjoy exercising their power and will resist attempts to restrain or reclaim it. Indeed, the entire separation of powers framework, and much of the Bill of Rights for

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155. Id. at 173 (emphasis added).

156. Id.

157. Id. at 172.

158. See Sotirios A. Barber, *The Constitution and the Delegation of Congressional Power* 29 (U. of Chicago, 1975) ("It is difficult to appreciate [Duff and Whiteside's] conclusion that the second version 'has annihilated' the first."). Professor Barber's book is good general background for those interested in nondelegation theory.

159. Other commentators have sometimes phrased the nondelegation concern in these terms. See, for example, J. G. Sutherland, *Statutory Construction* § 4.12 at 157 (Clark Boardman Callaghan, 5th ed. 1992) ("Judicial hostility to [prospective incorporation] seems unfortunate .... Even where another legislature may change not only the operation of local law but its substantive content, the statute should be sustained *for enactment of the statute does not cause any permanent loss of sovereignty or legislative power.... The local legislature retains its power to change the statute if it is not satisfactory.*") (emphasis added); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650, 656, 659 (1975) ("Save where the delegation [to private parties] is so broad *that the legislature cannot retrieve what it has delegated*, pronouncement upon a delegation question deals with the effects of a legislative act and not any altoration of legislative power.... [Only] [w]here a delegation by virtue of its content or breadth calls into question the *future operation of the political process* [does] judicial scrutiny seem[ ] warranted.") (emphasis added).

that matter, was a self-conscious effort by the Framers to deal with problems of selfish government agents—delegates of the People's sovereign power—who would have personal incentives to betray the interests of their principals, the People.[160]

Of course, agents or delegates are capable of many kinds of interference. Political appeal to the People themselves to lobby for preservation of the delegated power is one thing. But more formal control—an institutional say in the retrieval processes—is another entirely. And before the Seventeenth Amendment, States had formal authority over the Senate—in the form of their power to reelect or not reelect Senators—whose assent would be necessary to congressional efforts to reclaim authority delegated to the States.

That state legislatures might use the leverage created by indirect Senate election to further local agendas is not surprising. Recall the debate over instruction from Part III above, which describes attempts by States to use their legislative clout to advance parochial interests over federal goals. Worse still, those in statehouses might use their leverage to advance interests not of state constituencies but rather of the *state legislators*. James Wilson, who disfavored legislative election precisely because he knew state legislators would act selfishly and personally, put the point better than I can:

> [J]ealousy would exist between the State Legislatures [and] the General Legislature: ... the members of the former would have views [and] feelings very distinct in this respect from their constituents. A private Citizen of a State is indifferent whether power be exercised by the [General] or State Legislatures, provided it be exercised most for his happiness. *His representative has an interest in its being exercised by the body to which he belongs.*[161]

In this regard, Senator Hoar of Massachusetts observed in 1893, in the midst of the direct election debate: "The State legisla-

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160. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1133 (1991) ("[T]he Bill of Rights was centrally concerned with controlling the 'agency costs' created by ... republican government."). Nor is the Framers' vision rendered irrelevant by the fact that in the delegation contoxt Congress seems anxious *not* te exercise, but rather to delegate, power. One need ask, how often does the President decline authority Congress gives him? Perhaps tlie concern about selfish exercise is most acute when tlie branch is controlled by a single person, rather than (as in the case of Congress) a group. Maybe this is wliy the Constitution vests ultimate control over legislative powers in tlie Congress; its numbers and diversity make it less susceptible to corruption.

161. Madison, *Notes on the Debates in the Federal Convention* at 162 (cited in note 17) (emphasis added). See also id. at 167 ("[T]he Legislatures are actuated not merely by the sentiment of the people; but have an official sentiment opposed to that of the [General Government] and perhaps to that of the people tliemselves.").

tures are the bodies of men most interested of all others *to preserve State jurisdiction* [i.e., state power]."[162]

Nor is this selfishness inherently evil; indeed, the Framers counted on it in the way they devised institutions to protect liberty overall:

> [T]he interior structure of the government [must be contrived so that] its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.... Ambition must be made to counteract ambition. The interest of man must be connected with the constitutional rights of the place.[163]

But this selfishness would create conflicts of interest in the pre-seventeenth amendment world when the federal government tried to reclaim authority given to the States. Since the advent of direct election, however, state legislatures no longer wear two hats; they may be recipients of federal authority but they no longer have as important a role in congressional efforts to revisit the grants of power. Viewed in this light, the reasoning of *Sharpnack*—that the delegation problem is unimportant because Congress can reclaim the power—is more satisfying, but only because the Seventeenth Amendment has made it much easier for Congress to in fact reclaim that power. To answer the question posed by Professor Gunther,[164] what justifies congressional consent authority today (but not in the time of *Cooley*) is direct election, which reduces the power state legislatures have to resist efforts by Congress to reclaim authority.

In a sense, the observation I am explicating here is the flip-side to a debate among judges and scholars about the extent to which the federal government can intrude upon or conscript state instrumentalities. In *Garcia v. San Antonio Metropolitan Transit Authority*,[165] the Court essentially removed itself from the business of protecting state entities from the application of federal law. The Court did so largely on the theory that the federal structure enables state governmental entities to protect themselves through the political process.[166] I think it fair to say that Justice Blackmun's opinion did not really grapple with the fundamental change in that structure reflected by direct election. Legislative election was, in

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162. S. Doc. No. 232, 59th Cong., 1st Sess. 21 (1906) (emphasis added).

163. Federalist No. 18 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 322 (Mentor, 1961).

164. See text accompanying note 143.

165. 469 U.S. 528 (1985).

166. Id. at 556 (holding that the political process—and not the Court—is the essential limit on federal commerce power).

1787, thought to be the most important device by which state governments could protect themselves from federal domination.[167] After the Seventeenth Amendment, perhaps it does not serve federalism for courts to remain above the fray.[168] But however much the federal government can intrude upon state sovereignty,[169] the Seventeenth Amendment also makes it less constitutionally problematic (and thus easier) to *increase* state sovereignty via grants of federal authority. Thus, if the Republican revolution is serious about returning power to the States to implement and tailor federal schemes, it can do so more freely now without worrying about delegation problems.

This point has not been widely appreciated. For example, in a recent article, Professor Kathleen Sullivan reads the important term limits case, *Thornton*,[170] decided by the Court last year, as calling into question not just state efforts to affect the makeup of federal institutions like Congress, but also state exercise of what the Constitution characterizes as federal power.[171] For her,

> The hard[ ] question is whether [the term limits case] . . . would preclude state efforts to govern the federal legislative agenda. Pending block grant proposals, for example, would cede to the states considerable discretion in deciding how to distribute federal tax revenues and administer federal programs. Thus, block grants would impose externalities on federal taxpayers in other statos—citizens unrepresented in such decisions—in apparent violation of the federal sovereignty principle of [the term limits case].[172]

Professor Sullivan's concern is unfounded, I think, in light of the federal government's clear power to authorize States that is reflected in the *Prudential* and *Sharpnack* lines of cases. Nothing in *Thornton* calls these cases into question because under the reasoning of the *Thornton* majority, *Congress* does not enjoy any more power than do States to impose qualifications for congressional representatives beyond those enumerated in Article I. Congress obviously may not authorize other bodies to do what it cannot. In the block grant context, by contrast, Congress *does* have the authority to decide how federal tax revenues are spent and federal regulatory schemes administered. Thus, Congress's attempt to vest that

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167. See Brooks, 10 Harv. J. L. & Pub. Pol. at 192 (cited in note 5).
168. See Amar, 55 U. Chi. L. Rev. at 1071 n.98 (cited in note 51).
169. For cases and scholarly commentary in which this debate is being waged, see note 8.
170. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).
171. Sullivan, 109 Harv. L. Rev. at 104 (cited in note 3).
172. Id. at 105.

discretionary authority in the States via grants raises questions that are not directly implicated by the reasoning of the term limits case, but are more directly addressed in the state delegation cases discussed above.[173]

I am not at all suggesting that Professor Sullivan is wrong in reading the term limits decision as a case about federalism; at some level it is. But the federalism issue posed by *Thornton* is not the same kind of federalism issue raised in the *Prudential* case or the block grant scenario, where the ultimate question is not whether States can do something on their own, but whether Congress can empower them to do something. And if Congress wants to empower States through block grants, there are no longer (in part because of direct election) any delegation constraints.[174]

None of this is to say that the *sole* explanation driving a constitutional nondelegation principle is a concern about the ability of Congress to retrieve lawmaking power.[175] It is only to say that a *significant* part of nondelegation thinking can be organized around the difficulties in retrieving delegated power; that *one very significant difficulty* involves delegates who can exert formal electoral pressure on congressional attempts to reclaim delegated authority; and that States before, but not after, the Seventeenth Amendment wore two hats such that congressional delegations to them were more constitutionally troubling.[176]

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173. See notes 115-43 and accompanying text.

174. Of course, States may not always welcome this authority if it comes with strings. See Brooks, 10 Harv. J. L. & Pub. Pol. at 197 n.45 (cited in note 5) (suggesting agreement with Alexander Hamilton that dependence on federal funds *decreases* state autonomy).

175. Indeed, Supreme Court invalidation of legislative delegations to *private* individuals—who obviously have no formal role in legislative processes—illustrates that other constitutional values are sometimes at stake in so-called delegation cases. As one commentator discussing *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), has put the point, "many of the vices thought to be inherent in delegation to private groups *constitute violations of express constitutional mandates—particularly the requirements of due process and equal protection.*" Liebmann, 50 Ind. L. J. at 660 (cited in note 159) (emphasis added). Liebmann's exhaustive and impressive survey leads him to conclude that "a per se doctrine precluding delegation of legislative powers to private persons is not needed and would have unfortunate results," and is not suggested by either Supreme Court or lower court cases. Id. at 654.

176. In one post-seventeenth amendment line of cases, the Court has invalidated congressional grants of authority to States on what at first blush appears to be nondelegation grounds. In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-64 (1920), and *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227-28 (1924), the Court refused Congress's attempts to allow States to apply their workers' compensation laws to stevedores and maritime workers. Close examination of these cases reveals that, notwithstanding the Court's references to *Gibbons* and nondelegation notions, the driving force behind the results was the perceived need for uniformity of regulation in these areas. Although

E. Implications for Separation of Powers

What relevance does this have to separation of powers? While this Article is not the place to elaborate a complete theory of legislative delegation to the President, my Seventeenth Amendment story does lead me to a few observations and suggestions for further thought.

My analysis of delegation to States before the Seventeenth Amendment suggested that the inability to easily retrieve delegated authority accounts for much of the nondelegation principle. If this is true, then a unicameral legislative framework in which the Executive Branch lacked any veto would pose far fewer nondelegation problems. In such a world, the legislature could take back delegated power relatively easily when it saw fit.[177] Ours is not such a world, however. Bicameralism presents several complications. For example, suppose that Congress, in year one, enacts a law delegating federal legislative authority to the President. Suppose further that the House, in year five, does not like the presidential lawmaking and seeks to reclaim legislative dominion. If the Senate disagrees as a policy matter, the House majority can do precious little.[178]

Unless we have a substantive test for distinguishing legislative from executive discretion (which we haven't been able to formulate), this kind of delegation problem will be present in a bicameral scheme. Each House's ability to reclaim its lawmaking discretion is dependent on the other's agreement. This wrinkle suggests perhaps that sunsetting provisions (even as short as two years) might be a good idea for a wide variety of federal laws that create broad powers in the Executive Branch. Extensive use of such provisions would address the core of the nondelegation problem by preserving *each House's* lawmaking discretion. Although logistically tricky, this response to delegation concerns might be manageable if we could "fast track" consideration

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the Court did not identify the source of the uniformity requirement with clarity, the Court did make clear that even Congress could not enact nonuniform rules to govern in the different states. Cohen, 35 Stan. L. Rev. at 402 (cited in note 88). Thus, the cases are not so much about which of its own powers Congress may or may not delegate to the States, but whether federal power to regulate in nonuniform ways exists at all. In any event, as Professor Cohen has forcefully argued, this trilogy of cases is "bizarre," and the cases are perhaps best thought of as "constitutional law derelicts." Id. at 402-03.

177. The legislative inertia problem would, of course, remain. See Part IV.D.

178. See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. Bar. Found. Res. J. 379, 397-405 (discussing the nondelegation doctrine's cousin—the "entrenchment" concern).

of many laws likely to be continually and enthusiastically supported by both Houses.

Presentment to the President raises further complications. Because of the Presentment Clause, Congress's ability to reclaim broad authority delegated to the President may require more than just agreement of a majority of both Houses. Retrieval might require a super-majority of both Houses if the President rebuffs the retrieval attempt. In other words, the veto possibility is a substantial impediment to the retrieval of power by Congress.[179]

Worse yet, this impediment is in the hands (the pen-holding hand, to be more precise) of the beneficiary of the delegation! To the extent that the Seventeenth Amendment's effect on delegation to the States focuses our attention on the two-hat problem of congressional retrieval, we should be especially wary of congressional delegations to the President, who (unlike States after the Seventeenth Amendment) continues to wear two hats. Under my analysis, pre-seventeenth amendment delegations to the States were problematic not just because the Senate might not agree with the House and the President that States should no longer be making federal law; the problem was that the Senate's judgment in this regard might be warped because of the control the States—the beneficiaries of the power—would be able to exert. It is almost as if States had a veto over congressional retrieval efforts—a veto they would exercise for selfish reasons.

A President who receives congressionally created authority also has a formal electoral input—through his veto power—into subsequent congressional attempts to reclaim that authority. This input may be exercised merely because the President enjoys exercising the power. Thus, while it may only take a majority of both Houses to give power to a President, the same bare majority may not be able to override a presidential veto of congressional attempts to take back that power.

Broad delegations to the President are thus the most structurally problematic; the President's dual role as recipient of delegated authority and participant in decisions about its retrieval creates the very real potential that lawmaking power is ceded in such a way that Congress's ultimate power to make laws is diminished.

It is true, of course, that the Constitution does not give a bare majority of both Houses of Congress alone the power to make law, and

179. Id. at 401. See Charles Black, *Some Thoughts on the Veto*, 40 L. & Contemp. Probs. 87, 95-97 (1976) (applying "game theory" to vetoes and demonstrating why vetoes are hard to override).

that the President has a lawmaking role as well. But the President is not a constitutional lawmaker by himself; he needs a majority of both Houses of Congress to join him as participants in the lawmaking process. If he alone is delegated lawmaking power under a statute, and selfishly resists retrieval efforts by Congress, he continues to make federal law with the support of only one-third (plus one) of one House. Nothing in the veto provisions or the Constitution more generally confers this kind of lawmaking power. Just as it is unconstitutional for one of the two Houses of Congress to make laws by itself,[180] it is unconstitutional for the President to make laws when a majority of one or both Houses dissents.[181]

F. Rethinking Chevron

To say that we ought to be especially concerned about delegations to the President is not to suggest that we reinvigorate the nondelegation doctrine by trying to draw the elusive line between standard-guided delegations and standardless delegations—a line that has bedeviled the Court for decades. Indeed, I see no easily workable way to draw such a line. But perhaps we should take a close look at other judicial doctrines in the light that the Seventeenth Amendment inquiry has shed on the nondelegation doctrine generally. One candidate for rethought is the so-called *Chevron*[182] doctrine.

Under the *Chevron* doctrine, if Congress has not spoken decisively as to the meaning of an executive agency's organic act, courts should defer to "reasonable" agency interpretations of the act. Courts are to defer even if these interpretations are not the best ones in the sense that they would have been selected by the courts in the first instance.[183] Although there is some disagreement in the Supreme Court, *Chevron*'s advocates and the lower courts apply the deference rule even when the agency has interpreted a statutory provision that requires no technical expertise. In such situations the agency has

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180. See *INS v. Chadha*, 462 U.S. 919, 958 (1983) (finding that legislative action requires "passage by a majority of both Houses and presentment to the President"). As Professor Tribe has suggested, *Chadha* could arguably be understood as a delegation case, in which lawmaking power was unconstitutionally delegatod to one House, which House could block subsequent attempts to reclaim that power. *American Constitutional Law* § 4-9 at 245 (cited in note 145).

181. See Black, 40 L. & Contemp. Probs. at 98-99 (cited in note 179) (discussing the effect of congressional approval or disapproval upon presidential actions).

182. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

183. See, for example, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 511-18 (discussing justifications for and implications of the *Chevron* doctrine).

resorted only to the tools of statutory construction courts ordinarily use.[184] Moreover, *Chevron* applies even where the executive's construction is based explicitly on political considerations within the Executive Branch.[185]

Although some commentators have suggested that *Chevron* deference is constitutionally required,[186] this surely cannot be so. As Justice Scalia has recognized, if Congress passed a law requiring federal courts to review all agency interpretations of statutes *de novo*, this congressional command would have to be obeyed.[187]

Others have argued that *Chevron* is constitutionally foreclosed; that separation of powers forbids Congress from giving interpretive authority to agencies to determine (more or less conclusively) the scope of their own authority.[188] Although I do not take a position on this, I think I agree with Professor Monaghan that if Congress explicitly delegated interpretive authority to federal agencies, such interpretive authority would not be different in kind from other kinds of now-permissible delegations.[189]

But what about cases in which Congress has not made clear its intent to delegate interpretive authority to agencies? There are three possible approaches: (1) assume no delegation of interpretive authority to the agency unless Congress speaks clearly; (2) decide each case individually, looking at how much agency expertise is likely to be relevant to the interpretive inquiry and how likely it is that Congress—on account of that expertise—wanted to delegate interpretive authority; or (3) presume that Congress intended to delegate interpretive authority unless it has clearly suggested otherwise. Justice Scalia correctly suggests that the *Chevron* rule moves us from category two to category three. He has defended this movement by pointing to the fact that the courts have not struck down even broad grants of authority by Congress on nondelegation grounds.[190] To

184. Id. at 512. See also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (arguing that courts should not suhstitute their reasoning in matters of pure statutory construction); *National Labor Relations Bd. v. Food & Commercial Workers*, 484 U.S. 112, 133-34 (1988) (Scalia, J., joined by Rehnquist, C.J., along with White and O'Connor, JJ., concurring).

185. See, for example, Scalia, 1989 Duke L. J. at 515 (cited in note 183).

186. See, for example, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L. J. 269, 277-78, 283, 285 (1988).

187. Scalia, 1989 Duke L. J. at 515-16 (cited in note 183).

188. See, for example, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 476-99 (1989).

189. Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 25-27 (1983).

190. Scalia, 1989 Duke L. J. at 516 (cited in note 183).

Justice Scalia, this trend reinforces the presumption that Congress intends—as a general matter—to delegate interpretive along with substantive authority to the President.[191]

I suggest that the nondelegation doctrine's concern over the retrieval of delegated power cuts the other way, such that the first and second approaches are preferable to the third. That is, precisely because we uphold delegations of broad authority that skirt, if not cross, the elusive execution/lawmaking line, we ought to be worried about the ability of Congress to retrieve the broad authority. And there are fewer retrieval problems if courts rather than executive agencies decide the scope of executive authority. This is so because agencies are prone to overread the delegation of authority by Congress to them, sometimes to include powers that we might fear constitute lawmaking. If courts are bound to uphold such constructions so long as they are not unreasonable, a simple majority of each House of Congress may be unable to reclaim the broad lawmaking authority, and a delegation problem results.

Put another way, if we are worried about Congress's ability to reclaim delegated authority, we should not create a presumption by which a simple majority of each House may be unable to retrieve power that has been aggressively defined by an Executive Branch that enjoys exercising the power and resists efforts to reclaim it. To paraphrase and build upon Cass Sunstein's metaphor, it is bad enough to give the fox a key to the henhouse;[192] it is worse still to give the fox a key when he has a large say as to whether the locks get changed.

If the ordinary rule is that courts decide the meaning of federal statutes (in the absence of explicit or implicit evidence that Congress intended to delegate interpretive authority to the executive), and the courts *underread* the scope of substantive power to federal agencies, then Congress and the President can quickly and cheaply correct the error.[193] Thus, the error costs created by a *Chevron*-type rule (which include the possibility of unretrievable delegations of legislative authority) are greater than those of a converse approach.

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191. Id. at 516-17.

192. In remarks at a panel discussion held on October 10, 1986, Cass Sunstein criticized *Chevron* deference with the pithy phrase, "foxes shouldn't guard henhouses." See Farina, 89 Colum. L. Rev. at 498 (cited in note 188).

193. It is, of course, possible that federal courts will *overread* federal executive authority, raising the same retrieval and delegation problems discussed above. But courts are not as likely to do this as are agencies. Indeed, courts are likely to maximize their own authority by systematically underreading the scope of executive authority.

Of course, *Chevron* is only a default rule; as Justice Scalia recognizes, it could be "overruled" by Congress.[194] Because of the veto threat, however, such overruling is unlikely. Thus, the default rule is, as those all along the spectrum concede, terribly important.

Consider, for example, *Rust* v. *Sullivan*[195]—the infamous abortion gag order case. Twenty years after a law is passed, the President rewrites the regulations under it, asserting broad powers to deny federal funding to institutions that engage in abortion counseling or referral—powers that the initial legislation and the current Congress arguably did not intend to create.[196] If there were no *Chevron* rule to apply, and the Court underread federal executive power in a way that frustrated the desire of Congress, such a mistake would be easy enough for Congress and the President to fix. Under *Chevron*, however, the President predictably read his power expansively to perhaps cross over into the lawmaking realm, and since his reading was not patently "unreasonable," the Court deferred.[197] And because of the President's veto power, he may continue to make federal law in this sensitive area as long as he can hold the support of one-third of one House. This possibility raises nondelegation concerns.

Although it does not involve *Chevron* deference, *INS v. Chadha*[198]—the legislative veto case—is also instructive on some of these important separation of powers issues. At a most basic level, the invocation of the legislative veto is itself a recognition by Congress that delegated power may not be easy to retrieve. Not all defensive tactics, of course, are constitutional. On the merits of the constitutional question presented, the Court correctly held that bicameralism and presentment are required before Congress can act to make law.[199] In holding that the unconstitutional legislative veto could be severed from the statute granting the INS authority, however, the *Chadha* Court goofed.[200] Given the concern expressed by Congress about rec-

194. Scalia, 1989 Duke L. J. at 515-16 (cited in note 183).

195. 500 U.S. 173 (1991). The precise issue in *Rust* was whether Title X of the Public Health Service Act, which prohibited the use of federal funds granted under Title X in programs "where abortion is a method of family planning," gave the executive branch the authority to promulgate regulations forbidding any Title X fund recipient from engaging in any abortion counseling, referral or advocacy. Id. at 178.

196. See id. at 222 (Stevens, J., dissenting) ("The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary.") (citation omitted).

197. Id. at 184-87.

198. 462 U.S. 919 (1983).

199. Id. at 957-58.

200. The statutory "severability clause," which required that any unconstitutional "provision" in the Immigration and Nationality Act be severed from the rest of the law, was not

lamation, why would we believe that Congress intended to confer the authority without the (now unconstitutional) string? It is one thing to deny Congress the weapon it has chosen; it is another to deny that Congress is worried about its opponent. Moreover, if the Court turns out to be wrong in holding the veto severable, a majority of each House cannot reclaim what it has given, unless it can override a presidential veto. On the other hand, if the Court erred in the other direction, then Congress could have fixed any mistake more easily.

As was true with the *Chevron* doctrine, the severability presumptions and analyses serve only as background defanlt rules for interpreting many federal statutes. But as was also true of *Chevron*, such default rules often involve high stakes. If the INS's authority in *Chadha* did not seem earth shattering, ponder for a moment the legislative veto provisions (which are presumptively severable under the *Chadha* analysis) in the War Powers Resolution.[201]

V. THE SEVENTEENTH AMENDMENT AND THE SUPREME COURT

Many people view the Supreme Court as the most important, if not the only, governmental institution involved in constitutional interpretation and societal value pronouncement. As to constitutional interpretation, some point to the Court's own broad dicta in *Cooper v. Aaron*[202] to argue that the Court is the only institution whose constitutional judgment matters.[203] On this view, the Constitution is exactly—no more than, no less than—what the Court says it is. The Court is thus the "ultimate and supreme" interpreter of the Constitution, and other governmental actors are bound to its interpretation.[204] As to societal value pronouncement, some scholars and observers, often associated with Alexander Bickel, view the Court as a policymaking institution whose job is to guard and pronounce

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self-defining. As Justice Rehnquist's dissent suggests, the clause required the Court to determine the meaning of "provision," which in turn required the Court to decide whether Congress would have granted the I.N.S. authority but for the legislative veto. See *Chadha*, 462 U.S. at 1014 (Rehnquist, J., dissenting) ("[T]he determination, in the end, is reached by asking [w]hat was the intent of the lawmakers, . . . and will rarely turn on the presence or absence of [a severability] clause.") (internal quotation marks and citations omitted).

201. 50 U.S.C. §§ 1541-48 (1994 ed.).

202. 358 U.S. 1 (1958).

203. Id. at 18-20.

204. See also *Powell v. McCormack*, 395 U.S. 486, 521 (1969) (finding that the Supreme Court is the "ultimate interpreter of the Constitution"); *United States v. Nixon*, 418 U.S. 683, 705 (1974) (affirming that it is the Court's duty "to say what the law is").

enduring societal values.[205] The Court's mission, on this view, is to search for long-term societal interests and principles—to lead, to elevate, and to instruct society.[206]

The two schools, then, are not incompatible;[207] proponents of the first define how others must react to Court decisions, while those who adhere to the second seek to give the Court guidance in making the decisions themselves. Both schools, however, obscure and trivialize the central roles the Senate was intended to play in these areas. In this Part, I set out the vision the Framers had for the Senate, and then discuss the extent to which the Seventeenth Amendment may justify a departure from the vision. In the end, although the Seventeenth Amendment (and other changes) may justify rethinking the Senate's role, they do not clearly support a shift in authority from the Senate to the Court as the Bickel school might argue.[208]

Take first the Senate's intended role in interpreting the Constitution. To see this role clearly, consider four core constitutional processes: legislation, impeachment, appointment, and amendment. Each process requires more than one federal governmental body to interpret the Constitution and arrive at a consensus. In each process, the Constitution prefers the status quo if any one of the involved governmental bodies thinks the proposed action unconstitutional. For example, we may say that in federal legislation, all four federal bodies—the House, the Senate, the President and the federal judiciary—must agree a law is constitutional before it is enacted and effectively applied.[209] Each of the four branches has a constitutional

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205. Bickel, *The Least Dangerous Branch* at 24-28 (cited in note 14).

206. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L. J. 1567, 1580-81 (1985). This general view of the Court anchors all of Bickel's more specific observations. Id. at 1575.

207. Professor Bickel, himself, subscribed to both. See Bickel, *The Least Dangerous Branch* at 264 (cited in note 14). See also Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 25 n.155 (1964) ("[Bickel] confuses Marshall's assertion of judicial authority to interpret the Constitution with judicial exclusiveness."); Paul Brest, *Constitutional Citizenship*, 34 Clev. St. L. Rev. 175, 180 (1986) ("[T]he Constitution does not appear to assign a privileged, let alone an exclusive, role to the judiciary."); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 63 (1986) ("[N]othing in *Marbury* implies that *only* the courts can interpret the Constitution.").

208. Much of my analysis in this Section builds on my Student Note, cited in full at note 16.

209. While the President's agreement may not seem to be required, in that his veto may be overridden by a two-thirds vote, the President does still retain the prosecuterial and pardon powers under the Constitution.

This model also assumes that all constitutional questions must be able to be raised in an Article III court. The plain words of Article III itself, tbat "the judicial power shall extend te all Cases . . . arising under this Constitution," would seem to compel such a result. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 246-52 (1985); William Winslow Crosskey, 1 *Politics and the Constitution in*

veto. In impeachment proceedings, only the House and Senate are called upon to interpret the Constitution—this time, the "high crimes and misdemeanors" clause.[210] In appointment, the President and the Senate are to exercise constitutional judgment before an appointment is given effect. Finally, in amendment, the House and Senate are to exercise independent constitutional interpretation of a sort. From this glimpse of the structure and processes of the Constitution, an interesting pattern emerges. The federal judiciary interprets the Constitution in only one, the President in two, the House in three, and the Senate in all four[211] of these constitutional processes.[212]

A reexamination of the Senate's role in these processes also reveals the special policy functions it was intended to perform. The Senate was designed to be a select deliberative body whose unique job was to protect the People from policy and value preferences that would be unwise in the long-term. To explore all this more fully, the

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the History of the United States 610-20 (U. of Chicago, 1953); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rov. 741, 749-50 (1984). If, however, as many scholars believe, Congress can constitutionally remove jurisdiction from all Article III courts in some constitutional cases, see, for example, Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rov. 157, 173 (1960); Martin H. Redish and Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rov. 45, 108-09 (1975), the role of the Senate vis-à-vis the federal judiciary in constitutional interpretation is even more important.

210. U.S. Const., Art. II, § 4.

211. I do not mean to suggest that this 4-3-2-1 model necessarily represents the *only* way to look at the Constitution and the processes it sets up, but rather that it is *one very useful* way. There may be other processes which, at times, require substantive constitutional interpretation by more than one federal body. Two possible examples are treaties and executive orders. In any event, the general point remains: The Constitution's structure makes clear the Senato's centrality in constitutional interpretation.

212. This 4-3-2-1 model does not mean that there is nothing federal courts can do (in the realm of constitutional interpretation) that the Senate cannot. Indeed, federal courts, particularly the Supreme Court, have the power to review the constitutionality of state legislation. It is true that Congress, with the President's consent or with two-thirds support, can displace a large percentage of state legislation by enacting preempting federal laws. See Amar, 65 B.U. L. Rev. at 223 n.68 (cited in note 209). Nevertheless, the Senate's ability to oversee state legislation seems constrained. Besides this review of state legislation, there are three related reasons why people commonly think of the Court (or federal courts in general) as the single most important guardian of the Constitution.

First, other actors don't always perform their duties of constitutional interpretation. Second, even if and when they do, this performance might be invisible to outsiders; judicial review is easier to observe. Third, the Court's role necessarily appears more *active*, since its decision to strike down a law normally occurs against a backdrop of the law's legitimacy. The Court is usually ontologically the "ultimate" interpreter in that it is chronologically the "ultimate," even though technically it can do no more than each of the other branches, except with respect to state laws.

Thus, I am suggesting not that federal courts are unimportant interpreters of the Constitution, but rather that they are not the only ones.

following Sections discuss the Senate's function in each of the above-mentioned constitutional processes in detail.

A. The Senate's Role in Constitutional Interpretation and Value Pronouncement

1. Impeachment

In impeachment, the Senate performs a narrow kind of constitutional interpretation. The Senate is called upon to give meaning to a particular clause of Article I, the "high crimes and misdemeanors" clause.[213] To be sure, the Senate has a great deal of latitude in performing this difficult interpretation. What is important to note here is that however the Senate interprets the clause, its interpretation is final and unreviewable by the courts.[214]

Why is this constitutional interpretation "committed to the Senate" whereas other kinds—such as the constitutionality of legislation—are not? Professor Scharpf provides a convincing textual answer, arguing that the judicial nature of the clause that gives the Senate the "sole power to try" all impeachments effectively ousts other "courts" of jurisdiction to review the Senate.[215] This notion of

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213. U.S. Const., Art. II, § 4.

214. While the guilt or innocence of the impeached is clearly not reviewable, as this might prejudice the outcome of any post-impeachment criminal trial, some have urged that the Court (or courts) have the power to second-guess the House and Senate's definition of "high crimes and misdemeanors." See, for example, Raoul Berger, *Impeachment: The Constitutional Problems* 103-21 (Harvard U., 1973) (arguing that since "high crimes and misdemeanors" has discernible meaning, the Court can oversee the Senate's determination). However, Berger's analysis confuses the issue of whether there are standards with that of who should apply them.

Professor Black contends that the ability of Congress te manipulate the jurisdiction of federal courts will avoid what he considers to be an undesirable review. Charles L. Black, *Impeachment: A Handbook* 58-63 (Yale U., 1974). This, however, ignores the body of literature that suggests—based upon a straightforward reading of Article III—that it is unconstitutional to deny access te *all federal courts in constitutional* cases. See Clinton, 132 U. Pa. L. Rev. at 749-50 (cited in note 209) ("The extent of federal jurisdiction was precisely spelled out in Article III and nowhere left to congressional curtailment."). See also Amar, 65 B.U. L. Rev. at 246-52 (cited in note 209). Moreover, Black's solution fails to explain why *state courts* could not entertain suits for mandamus, if federal courts were closed.

215. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L. J. 517, 540 (1966) ("It may . . . be reasonable to construe the express constitutional authorization of Congress to decide [impeachment] disputes as an equally explicit exception to the general grant of judicial power to the courts in Article III. But this rationale is unavailable . . . where the Court . . . is presented with a challenge to the validity of a *legislative* or *executive* decision.").

The leading case in this area, *Powell v. McCormack*, 395 U.S. 486 (1969), is consistent with this "res judicata" theory of impeachment. In *Powell*, the Court refused to allow the House of Representatives te deny Adam Clayton Powell a seat. Id. at 550. But Article I, § 5, cl. 1—the

the Senate as a "final interpreter" in impeachment is supported by debates at the Convention, by Joseph Story's *Commentaries*, and especially by Alexander Hamilton's writings in Federalist No. 65.[216]

2. Legislation

The constitutional interpretation the Senate performs in the legislative realm is broader in that each Senator must interpret the entire Constitution—rather than one clause—and compare it with the proposed legislation. In this sense, the Senate is performing the equivalent of judicial review.[217]

The Convention and ratification records make perfectly clear that the Senate was intended to act as a check against unconstitutional legislation.[218] Indeed, this checking function was the primary

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clause that gives the House the power to "judge" the qualifications of its members—refers back to Article I, § 2, cl. 2, which specifies only age, residence, and citizenship as "qualifications" for membership. The House did not purport to refuse to seat Representative Powell because of his age, residence, or citizenship. If the Senate, in impeachment, has decided that an officer has committed "treason, bribery, or other high crimes and misdemeanors," it is acting within its constitutional powers. The holding of *Powell* would not support judicial review of the Senate's definition. Compare *Nixon v. United States*, 506 U.S. 224, 226 (1993) (holding that challenge to the Senate's rules of procedure and evidence in impeachment is not justiciable).

216. Justice Story argues that impeachment trials were moved from the jurisdiction of the Court, where they resided in early drafts, to the Senate because the Framers wanted a body that would appreciate the seriousness of various political crimes, and a body that would not owe anything to the accused (as the Court might if it were impeaching the President who appointed members to it). See Joseph Story, 2 *Commentaries on the Constitution of the United States* 220 (Hilliard, Gray, 1833).

Hamilten suggests two other reasons. First, he argues that a decision of this magnitude should be made by a group of many, rather than few, to reduce the likelihood of an erroneous result. Federalist No. 65 (Hamilten), in Clinton Ressiter, ed., *The Federalist Papers* 398 (Mentor, 1965). Second, and more important, the need for reconciling an acquittal to the People, after the House (the most representative body) has voted for the articles of impeachment, dictates that the decision be made by a group that is in some sense politically accountable to the People.

For those who see impeachment as an exclusively political remedy, any judicial involvement will be problematic. There are plausible reasons for viewing impeachment in this way: "[I]mpeachment is not a criminal prosecution; removal from office is not a penalty.... What is at stake, on both sides [of the trial] is the welfare of a nation.... [I]t is the welfare of the Republic that is the subject, not the welfare of [the official].... Impeachment and removal, rather, are a unique political mechanism, created by our Constitution, a proceeding *sui generis*." Charles Rembar, *How Much Due Process is Due a President*, N.Y. Times Magazine 22, 22-24 (July 21, 1974), reprinted in 120 Cong. Rec. 24,716 (July 23, 1974).

217. Indeed, given that a court's ability to review constitutionality is constrained by the Article III case or controversy doctrine, as well as mootness and ripeness considerations, the Senate's review is in some sense broader.

218. See Eugene W. Hicock, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 Ga. L. Rev. 217, 257 (1986) (discussing James Madison's argument in Federalist No. 62 that the Senate would be "an additional impediment against improper acts of legislation"). This is not to say that the Senate always does a diligent job. Indeed, even early Senates appear to have ignored clear text in seating three Senaters who were well under thirty

reason the Senate was created. At the Convention, the delegates agreed that "[i]f the legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself.... In a single house there is no check...."[219] Besides this check against general unconstitutional usurpation by the House, the Senate was to guard especially against federal encroachments on the *rights* of States: "[T]he equal vote in the Senate was given to secure the *rights* of the states."[220]

In addition to these constitutional judgments, the Senate was intended to perform a very special policy function in legislation. First, the *interests* of States—as distinct from their rights—were to be considered. Even Alexander Hamilton, the ardent nationalist, conceded that "[i]t is proper that the influence of the states should prevail [in the Senate] to a certain extent."[221] These interests were not to dominate, however.

In guaranteeing that legislation serve the public interest, the Senate was to act as a check against specific tendencies inherent in democratic government, the most threatening of which was instability. The Senate was to remedy this problem in order (1) to produce a sense of national character, (2) to gain respect from foreign countries, and (3) to introduce predictability into government to prevent cunning individuals from using the political system for personal gain.[222]

In addition to these reasons for wanting stability, the Framers continually expressed a general concern over the capricious nature of public opinion. The Senate was intended to act as a check against democracy to prevent legislation that everyone would soon realize to

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years old when elected. See Vikram David Amar, *Underage Senators* (unpublished manuscript on file with the Author).

219. Max Farrand, ed., 1 *Records of the Federal Constitutional Convention of 1787* at 254 (Yale U., 1911) (statement of James Wilson). Madison confirms this notion: "[A] senate, as a second branch... distinct [and independent] from and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation...." Federalist No. 62 (Madison), in Rossiter, ed., *The Federalist Papers* at 378-79 (cited in note 18).

220. Jonathan Elliot, 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 319 (Franklin, 1896) (emphasis added and omitted) (remarks of Alexander Hamilton at the New York ratifying convention).

221. Id. (remarks of Alexander Hamilton). As Joseph Story put it: "The equal vote allowed in the senate is,... at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist, as improper) a consolidation of the states into one simple republic...." Story, 2 *Commentaries on the Constitution* at 179 (cited in note 216).

222. See Federalist No. 62 (Madison), in Rossiter, ed., *The Federalist Papers* at 376 (cited in note 18).

be unwise.[223] Perhaps more importantly, the Senate was to become expert at the principles of government and legislation so that it could anticipate the subtle effects—*effects the masses could never appreciate*—of legislation on larger governmental and societal ends and values.[224]

Given these specific duties of constitutional interpretation and value protection in legislation, the structural differences between the House and Senate take on new meaning. As Justice Story observed in his *Commentaries*, the senatorial check on unconstitutional legislation coming from the House would not have been nearly as effective had the two bodies been similarly constituted:

> If each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative; the visions and speculations of the brain, and not the waking thoughts of statesmen, or patriots. It may be safely asserted, that for all the purposes of liberty, and security, of stable laws, and of solid institutions, of personal rights, and of the protection of property, a single branch is quite as good, as two, if their composition is the same, and their spirits and impulses the same.[225]

The internal structure of the Senate was designed to enable the upper house to perform both its constitutional interpretation and value pronouncement functions more effectively. Smaller size was intended to make senatorial proceedings less cumbersome and more deliberative. Longer tenure was provided for two reasons. First, it would enable individual Senators to check unwise or unconstitutional legislation (against the popular will) and still be vindicated by reelection time.[226] Second, it would enable Senators to become wise to the principles of government and expert at anticipating the effects of governmental actions on larger societal interests and norms.

Even more important than longer tenure was rotation of terms; it is this structural oddity that allows the *Senate as an institution* (as contrasted with individual Senators) *to effectively guard societal values*. Without continuity, the institution of the Senate would be

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223. See id.; Federalist No. 63 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 382 (Mentor, 1961). See also Elliot, 2 *The Debates of the Several State Conventions* at 317 (cited in note 220) (remarks of Alexander Hamilton).

224. See notes 244-45 and accompanying text.

225. Story, 2 *Commentaries on the Constitution* at 179 (citod in note 216).

226. See id. at 193 ("If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon tbe merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation.").

ill-fitted for this job.[227] Moreover, staggered terms were intended to allow more senior Senators to teach younger Senators how to perform their duties effectively.

The higher age requirement was intended to insure that Senators would be wiser and more experienced than House members.[228] Finally, the unusual qualities of the Senate that were stressed in the rhetoric of ratification campaign—"system," "permanence," "wisdom," "energy," "learning," and "ability"—all comport well with the special functions and duties the Framers expected of the upper house.[229]

3. Appointment

The constitutional judgment the Senate is called upon to make in the appointment procedure is broader than in either impeachment or legislation. Here each Senator must not only consider his own substantive visions of constitutional provisions, he must also consider and compare those of the nominees in order to decide, as Professor Laurence Tribe has put the point in the context of judicial appointments, whether or not the nominee's conduct would be likely to move constitutional interpretation in a direction that the Senator thinks is dangerous to the nation's constitutional welfare.[230]

Despite recent controversy, text, structure, and history all indicate that the Senate was intended to perform some substantive interpretation in appointment. As Professor Tribe points out, "the Senatorial role of advice and consent is not to be read out of the Constitution . . . , [as a logical textual matter] an advisor is entitled to take into account all the same considerations as the advisee."[231]

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227. See note 246 and accompanying text, for a discussion of Bickel's emphasis on continuity. See also Bickel, *The Least Dangerous Branch* at 31-32 (cited in note 14) ("The Court is seen as a continuum. It is never, like other institutions, renewed at a single stroke. . . . [The symbolic function of the Court depends upon] the total impression of continuity personified.").

228. See, for example, Julian P. Boyd, ed., 1 *The Papers of Thomas Jefferson* (Princeton U., 1950). While wisdom is difficult to measure objectively, the Senators of the First Congress, were, by all accounts, more experienced than their House counterparts. All but one or two of the ninety-four Senaters who served from 1789-1801 had either participated in the Revolution itself, Congress under the Articles, Stato constitutional conventions, or the framing and ratification process. Moreover, while age thirty is only five years older than age twenty-five, most Convention delegates appear to have anticipated that Senators would generally be far older than the prescribed minimum. The Senators of the 100th Congress were also more "experienced" than their House counterparts. The Senators were older, more educated, and had more legal training than the Representatives. *Congress: The First and the 100th*, N.Y. Times A14 (Jan. 5, 1987).

229. See Gordon Wood, *The Creation of the American Republic, 1776-1787* at 557 (U. of North Carolina, 1969).

230. Tribe, *God Save This Honorable Court* at 93-94 (cited in note 48).

231. Id. at 9.

Indeed, the early drafts in Philadelphia placed the entire appointment power in the Senate, in recognition of this body's deliberative nature.[232] Moreover, an active role was taken by the Senate in the nineteenth century. The "rubber stamp" is a recent phenomenon.[233]

Even those who disagree with Professor Tribe generally acknowledge that Senators are to inquire into the substantive constitutional views of nominees. Some have argued, however, that since the acceptable range of constitutional methodologies is broad, Senators should not be too quick to exclude many constitutional viewpoints. But the only person capable of defining "acceptable constitutional methodology" is the individual Senator.[234] By the terms of the Constitution, he is to ask this question of constitutional conscience.[235]

4. Amendment

The constitutional judgment the Senate performs in amendment is in some sense the broadest. Here the Senator not only decides what our Constitution means, he must also decide what a good Constitution should mean. Policy judgment and constitutional judgment merge. While, by the terms of Article V, the States may force a

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232. See, for example, Farrand, 1 *Records of the Federal Constitutional Convention* at 233 (cited in note 219) (remarks of James Madison).

233. See Tribe, *God Save This Honorable Court* at 77, 90 (cited in note 48).

234. Chief Justice Rehnquist made essentially this point in his confirmation hearings. See *Excerpts from Questioning of Rehnquist in Senate Committee*, N.Y. Times A8 (Aug. 1, 1986). Some, see, for example, Richard D. Friedman, Book Review, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 Yale L. J. 1283, 1317 (1986), have attacked Professor Tribe's position by arguing that too much ideological scrutiny by the Senate may make a Court less likely to issue unpopular decisions in the future and is therefore not costless. Three things need to be noted with respect to this argument. First, even Richard Friedman acknowledges some substantive inquiry. Id. at 1318. Second, the insulation of Article III judges provided by the Constitution allows Justices to vote freely, even if their unpopular decisions are publicized in confirmation hearings. Third, Richard Friedman neglects a cost of too little senatorial screening—the cost associated with the Senate not developing and implementing its vision of the Constitution, the cost of not being true to the constitutional framework itself. For a superb discussion of this general issue, see Paulsen, 105 Yale L. J. at 562-70 (cited in note 48).

235. As I have noted previously:

> It is interesting that the debate continues to rage over the appropriato level of generality at which Senators should evaluate the substantive constitutional ideas of a nominee. Some have suggested that only inquiries into *general* constitutional methodologies are appropriate; predictions about hypothetical (or not so hypothetical) cases are improper. This distinction is both unworkable and incoherent. The relevant distinction is properly between a *prediction* (even a specific one), which a Senator is justified in trying to obtain to evaluate the nominee, and a *promise* te vote a certain way, which would compromise the independence of the federal judiciary.

Amar, 97 Yale L. J. at 1122 n.60 (cited in note 16). See also Paulsen, 105 Yale L. J. at 573 (cited in note 48).

convention of the People when Congress declines to pass an amendment,[236] the Framers clearly recognized that Congress's role could make a difference. Delegate Mason, for example, insisted on inserting the Convention language into Article V so that Congress would have no choice but to act when two-thirds of the States petitioned.[237] Even with this mechanism, many Framers recognized amendment without congressional agreement to be a difficult procedure.[238] As an historical matter, none of the twenty-seven amendments was ratified without Congress approving it and sending it on to the States. Indeed, Congress has often exercised its constitutional judgment (in spite of pressure) in refusing to send amendments to the States when less than two-thirds of the States petitioned. The proposed pro-slavery amendments during the 1850s are early examples; the balanced budget amendment proposal of the 1970s is a recent one. In any event, it is clear that Congress's judgment—including that of the Senate—makes a difference in amendment.[239]

The centrality of the Senate in all of these processes was not lost upon those who opposed ratification. A major objection to the new Constitution was that the Senate was *too* central, that it had *too much* power. As Cincinnatus, one outspoken antifederalist, put it: "I come now . . . to the most exceptionable part of the Constitution—the Senate. . . . [T]he same body, called the Senate, is vested with legislative, executive and judicial powers."[240] Because the antifederalists did not desire such a powerful role for the Senate, they also did not see the need for the structural characteristics of the Senate that the federalists felt would enable it to execute its functions better. The antifederalists wanted less insulation,[241] and less continuity[242] in the Senate. Thus, there existed an almost perfect symmetry in view-

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236. Article V provides for a convention to be formed "on the Application of the Legislatures of two thirds of the several States." U.S. Const., Art. V.

237. Farrand, 3 *Records of the Federal Constitutional Convention* at 367-68 (cited in note 219) (remarks of George Mason).

238. Farrand, 2 *Records of the Federal Constitutional Convention* at 629 (cited in note 219) (remarks of George Mason).

239. Indeed, given the fact that courts today invariably look to "legislative history," the Senator's job in amendment is more important now than ever, as she can influence future interpretation of the amendment with remarks about its scope and purpose.

240. Antifederalist No. 64 (Cincinnatus), in Morton Borden, ed., *The Antifederalist Papers* 188, 188-89 (Michigan State U., 1965).

241. The antifederalists wanted to do this in two ways. First, they wanted a shorter term; second, they wanted state legislatures to be able to recall Senators. See Antifederalist No. 65 (Cincinnatus), in Morten Borden, ed., *The Antifederalist Papers* 191, 192-93 (Michigan State U., 1965).

242. Antifederalists favored limiting Senators to one term, thereby reducing senaterial continuity. Id. at 193.

points. The federalists, who won, wanted a powerful, deliberative, energetic upper branch, while the antifederalists wanted merely another representative body.

B. The Bickel Thesis Revisited

From this historical description, some implications follow, not just for the Senate, but also for other federal institutions. To begin with, a recognition by the Supreme Court that other bodies do and should interpret the Constitution may lead the Court to be more receptive to arguments that certain constitutional questions, like impeachment, are committed to other branches. Much more importantly for present purposes, followers of the Bickel school are forced to reexamine their premises. In his classic *Least Dangerous Branch*, Professor Bickel searches for, and finds, a justification for judicial review:

> The point of departure is a truism; perhaps it even rises to the unassailability of a platitude. It is that many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government . . . should be the pronouncer and guardian of such values. . . .
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> Initially, great reliance for principled decision was placed in the Senators and the President, who have more extended terms of office and were meant to be elected only indirectly. Yet the Senate and the President were conceived of as less closely tied te, not as divorced from, electoral responsibility and the political marketplace. And so even then the need might have been felt for an institution [the Court] which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle.[243]

Compare this passage with James Madison's writings in Federalist No. 63,[244] which explicate the Framers' vision of the Senate that I described above:

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243. Bickel, *The Least Dangerous Branch* at 24, 25 (cited in note 14).

244. Federalist No. 63 (Madison), in Rossiter, ed., *The Federalist Papers* at 383-85 (cited in note 223).

> The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident that an assembly elected for so short a term [the House] as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years. . . .
>
> The proper remedy for this defect must be an additional body in the *legislative* department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.[245]

The parallelism is striking. It is clear that Alexander Bickel and James Madison assign similar functions to different bodies. Moreover, the structural characteristics that Alexander Bickel uses to justify his decision—that is, insulation and continuity[246]—apply to the Senate as well, in some sense with more force. While the Court is more insulated, it is at least arguable that too much insulation is bad; it divorces the governmental body from the people who have to abide by the values being pronounced. Indeed, as we saw in the value-laden interpretation in impeachment (and to some extent, appointment), the Framers decided against complete insulation.

Similarly, while the Court historically may appear to be the most continuous body, the Senate is the only institution that cannot—short of amendment—"turn over" at one time. The President does, the House conceivably could, and the Court effectively could as well, if the political branches "packed it" (as F.D.R. tried to do) to render the votes of the current Justices all but meaningless. There is absolutely no constitutional guarantee that the Court's decisions have continuity if the political branches don't acquiesce.[247]

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245. Id. at 383-84 (emphasis added).

246. For Bickel's reliance on these two structural principles, see Bickel, *The Least Dangerous Branch* at 26, 31, 32 (cited in note 14).

247. Bickel also emphasizes the "leisure," "training," and "learning" that judges have that makes them good guardians for society's values. It is interesting te note that those qualities are remarkably similar te those that the ratifying conventions used to describe Senators. Id. at 25-27.

C. The Arguable Impact of Direct Election

Even if Professor Bickel's premise is ahistorical, we must also ask whether his result is wrong. Professor Sunstein has argued that the democratization of the Senate (through the Seventeenth Amendment) and the President—coupled with technological changes that make it easier for private interest groups to monitor and exert influence upon legislators—have prevented the political branches from virtuously performing their deliberative roles as James Madison envisioned they would.[248] Given this, Professor Sunstein says, it is not unexpected or wrong that the Court should accept a more active role, perhaps assuming some of the functions of other governmental bodies.[249]

A few points need to be made about this argument.[250] First, my goal here is not to answer definitively whether the Seventeenth

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248. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 79 (1985).

249. Id. It must be noted that Professor Sunstein, and others who urge the Court to take an active role in this regard, are trying te use the Court to make the legislative bodies more deliberative. They, unlike Professor Bickel, do not advocato the Court supplanting *considered public-regarding legislative decisions* that happen to conflict with the Court's sense of what is good for society in the long run. Nevertheless, the observation Professor Sunstein makes regarding histerical developments could be employed to justify a Bickelian usurpation of the senaterial role.

250. There is one other way to reconcile Professor Bickel's message regarding the Court's mission with the text, structure, and history of the Constitution. Since the ability of the Senate to oversee the wisdom of state legislation is somewhat constrained, a Bickelian role for the Court—that is, preserving societal (though not necessarily constitutional in the narrow sense) values—seems more appropriate when the Court is reviewing state legislation. The separation of powers concern that is implicated when the Court usurps senatorial functions does not come inte the picture.

If we were to modify Professor Bickel's remarks this way (limiting their scope to review of state legislation), the resulting conception of federal courts is more historically defensible. Although many people today believe that States were not viewed as threatening in 1789, this is plainly not true. James Madison, in particular, was very wary of the damage States could inflict by legislation, and sought repeatedly to provide the legislature of the federal government a power "to negative all laws passed by the several states . . . contravening the [Constitution]." Farrand, 1 *Records of the Federal Constitutional Convention* at 21 (cited in note 219) (remarks of James Madison).

In a sense, then, the Bickelian argument can be read as giving to the federal government (through the federal courts) a power that James Madison wanted to give to the political branches all along. This way of reading Professor Bickel, however, is not without its problems. We must remember that all of James Madison's proposals in this regard were ultimately rejected by the Convention. Instead, the only review of state legislation was that provided by the federal courts, and there is no indication that this review was intended to be extra-constitutional in the Bickelian sense. It is quite possible the Framers did not want a federal body reviewing the wisdom of all state legislation. While it is true that the Thirteenth, Fourteenth, and (to some extent) Seventeenth Amendments all reflect a changing attitude regarding States vis-à-vis the federal government, there is nothing to suggest that these amendments were intended to give to the Court what James Madison could not give to

Amendment justifies Professor Sunstein's approach. Instead, the point I am trying to make is that to the extent that Professor Sunstein's approach is historically and structurally justifiable, it depends in some substantial part upon a change worked by direct election. And how good a case for Professor Sunstein can be made? A few tentative observations are in order.

It is certainly true that the special role the Constitution assigns the Senate was initially justified, in part, by reference to the "select appointment" mode represented by indirect election. Indeed, we trust federal courts today with important constitutional adjudication not just because of life tenure, but also because of the refined mode of their appointment: they come from the People's representatives, not the People directly.[251] In a sense, then, direct election makes the Senate less "court-like," if our model of courts is the federal judiciary.

Nonetheless, it is far from clear whether the Seventeenth Amendment by itself goes very far in justifying senatorial abdication or judicial usurpation of senatorial functions. Election by state legislatures was not justified in 1787 exclusively or even primarily as a way of getting better Senators. This is not to say that such arguments were not advanced in Philadelphia or in the ratification process. But as I suggested earlier,[252] these arguments were infrequent and secondary. Indeed, what is most startling about the election procedure of Senators is that its outcome was taken for granted by most. James Madison, in Federalist No. 62,[253] comments that it is "unnecessary to dilate on the appointment of Senators by the state legislatures."[254] As Max Farrand keenly observed, the method of

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Congress. Indeed, if the Fourteenth Amendment vindicated James Madison's vision in this regard, it did so with section five, which *enables Congress* to act. Although no one has ever suggested that section five enables Congress to invalidate state legislation directly, it would be an interesting argument.

Nevertheless, many people have argued that the Court should view federal and state legislation in different lights. See, for example, James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in James Bradley Thayer, *Legal Essays* 1 (Harvard U., 1927). Perhaps the Court is more deferential to acts of Congress. No federal law was struck down on free speech grounds, for example, until 1965. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965). Whether this "deference" was due to a recognition of the Senate's role in federal legislation (which is not guaranteed by the Constitution with respect to state laws) or something else, is unknowable.

251. See Paulsen, 105 Yale L. J. at 578-79 n.79 (cited in note 48) (contrasting the "one-step removed" political process for appointment of federal judges with a more directly democratic one used by many states).

252. See text accompanying notes 16-19

253. Federalist No. 62 (Madison), in Rossiter, ed., *The Federalist Papers* at 377 (cited in note 18).

254. Id.

election was tied to the "compromise" of equal suffrage and was never challenged because it was a political concession.[255]

More importantly, to the extent that election by state legislatures was intended to produce "better" men in the Senate, the Seventeenth Amendment reflected a reversal in this thinking.[256] The Progressives who pushed for direct election did so in large part because of the corruption they perceived in local and state governmental machines.[257] Notwithstanding this impetus for reform, however, the membership in the Senate remained very much the same after passage of the amendment.[258]

If the type of Senator did not change because of the amendment, we still must determine whether a Senator's outlook was altered. On the one hand, if state legislatures have a more coherent vision of a State's interests than the citizens do, direct election may make it easier for a Senator to consider the interests of the union, not just those of his State.[259] It is precisely for this reason that many Framers, especially James Wilson, favored direct election from the outset.[260] After all, the insulation of the longer term was retained. In addition, as discussed earlier, complete insulation was never the object. On the other hand, to the extent that state legislatures are more far-sighted than the populace, direct election may make it

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255. Farrand, *The Framing of the Constitution* at 111-12 (cited in note 16).

256. See, for example, Election of United States Senators, H.R. Rep. No. 52-368, 52d Cong., 1st Sess. 3 (1892) (Minority Report) (arguing that the ability of the people to govern without filtering has been "tried, tested and found not wanting"). See generally Brooks, 10 Harv. J. L. & Pub. Pol. at 200-05 (cited in noto 5) (documenting the progressives' rejection of the notion that indirect election produces better men).

257. See Leon Litwack, *The United States: A World Power* 476-77 (Prentice Hall 1976); Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 255 (Alfred A. Knopf, Inc., 1955) (discussing the Progressive belief that direct election of Senators and other political changes "would deprive machine government of the advantages it had in checkmating popular control"); William Allen White, *Changes in Democratic Government,* reprinted in David M. Kennedy, ed., *Progressivism: The Critical Issues* 19 (Little, Brown, 1971). See also Election of United States Senators, H.R. Rep. No. 57-125, 57th Cong., lst Sess. 4 (1902) (calling legislative election "one of the most potent powers through which corporate influence now holds its sway"); S. Rep. No. 530, 54th Cong., 1st. Sess. 6 (1896) (noting that direct election "tends to render impossible the use of improper methods to influence Senatorial elections").

It is somewhat ironic that in 1913, indirect election was viewed as a process that enabled corrupt state governments to taint Senators. In arguing for senatorial recall in 1787, New York antifederalists argued that without state legislative removability *Senators* would corrupt the state legislatures.

258. See James Q. Wilson, *American Government: Institutions and Policies* 265 (Heath, 1980).

259. See text accompanying notes 248-49. See also Brooks, 10 Harv. J. L. & Pub. Pol. at 201-10 (cited in note 5) (arguing that whatever voice statos' interests had in the Senate in 1787, after 1913 the States' interest were much more easily sacrificed to those of the union).

260. See note 161 and accompanying text.

harder for the Senate to "check the popular passion." That is, to the extent that election by state governments made it harder for citizens to monitor Senators, the ability of the Senate to perform its "checking" function is reduced by direct election.

These two offsetting effects, however, do not seem to warrant, by themselves, a radical reworking of the Senate's relationship to the Court. But an argument could be made, picking up on Professor Sunstein's observations, that direct election may exacerbate the already troubling problem of private interest group pressure. By requiring senatorial candidates to raise large amounts of money to campaign for many votes, the Seventeenth Amendment may facilitate private interest group access to the federal government. If direct election actually has this effect, it is a somewhat ironic outcome,[261] given that the Progressives of 1913 were reacting against the private interest group dominance in the state government.

Whether or not the interest group problem is worse because of direct election depends upon our vision of state governments and how resistant to interest group pressures they are. While much work has been done in the field of private interest group politics in the last twenty-five years, the empirical case is still evolving. Even if the empirical case proves strong, it is not clear why other solutions, less radical than senatorial abdication or judicial usurpation of senatorial functions, would not work better to alleviate the private interest group problem. For instance, a constitutional amendment limiting campaign expenditures, or limiting Senators to two eight-year terms, would appear to be more attractive. Here again, then, as with inter-branch rotation, term limits might offset the effect of the Seventeenth Amendment in heretofore unobserved ways.[262] Moreover, political scientists have argued that the special interest group problem can be diminished by strengthening the two-party system and its leadership.[263] Referring senatorial functions to less able (in the eyes of the

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261. Alexis de Tocqueville thought just the opposite was true:

> When the public is supreme, there is no man who does not feel the value of public good-will, or who does not endeavor to court it hy drawing to himself the esteem and affection of those amongst whom he is to live.... Under a free government, as most public offices are elective, the men whose elevated minds or aspiring hopes are too closely circumscribed in private life, constantly feel that they cannot do without the population which surrounds them. Men learn at such times to think of their fellow-men from ambitious motives, and they frequently find it, in a manner, their interest to be forgetful of self.

Democracy in America, in J. Mill, *Politics and Society* 186, 222-23 (G. Williams ed. 1976).

262. See note 51 and accompanying text.

263. See, for example, Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567, 1603-12 (1988) (discussing the political party approach to reforming the political process).

Framers at least) bodies might be no less of an "amendment." It is incumbent on those who would have the Senate abdicate its duties, or have the Court or the executive usurp them, to prove their case.[264] The Seventeenth Amendment may be a start, but surely much more of the story must be told.

VI. CONCLUSION

As I hope the preceding pages have shown, the Seventeenth Amendment has altered or shed light on important dynamics not just between state and federal governments, but also between organs *within* the federal government itself. Indeed, direct election speaks to the congressional/presidential relationship, the presidential/judicial relationship, and the congressional/judicial relationship. Nor is this complicated interplay between a provision seemingly about federalism on the one hand and separation of powers questions on the other anomalous. Indeed, I think we are just beginning to understand (or to remember) the myriad ways in which these two great structural themes of the Constitution connect to form an integrated whole.

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264. Indeed, this burden shifting argument is a powerful one. By pointing out that the Senate is not performing all the functions it was supposed to, and by pointing out that followers of Professor Bickel want the Court in some sense to usurp senaterial functions, this Article has done much. It is not clear that everyone, once informed of those two observations, will think political realities in the Senate have changed so much that we should ignore the Senate's intended role. Not everyone concedes that changing circumstances even matter. Furthermore, those who are willing to take changes over time into account may only consider these changes relevant to interpretation of substantive constitutional provisions, not the roles of various actors in constitutional processes. See, for example, Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 853-59 (1985) (noting that interpretivism is more worthwhile when examining issues of separation of powers). Moreover, it is not clear why alternatives, including those presented in this Article, are not a better solution to the interest group problem.