DEFERENCE, FEDERALISM, AND THE MYTH OF DEMOCRACY

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I. INTRODUCTION

The idea of democracy has played a central role in the development of modern constitutional jurisprudence and theory. Scholarship that focuses on the institution of judicial review often begins with the premise that the American political system is, or should be, fundamentally democratic. Commentators then proceed to discuss the appropriate role to be played by the federal courts in defining constitutional values in such a system.[1]

Appeals to the concept of democracy as an abstract normative value have a powerful emotive appeal in American political culture. However, judges and commentators who focus on democratic theory frequently do not content themselves with purely abstract appeals to the idea that government policy should be determined by majoritarian principles. In addition, they frequently contend that the concept of democracy is implicit in the structure of the Constitution itself. This perceived

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1. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

commitment to democracy is often the cornerstone of arguments against open-ended judicial activism.[2]

This article will argue that, despite the prominence of these arguments, a close examination reveals that a commitment to democratic theory does not provide an adequate justification for judicial deference in constitutional cases. After providing a brief overview of the role that democratic theory has played in the caselaw and the literature, the article will contend that the effort to link deference and democracy faces insuperable difficulties. The article will then argue that, at least in cases where the Supreme Court is asked to strike down the actions of state governments, the decision to defer is better understood to be a vindication of the high value that the Constitution places on state autonomy.[3]

II. THE CONSTITUTION AND THE CONCEPT OF DEMOCRACY

The appeal to the concept of democracy plays two quite different roles in constitutional discourse. In some contexts, democratic theory provides the foundation for a defense of judicial activism. Among the clearest examples of this phenomenon are the Warren Court decisions mandating that elected officials should generally be chosen in accord with the principle of one person, one vote and invalidating laws that limited access to the ballot.[4] These decisions are explicitly premised on the view that "[a]s long as ours is a representative form of government . . . the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[5] Adherents to this philosophy continue to press for an expansive judicial role in policing the electoral process.[6]

However, in contemporary analyses, the appeal to democratic theory is more often viewed as a counterweight to arguments for judicial activism. In the modern era, the focus on the so-called "countermajoritarian difficulty" can be traced to the work of Alexander

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2. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); SCALIA, *supra* note 1.

3. This argument has no bearing on the proper role of the federal judiciary in reviewing actions taken by Congress or the President. While a detailed analysis of this issue is beyond the scope of this article, arguments for deference clearly cannot be based on an appeal to federalism in such cases. Instead, judicial deference to federal legislative and executive action can only be based on the idea of separation of powers.

4. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

5. *Id.* at 562.

6. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 363-65 (2004) (Breyer, J., dissenting).

Bickel.[7] Bickel famously contended that "judicial review is a deviant institution in American democracy" because it allows an unelected judiciary to override the policy decisions of the legislatures, which, in turn, presumably reflect the will of the populace at large.[8] In the wake of Bickel's seminal work, commentators have generated a vast body of literature showing an almost obsessive concern with the problem of reconciling judicial review with democratic principles.[9] Much the same concern is often reflected in the rhetoric of judicial opinions as well.[10]

Judges and commentators frequently seek to link their appeals to democratic theory with the structure of the Constitution itself. In the words of Justice Stephen G. Breyer, they argue that the Constitution was designed "to create and to protect a . . . form of government that is in its principles, and structure and whole mass basically democratic."[11] Similarly, railing against the Court's decision to strike down a Texas statute forbidding sexual relations between two members of the same sex in *Lawrence v. Texas*, Justice Antonin Scalia asserted that "it is the premise of our system that [these] judgments are made by the people, and not imposed by a governing caste that knows best."[12]

The reliance on democratic theory as the rationale for judicial deference faces a variety of different problems. First, the Court typically defers in a significant number of cases where the challenged action was not a product of legislative decision-making. The decision in *Pruneyard Shopping Center v. Robins*[13] is a classic example. In *Pruneyard*, the California Supreme Court had held that the state constitution required the owner of a private shopping center to allow members of the public to use the grounds of the shopping center to solicit signatures on a political petition.[14] The owners of the shopping center challenged this decision in the United States Supreme Court, noting that the Court had refused to find an analogous right in the federal Constitution and contending that the decision of the California Supreme Court both violated their First Amendment rights and constituted a taking of their property without

7. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

8. *Id.*

9. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 603-04 (2003) (Scaila, J., dissenting).

10. For prominent examples of this literature, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-35 n.1 (1998).

11. *Vieth*, 541 U.S. at 356 (Breyer, J., dissenting) (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1789 595 (1969)).

12. *Lawrence*, 539 U.S. at 603-04 (Scalia, J., dissenting).

13. 447 U.S. 74 (1980).

14. Pruneyard Shopping Ctr. v. Robins, 592 P.2d 341, 347 (Cal. 1979).

compensation.[15] Applying a deferential standard of review,[16] the Supreme Court unanimously rejected the challenge.[17]

The Court's approach in cases such as *Pruneyard* cannot be justified by reference to the countermajoritarian difficulty. No legislative judgment was involved in the case; indeed, by premising its decision on the state constitution, the California Supreme Court had effectively deprived the state legislature of the authority to determine whether shopping center owners could prevent the use of the shopping center for the gathering of signatures.[18] Thus, whatever decision the United States Supreme Court made in *Pruneyard*, a court, rather than a popularly-elected body, would have had the final word in defining the respective rights of the shopping center owners and those who sought to gather signatures. The only question was *which* court would make the final determination. Thus, if democratic theory provides the justification for judicial deference, the decision to defer in *Pruneyard* and analogous cases would be inexplicable.

More fundamentally, whatever the appeal of democratic theory in the abstract, a strong endorsement of the principle of democracy cannot be derived from the nature of the Constitution itself.[19] Of course, the Guaranty Clause clearly reflects a commitment to the idea of representative government in general terms.[20] But the manner in which the Constitution structures the institutions of the federal government itself belies any claim that the idea of democracy was fundamental to the political theory of the framers.

To be sure, the drafters determined that at least one body of the federal legislature, the House of Representatives, should be chosen by "the people."[21] But even in this context, the framers' embrace of democracy was at best contingent. The Constitution does not require that the members of the House be chosen on the basis of universal adult suffrage. Instead, the states retained control of the makeup of the electorate, with the qualifications of voters being defined by reference to those for the elections for state legislatures, which in 1787 often

15. *Id.* at 82-86.

16. *Id.* at 84 (applying the rational basis test).

17. *Id.* at 88.

18. *Id.*

19. For a detailed discussion of the provisions of the Constitution that are aptly characterized as undemocratic, *see* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

20. U.S. CONST. art. I, § 4, cl. 1.

21. U.S. CONST. art. I, § 4.

excluded many adult white male citizens, not to mention women and free African-Americans.[22]

Moreover, one searches in vain for any suggestion of a commitment to democracy in the process of selecting other officials in the federal government. Most famously, states were provided equal representation in the Senate, notwithstanding the fact that their populations varied enormously.[23] But in some respects, the evolution of the procedure for selecting the President reveals the limitations of the framers' commitment to democracy even more clearly.[24]

During the long and tortuous debates over the selection process, the delegates twice considered and overwhelmingly rejected proposals to have the President selected directly by the people.[25] The opponents of these proposals often used language that was fundamentally inconsistent with any strong commitment to democratic principles. For example, George Mason of Virginia declared that "it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people as it would to refer a trial of colors to a blind man"[26] and Elbridge Gerry of Massachusetts pronounced the idea of direct elections "radically vicious."[27] The convention also rejected a proposal that the President be chosen by electors selected by the people.[28]

Instead, the delegates crafted a complicated system whereby candidates are initially considered by electors chosen on a state-by-state basis, with the selection process in each state left totally in the control of the appropriate state legislature and the allocation of electors based only loosely on free population.[29] In the event that no candidate received the vote of a majority of the electors (a prospect that a number of delegates to the convention pronounced quite likely),[30] the selection was referred to the House of Representatives, with the delegation from each state casting a single vote, rather than allocating voting power on the basis of

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22. *See* U.S. CONST. art. IV, § 4.

23. U.S. CONST. art. I, § 3.

24. For a detailed discussion of the evolution of the presidential selection process, *see* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35 (1986).

25. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 32 (Max Ferrand ed., 1927).

26. *Id.* at 31.

27. *Id.* at 114.

28. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 81 (Max Ferrand ed., 1927).

29. *See* U.S. CONST. art. II, § 1.

30. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 501 (statements of Charles Pickney); *Id.* at 512 (statements of George Mason); *id.* at 524-25 (statements of Alexander Hamilton).

population.[31] Such a system cannot be said to embody the tenets of democratic theory in any meaningful sense.

In short, taken together, the relevant provisions of the Constitution that was adopted in 1789 suggest that the commitment of the framers to the principle of democracy was incomplete at best. Subsequent events create even more difficulties for those who argue that the Constitution was founded on democratic theory. The events surrounding the drafting of the Fifteenth Amendment are particularly problematic for those who take this position.[32]

The adoption of the Fifteenth Amendment was the culmination of a long struggle over the issue of African-American suffrage.[33] Throughout the early Reconstruction era, the question of whether African-Americans should be granted the right to vote by federal action was a divisive, politically-explosive issue.[34] At one point in the process of drafting the Fourteenth Amendment in 1866, the Joint Committee on Reconstruction even voted to report a proposal to amend the Constitution to prohibit racial discrimination in voter qualifications.[35] However, the proposal was abandoned in favor of section 2, which simply reduced the representation in the House of Representatives for states that disqualified African-Americans from voting in the House of Representatives.[36] As John Bingham observed, "[t]he second section excludes the conclusion that by the first section suffrage is subjected to [federal] law."[37]

As the Reconstruction era progressed, the political dynamic surrounding the suffrage issue changed. Characteristically, Democrats and their allies continued to oppose all federal intervention.[38] In contrast, by 1869, mainstream Republicans were generally committed to the position that the federal government should require states to allow African-Americans to vote.[39] They differed sharply, however, on the appropriate scope of federal intervention.[40] Some took the view that the federal government should mandate universal manhood suffrage

31. U.S. CONST. art. II, § 1.

32. For detailed descriptions of the evolution of the Fifteenth Amendment, *see* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1969); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS 1863-1869, at 142-56 (1990).

33. *See, e.g.*, GILLETTE, *supra* note 31, at 21-23.

34. *See id.* at 21-22.

35. Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Congress, 1865-1867, at 101 (1914).

36. U.S. CONST. amend. XIV, § 2.

37. Cong. Globe, 39th Cong., 1st Sess. 2542, 2510, 2766 (1866).

38. GILLETTE, *supra* note 31, at 56.

39. *Id.* at 43-44.

40. *Id.*

throughout the United States.[41] Sen. Edmund G. Ross of Kansas elaborated this position in language that was strikingly similar to that which the Warren Court would employ nearly a century later in *Reynolds v. Sims*:[42]

> The right to vote is the most necessary and the most sacred of all rights, because it underlies all, and without which we are secure in the enjoyment of none . . . [I]t is not legitimately within the power of the Government, State or national, to withhold or restrict [the right to vote] while the national Government especially, as the sovereign head, has or ought to have the power, as it is its duty, to see that every person, who confesses to it allegiance, is protected in the exercise of that right.[43]

Other Republicans, however, preferred a simple prohibition on racial discrimination, and the proposals reported from the Judiciary Committees of both the House of Representatives and the Senate were couched in just such language.[44]

In response, Republican Senator Henry Wilson of Massachusetts moved an amendment that essentially embodied the principle of universal manhood suffrage.[45] The Wilson amendment would have prohibited discrimination in voting rights on the basis of race, color, nativity, property or education.[46] A number of Republicans raised objections to this and similar proposals.[47] Some argued that, as a matter of general principle, states ought to be allowed to limit the right to vote to those who had at least a minimum level of education.[48] Senator Roscoe Conkling of New York, for example, favored limiting voting rights to those who possessed "a standard of intelligence above the most groveling and besotted ignorance."[49] Others viewed the Wilson amendment as an unwarranted intrusion on the autonomy of the states. Senator Jacob M. Howard of Michigan, for example, complained that "the amendment of [Senator Wilson] is entirely too sweeping. It contemplates a complete revolution in the State constitutions . . . It runs a

41. *Id.* at 23-34.
42. *Sims*, 377 U.S. at 554-55.
43. Cong. Globe, 40th Cong., 3rd Sess. 982 (1869).
44. *Id.* at 286, 668.
45. *Id.* at 154.
46. *Id.* at 1035.
47. *See, e.g., id.* at 1029, 1038.
48. Cong. Globe, *supra* note 42, at 1038.
49. *Id.* at 1038 (statements of Senator Conkling). *See also id.* at 1037 (statements of Senator Patterson).

plowshare through all the State constitutions and overturns the most important State regulations that can be found."[50] By contrast, anticipating such objections, Edmund Ross contended that "[t]o admit that the individual State may on its own volition deny or abridge a right so essential to the preservation of personal and political liberty . . . would be to concede the doctrine of State rights in its most odious form."[51] Thus, as Ross recognized, in a very real sense, the conflict over the appropriate form of the Fifteenth Amendment involved a choice between the demands of democratic theory and the preservation of state autonomy.

At times during the long and complex process that ultimately produced the Fifteenth Amendment, it appeared that Congress might opt to ensconce democratic theory in the Constitution. At one point during the process, the Wilson language was adopted by the Senate;[52] at another, the House of Representatives adopted similar language.[53] Ultimately, however, the opponents of the expansive prohibition achieved most of their objectives. The amendment that was passed and ratified prohibited only discrimination on the basis of race, color, or previous condition of servitude.[54] This prohibition was generally understood to apply solely to classifications that were *explicitly* based on the forbidden criteria.[55] States were thus left largely free to regulate their own political processes, and also to prescribe the qualifications of voters in elections for Congress. It was in this form that the Fifteenth Amendment was ratified by the requisite number of states and became part of the Constitution in 1870.[56]

This sequence of events belies the argument that democratic theory is implicit in the structure of the Constitution. Congress not only failed to constitutionalize the principle of one person, one vote, but explicitly *rejected* efforts to adopt the necessary constitutional amendment. Subsequent amendments followed a similar pattern. While the Seventeenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments moved the electoral process in a more democratic direction, each of these amendments focused on a specific, discrete problem rather than

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50. *Id.* at 1037.
51. *Id.* at 982.
52. *Id.* at 1050.
53. *Id.* at 1481.
54. *Id.* at 1626, 1641.
55. *See, e.g.*, Cong. Globe, *supra* note 42, at 1009 (statements of Senator Howard); *id.* at 97-98 (statements of Representative Shellabarger).
56. Cong. Globe, *supra* note 42, at 1641.

embracing democratic theory more generally.[57] Indeed, although the framers of the Twenty-Fourth Amendment, which dealt with the poll tax, considered the tax an unjust, outrageous infringement on the rights of African-Americans and poor people in general,[58] Congress declined to outlaw the use of the tax in state elections, instead prohibiting the use of the tax as a qualification to vote only in federal elections.[59]

In short, nothing in either the original Constitution or the subsequent amendments suggests an endorsement of the kind of strong theory of democracy cited by many supporters of judicial deference. However, a generalized commitment to judicial deference can draw support from other aspects of the Constitution—most notably, the structure of American federalism.

III. FEDERALISM AND JUDICIAL DEFERENCE

In recent years, the relationship between constitutional federalism and judicial review has been the subject of an intense scholarly debate.[60] However, this debate has generally not focused on the possibility that principles of federalism might provide the basis for a defense of judicial deference. Instead, sparked by recent cases in which the Supreme Court has taken a renewed interest in revivifying federalism as a constitutional value,[61] the commentators have been preoccupied with assessing the desirability of federal judicial intervention to ensure that Congress does not unduly trench upon the prerogatives of the state government.[62]

By contrast, scholars generally pay much less attention to the possibility that an unduly activist Court might itself threaten the autonomy of state governments. Nonetheless, that possibility is very real. The Supreme Court is itself an institution of the federal government, and its decisions can dramatically undermine state autonomy by displacing diverse policy determinations of state and local governments with a

57. *See, e.g.*, U.S. CONST. amend. XIX (guaranteeing women's suffrage); U.S. CONST. amend. XXIV (prohibiting poll taxes as qualifications of voting in federal elections).

58. H. R. Rep. No. 1821, 87th Cong., 2d Sess. 4033-36 (1962), as reprinted in 1962 U.S.C.C.A.N. 4033-36.

59. U.S. CONST. amend. XXIV.

60. *See* ELY, *supra* note 1; SCALIA, *supra* note 1.

61. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617-19 (2000); Printz v. United States, 521 U.S. 898, 918-22 (1997).

62. *See, e.g.*, John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004); Larry D. Kramer, *Putting the Politics Back Into the Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

single national standard that may be antithetical to those policy determinations.

The decision in *Lawrence v. Texas*[63] is a classic example of this phenomenon. In *Lawrence*, the state of Texas, unlike some other states, had come to the conclusion that to countenance sexual relations between people of the same sex was inimical to good public policy.[64] The majority of the justices displaced this decision with a national standard that forbade the criminalization of such sexual relationships.[65] By doing so, the Court clearly limited the autonomy of the government of the state of Texas (as well as the other states that had hitherto outlawed same sex relationships).[66] Yet neither the majority opinion nor the dissent made any effort to grapple with the impact of the decision on the autonomy of state governments.

Lawrence is quite typical in this regard; discussions of federalism are generally notable by their absence in cases where the Court is faced with state laws that are seen as having an impact on individual rights.[67] Moreover, even where state autonomy is cited as an important consideration in Supreme Court opinions, its importance is generally described in narrow, purely instrumental terms. For example, defenses of state autonomy often rely on the dissenting opinion of Justice Louis D. Brandeis in *New State Ice Co. v. Liebmann*, where he argued that "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[68] This formulation essentially characterizes states as engaged in the search for a single right answer or policy.[69] It assumes implicitly that after the separate states try a number of different approaches to a problem, the evidence will eventually demonstrate that one (or a small number) of such approaches yield superior results, and that all of the states will then fall into line behind that approach.[70]

Such arguments vastly understate the significance of state autonomy in the system established and described by the original Constitution and

63. *Lawrence*, 539 U.S. at 558.

64. *Id.* at 562.

65. *Id.* at 578.

66. *Id.*

67. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (applying enhanced scrutiny to laws that discriminate against men).

68. 285 U.S. 262, 311 (1932). For examples of the influence of this perspective, *see* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 262, 289-92 (1990) (O'Connor, J., concurring); Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting).

69. *See Cruzan*, 497 U.S. at 289-92.

70. *See id.*

subsequent amendments. At all points in the drafting process, the Framers viewed the preservation of the prerogatives of each state government as a value to be respected for its own sake, not simply because different state approaches would eventually point to a single national policy on particular issues.[71] They understood that the separate political communities represented by the state governments were quite different in makeup, and believed that state governments should generally be left free to adopt diverse policies that reflected the value systems of the constituencies that they represented.[72] Of course, at the same time, the Framers understood that limitations on these prerogatives of state governments were necessary in some cases.[73] But as the next section demonstrates, the text, structure, and history of the Constitution clearly indicate that the Framers intended limitations on state power to be the exception, rather than the rule.

IV. STATE AUTONOMY AND THE STRUCTURE OF THE CONSTITUTION

The concept of federalism is by any standard one of the most conspicuous features of the American Constitution. The basic outlines of the system were established at the Constitutional Convention of 1787.[74] They were later altered substantially by the amendments drafted after the Civil War.[75]

A. The Constitution of 1787

On a purely theoretical level, in 1787, the basic idea of dividing the incidents of sovereignty between the national and state governments was one of the most novel and controversial aspects of the new Constitution.[76] Moreover, in *Federalist No. 37*, James Madison noted that, in practical terms, "the task of marking the proper line of partition between the authority of the general and that of the state governments"

71. *See, e.g., The Federalist No. 32-33, in* THE DEBATE ON THE CONSTITUTION, PART ONE 678, 679 (Bernard Bailyn ed., 1993).

72. *James Wilson's Speech at a Public Meeting* (Oct. 6, 1787), *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 66.

73. *See, e.g., The Federalist No. 22, in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 507-16.

74. *See Letter from James Madison to Thomas Jefferson*, (Oct. 24, 1787), *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 192-208.

75. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

76. *See* discussion, *infra*.

was one of the most "arduous" faced by the Constitutional Convention.[77] The difficulties associated with this task arose in part from theoretical problems, and in part from the political context that formed the background for the deliberations of the convention.

The story of the development of constitutional federalism begins well before the Convention of 1787, with the decision of the colonies to seek independence from England. Prior to this decision, separate governments controlled the local affairs of each of the colonies. However, the decision to leave the British Empire was taken by the Continental Congress on behalf of all the erstwhile colonies.[78] The ambiguities inherent in this situation were reflected in the Declaration of Independence, which referred to "the *United* Colonies" but declared that they were "Free and Independent *States*" rather than a single sovereign entity.[79] The question of where sovereignty might lie after the revolution was thus left somewhat uncertain.

This ambiguity was resolved by the Articles of Confederation, which, after considerable wrangling, were passed by the Continental Congress on November 15, 1777.[80] The congressional delegates did not presume to have the power to force the newly-independent states to accept the Articles. Instead, Congress merely submitted the Articles to the state legislatures, each of which ultimately ratified the document.[81] Moreover, Article II explicitly stated that "[e]ach state retains its sovereignty, freedom and independence, and every Power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States."[82]

The powers that were delegated dealt almost exclusively with matters of foreign affairs. Thus, in late 1777, each state government had almost unfettered power to regulate its domestic affairs as it saw fit, limited only by the strictures of its state constitution.[83] Against this background, federal power could be enhanced and state power limited, only if the existing state governments could be persuaded to surrender some or all of their preexisting authority over local affairs.

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77. *The Federalist No. 37*, *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 757.

78. *See generally* discussion, *infra.*

79. *The Declaration of Independence* (U.S. 1776), *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 952 (emphasis added).

80. *See The Articles of Confederation, art. II*, *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 954.

81. *See id.*

82. *Id.* at 954.

83. *Id.*

By 1787, many prominent Americans were convinced that some such adjustment was necessary.[84] Their dissatisfaction can be traced to a combination of different factors. The state governments had often balked at fulfilling their obligations under the Articles, commercial rivalries among the states threatened the economic prosperity of all Americans, some states had adopted statutes that were inimical to the economic interests of the affluent classes, and Shay's Rebellion threatened the established social and political order in Massachusetts and caused widespread alarm throughout the United States.[85] Problems such as these convinced some that the republican spirit that had animated the Revolution was in danger, and that the only solution lay in strengthening the federal government.[86]

Some of the delegates were convinced that the answer to the problems faced by the United States lay in either abolishing the state governments or subordinating them entirely to federal authority.[87] However, a majority of the delegates did not share these views. First, many continued to believe, as a matter of principle, that the states were superior repositories for most governmental power.[88] In addition, on a more practical note, implementation of the new Constitution required state governments to call conventions, and to have those conventions approve the changes proposed by the Philadelphia convention.[89] Given the political context of the late eighteenth century, states were simply unwilling to completely subordinate themselves to a national government. The document that ultimately emerged from the Convention clearly reflected the influence of the partisans of both sides of the debate.

The development of a new structure of constitutional federalism began with the introduction of the Virginia Plan by Edmund Randolph on May 29, 1787.[90] This plan, which became the basis for the subsequent deliberations in the convention, proposed to arm a reconstituted, bicameral federal legislature with two broadly-defined powers.[91] First, in addition to all powers granted to Congress by the Articles of Confederation, the new legislature was to have authority to "to legislate

84. *See* discussion, *infra*.

85. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 18-19.

86. WOOD, *supra* note 10 (arguing this proposition as his thesis).

87. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 282-93 (statements of Alexander Hamilton).

88. *Id.* at 284.

89. RALPH KETCHAM, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 35 (Signet Classic 1986).

90. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 17-23.

91. *Id.* at 20-21.

in all cases to which the several states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[92] Second, the federal legislature was to have power "to negative all laws passed by the several states, contravening in the opinion of the National Legislature the [Constitution]."[93] Both formulations created great controversy among the delegates.

Although Pierce Butler of South Carolina expressed doubt about the proposed scope of federal legislative power as early as May 31,[94] the proposed negative on state laws was the first of the two provisions to receive extended consideration.[95] On June 8, 1787 Charles Pinckney of South Carolina, supported by Madison and John Dickinson of Delaware, moved to strengthen the power of the national legislature, granting it authority to "negative all laws which they should judge to be improper."[96] The motion was opposed by Gunning Bedford of Delaware, Elbridge Gerry of Massachusetts, and Hugh Williamson of North Carolina.[97] Bedford attacked the entire idea of a legislative negative, arguing that it would allow the large states to use their preponderant power in the national legislature to "crush the small [states], whenever they stand in the way of [the ambitious] or interested views [of the large states],"[98] while Gerry argued that the negative should be limited to specific categories of state laws,[99] and Williamson contended that states should retain unfettered authority to "regulat[e] their internal police."[100] The opposition prevailed, with only the delegations of the three largest states ultimately supporting Pinckney.[101] On July 17, the original language of the Virginia plan was rejected by an almost identical vote,[102] with Gouverneur Morris of Pennsylvania asserting that "[t]he proposal . . . would disgust all the States."[103]

Although the issue of state autonomy was crucial to the rejection of the legislative negative, a number of delegates also argued that it was unnecessary because the courts would refuse to enforce any state law that

92. *Id.* at 21.
93. *Id.*
94. *Id.* at 51.
95. *Id.*
96. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 164 (statements of Pinckney); *see id.* at 164-65 (statements of Madison); *see id.* at 168 (statements of Dickinson).
97. *Id.* at 165-67.
98. *Id.* at 167-68.
99. *Id.* at 165-66.
100. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 165.
101. *Id.* at 168.
102. *Id.* at 28.
103. *Id.*

violated either the Constitution or a constitutionally-adopted federal statute that was inconsistent with the state law. Of course, the critical issue in the latter case would be whether Congress possessed the authority to adopt the relevant statute. Not surprisingly, strong nationalists pressed for a broad definition of the powers of Congress, while defenders of state autonomy worked equally diligently to narrow the constitutional scope of congressional authority.[104] Thus, when the Virginia Plan was first debated, Pierce Butler expressed the fear that "we are running into an extreme in taking away the powers of the states,"[105] and a number of other delegates also expressed concerns about the vagueness of the definition of the powers of the federal legislature.[106] Seeking to address this problem, on July 16, 1787, John Rutledge moved that the clause should be referred to a committee in order for it to be amended to specify the powers to be granted to the federal legislature,[107] but this motion failed on a tie vote.[108]

The next day, Roger Sherman of Connecticut proposed a different solution to the problem.[109] Sherman's proposal would have armed the federal legislature with authority to make laws "in all cases which may concern the common interests of the Union" but would have explicitly barred the legislature from "interfer[ing] with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned."[110] However, noting specifically the issue of paper money, Gouverneur Morris objected that in at least some cases, the federal government should have the power to interfere with matters of "internal police,"[111] and Sherman's motion was defeated by a wide margin.[112] Gunning Bedford then moved to broaden the language of the Virginia Plan still further, proposing that the federal legislature be empowered "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[113] An alarmed Edmund Randolph

104. U.S. Constitution Online, The Constitutional Convention, *available at* http://www.usconstitution.net/consttop_ccon.html (last visited Nov. 29, 2008).

105. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 53.

106. *Id.*

107. *Id.* at 17.

108. *Id.*

109. *Id.* at 25.

110. *Id.* at 25.

111. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 26.

112. *Id.*

113. *Id.* at 26.

complained that "[t]his is a formidable idea, indeed. It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police."[114] Nonetheless, the Bedford amendment passed on a 6-4 vote,[115] and the clause as amended was adopted with only South Carolina and Georgia dissenting.[116] Like the other provisions that had been agreed upon in principle by the delegates, this clause was referred to the Committee on Detail on July 26.[117]

The clause reported from the committee on August 6 differed markedly from that which had been adopted on July 17.[118] Apparently in response to the complaints of the defenders of state autonomy, the committee had abandoned the broad language of the Virginia Plan and the Bedford amendment.[119] In its place, the committee report specified the subjects that would be within the reach of federal legislative power.[120] Since the Constitution would provide the *only* source of authority for the federal legislature, all other matters would be left within the exclusive cognizance of the state governments (except in the rare instance when the Constitution itself prohibited some particular action by the states).[121] Thus, a far greater degree of state autonomy would be preserved.

Madison and Pinckney, both strong nationalists, were dissatisfied with the committee's enumeration.[122] On August 18, they introduced resolutions to add a variety of new powers to those provided in the committee draft.[123] In response, on August 22, the committee proposed to arm Congress with power "to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual states, in matters which respect only their internal police, or for which their individual authorities may be competent."[124]

This proposal was never acted upon by the convention. Instead, on August 23, Pinckney made a final effort to rescue the legislative

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114. *Id.*
115. *Id.* at 27.
116. *Id.*
117. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 128.
118. *Id.* at 181-82.
119. *See generally id.* at 25-36, 181-83.
120. *Id.* at. 181-82.
121. *See id.*
122. *Id.* at 324-25 (statements of Madison); *id.* at 325-26 (statements of Pinckney).
123. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 324-25, 325-26.
124. *Id.* at 367.

negative, proposing to arm Congress with the power "to negative all laws passed by the several states interfering, in the opinion of the legislature, with the general interests and harmony of the Union," but requiring two-thirds majorities in both the Senate and House of Representatives to effectuate the negative.[125] He contended that objections such as Bedford's had been obviated by the agreement to give all states equal representation in the Senate—an arrangement which, Pinckney argued, would provide sufficient protection for the interests of the smaller states.[126] James Wilson of Pennsylvania voiced emphatic support for Pinckney, describing his proposal as "the keystone wanted to complete the wide arch of government we are raising."[127] The opposition, however, remained unmollified; for example, John Rutledge asserted that "[i]f nothing else, this alone would damn, and ought to damn, the Constitution. Will any state ever agree to be bound hand and foot in this manner? It is worse than making mere corporations of them, whose by-laws would not be subject to this shackle."[128] After a motion to commit Pinckney's proposal to a committee failed,[129] he apparently realized that the proposal had no chance of passage and withdrew it without a vote.[130] Thus, the Constitution as ultimately adopted granted only enumerated powers to Congress.

Against this background, one point emerges clearly from the complex deliberations of the Convention: the delegates to the Philadelphia convention consistently rejected the proposals that would have made the broadest inroads on state autonomy. To be sure, the new Constitution required the states to abandon some of their prerogatives. The state governments were weakened in three significant ways. First, the Constitution itself stripped the state governments of a variety of powers, such as the authority to issue paper money, impair the obligation of contract, and grant freedom to fugitive slaves from other states.[131] Second, the Constitution created institutions that had the authority to override state government decisions in a variety of different contexts.[132] Finally, the Constitution required the states to accept further limitations on their power that might be added to the Constitution through the procedures outlined in Section V.[133]

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125. *Id.* at 390.
126. *Id.*
127. *Id.* at 391.
128. *Id.*
129. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 391.
130. *Id.* at 392.
131. *See* U.S. CONST. art. I, § 10.
132. *See* U.S. CONST. art. VI.
133. *See* U.S. CONST. art. V.

However, the new constraints on state power fell far short of the hopes of the strong nationalists such as Pinckney, Madison and Wilson. The Convention produced a document under which, as Madison himself noted in *Federalist No. 45*, "[t]he powers delegated...to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite [and] will extend to all the objects, which, in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[134] Nonetheless, during the debates over ratification, Antifederaltists such as "Brutus" of New York, John Winthrop of Massachusetts and Patrick Henry of Virginia complained that the Constitution as drafted posed an unacceptable risk to the prerogatives of the state governments.[135] Responding to these concerns, the First Congress reaffirmed the constitutional commitment to state autonomy in the Tenth Amendment, which, by its terms, reserves to the state government all powers not prohibited to them or granted to the federal government by the Constitution itself.[136] The ratification of this amendment explicitly confirmed that the system of divided authority established by the Constitution was premised on the view that, in general, fundamental policy decisions were to be made at the state level, without federal interference.

B. The Fourteenth Amendment[137]

The addition of the Fourteenth Amendment clearly changed the constitutional balance of power between the state and federal governments. The adoption of the amendment was a response to the problem of Reconstruction that faced Congress after the Civil War. The exigencies of the situation gave rise to a heated debate over the proper structure of federal-state relations. Like delegates such as Pinkney and Madison in 1787, some Republicans sought to destroy the entire concept

134. THE FEDERALIST NO. 45, *in* THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 105.

135. THE DEBATE ON THE CONSTITUTION, *supra* note 70, at 499-506 (statements of Brutus); *id.* at 517-19 (statements of Winthrop); *see also id.* at 596-97.

136. U.S. CONST. amend. X.

137. *See* U.S. CONST. amend. XIV. A comprehensive review of the literature dealing with the historical background of the Fourteenth Amendment would itself require a full monograph. For representative examples of different perspectives, *see generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1980); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (2005); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1995).

of states' rights during the Reconstruction era. The ultra-radical Senator Charles Sumner of Massachusetts, for example, repeatedly declared that "there can be no State Rights against Human Rights."[138]

However, the Thirty-Ninth Congress was essentially controlled by Republicans who took a more moderate view.[139] These Republicans distinguished sharply between the theory of state sovereignty and the idea of states' rights, condemning the former while consistently urging respect for the latter. Their views were typified by the influential *Springfield Republican*, which in late 1865 asserted that those who confuse the notion of states' rights with the southern doctrine of state sovereignty "only confess their own lack of brains" and that:

> It is well for the tranquility of the country and for the right direction of party policies that it should be considered a settled thing that the "states rights" recognized by the constitution are still sacred, and will be maintained as scrupulously as the authority of the federal government itself.[140]

Similarly, in 1868, Republican Senator H. P. T. Morton of Indiana declared that:

> I am an inveterate enemy of the blood-stained doctrine of State sovereignty [but] I still recognize the doctrine of State rights. There are rights that belong to the States, secured by the same Constitution that secures the rights of [the federal] Government, and therefore they are equally sacred. The States have their rights recognized by the Constitution of the United States as clearly and distinctly as that Constitution builds up this Government; and to the same extent, by the same power that sustains this Government, those rights are to be sustained . . . It was the abuse of the doctrine of States rights that led to the doctrine of State sovereignty; and it will be another abuse if we run to the other extreme, and say that the States have no rights which cannot be taken away by an act of Congress.[141]

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138. *See, e.g.*, Cong. Globe, *supra* note 42.

139. *See, e.g.*, MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION (1974); ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

140. SPRINGFIELD REPUBLICAN, Nov. 17, 1865, at 2.

141. Cong. Globe, 40th Cong., 2d Sess. 2742 (1869).

The political ideology reflected in these statements had a profound impact on the evolution of section one of the Fourteenth Amendment, which is the authority for most of the constitutional decisions that have since struck down state laws.[142]

The legislative history of section one clearly reflects an ongoing commitment to the basic principle of state autonomy. Initially, the Joint Committee on Reconstruction reported a proposal by Republican Rep. John A. Bingham of Ohio that would have armed Congress with the authority to "make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[143] In introducing the proposal in the House of Representatives, Bingham explained that it was designed to give Congress the power to protect the rights guaranteed to citizens of the United States by the Privileges and Immunities Clause of Article IV (the Comity Clause) and the Due Process Clause of the Fifth Amendment.[144] He argued somewhat idiosyncratically that, even when initially adopted, these two clauses required state governments to respect the fundamental rights of their own citizens, but that Congress lacked constitutional authority to adopt legislation to enforce this obligation on the states.[145] Bingham contended that his amendment would do no more than correct this specific problem.[146]

Opponents responded by characterizing the Bingham proposal as an affront to the basic principles of federalism.[147] Not surprisingly, many of these attacks came from congressional Democrats, who uniformly opposed all changes in the Constitution beyond the abolition of slavery. Thus, for example, Democratic Representative Andrew J. Rogers of New Jersey asserted that "[t]he effect of this proposed amendment is to take away the power of the States; to interfere with the internal police and regulations of the States; to centralize a consolidated power in this Federal Government which our fathers never intended should be exercised by it."[148] However, Democrats were not alone in these complaints; they were joined by more conservative mainstream Republicans such as Senator William M. Stewart of Nevada and Representatives Thomas T. Davis, Robert S. Hale, and Giles W.

142. *See* U.S. CONST. amend XIV.
143. Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 134-35.

Hotchkiss of New York.[149] The focus of the Republican complaints was not the privileges and immunities language, which they saw as aimed simply at the rights protected by the Comity Clause and the first eight amendments to the Constitution. Instead, Republican objections focused on the specific language of the proposed equal protection clause. Davis captured the essence of the Republican concerns:

> An amendment which gives in terms to Congress the power to make all laws to secure to every citizen in the several States equal protection to life, liberty and property, is a grant for original legislation by Congress. If Congress may give equal protection to all as to property, it is itself the judge of the measure of that protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it [*sic*] make it equal.
>
> Under such a power the constitutional functions of State Legislatures are impaired, and Congress may arrogate those powers of legislation which are the peculiar muniments of State organizations, and which cannot be taken from the States without a radical and fatal change in their relations.[150]

Faced with such criticisms, supporters of the Bingham proposal agreed to have it recommitted to the Joint Committee.[151] The basic proposal resurfaced more than two months later as section one of the omnibus Fourteenth Amendment.[152] However, the language was somewhat changed. In place of the offending equal protection language were two new clauses—one which prohibited states from depriving persons of "life, liberty or property without due process of law,"[153] and another which forbade states from "deny[ing] any person . . . equal protection of the *laws*," rather than "the rights of life, liberty and property."[154] The new language appears to have been chosen carefully. When queried earlier in the debate about the meaning of the Fifth

149. Cong. Globe, 39th Cong., 1st Sess. 1082 (statements of Stewart); *id.* at 1063-65 (statements of Hale); *id.* at 1083, 1087 (statements of Davis); *id.* at 1095 (statements of Hotchkiss). Hotchkiss also suggested that the amendment should be redrafted to constrain state legislatures without benefit of enforcing legislation. *Id.* at 1095. However, he was the only member of Congress to raise such an objection. *Id.*

150. Cong. Globe, 39th Cong., 1st Sess. 1087 (1866).

151. *Id.*

152. *Id.* at 2286.

153. U.S. CONST. amend. V.

154. Cong. Globe, 39th Cong., 1st Sess. at 1034 (emphasis added).

Amendment Due Process Clause by Democratic Representative Andrew J. Rogers of New Jersey,[155] Bingham had replied that "the courts have settled that long ago, and the gentleman can go and read their decisions."[156] The concept of "equal protection of the laws" had also been the subject of extensive judicial explication.[157] Thus, rather than an open-ended grant of power to Congress, the scope of the final draft of the Fourteenth Amendment were cabined by well-developed legal principles.

Unlike the original Bingham proposal, the revised section one vested the judiciary with the authority to enforce its provisions even in the absence of implementing legislation by Congress. However, this aspect of the amendment did not engender substantial discussion. Instead, the issue of state autonomy continued to occupy center stage. Democrats argued that even the new version of section one was inimical to basic principles of American federalism. For example, Representative Samuel J. Randall of Pennsylvania contended that the provisions of section one "relate to matters appertaining to State citizenship, and there is no occasion for the Federal power to be exercised . . . at variance with the wishes of the people of the States."[158] Bingham, however, insisted that, as revised, "this amendment takes from no State any right that ever pertained to it."[159] Moreover, the conservative Republicans who had opposed Bingham's original draft were apparently mollified by the revisions and cast their votes for the new proposal. With the unanimous support of mainstream Republicans, the Fourteenth Amendment gained the necessary majorities in both houses of Congress in 1866[160] and was ratified by the requisite number of states in 1868.[161]

The drafting of the Fourteenth Amendment thus bears a number of striking similarities to that of the original Constitution. In both cases, the drafters were generally convinced of the need for some expansion of federal power at the expense of state autonomy. In both cases, they seriously considered proposals that would have effectively vested Congress with plenary authority to overturn any state action with which it disagreed. In both cases, faced with objections from defenders of state authority, the drafters rejected these proposals in favor of more limited, fairly-well-defined expansions of federal power. Of course, no one could plausibly argue that the Fourteenth Amendment was not originally

155. *Id.* at 1089.
156. *Id.*
157. *See generally* MALTZ, *supra* note 31, at 1-12.
158. Cong. Globe, 39th Cong., 1st Sess. 1087 (1866).
159. *Id.* at 2542.
160. *Id.* at 3042, 3149.
161. *See* U.S. CONST. amend. XIV.

understood to add significant new limitations on the freedom of action of the states. Nonetheless, the amendment was clearly not designed to undermine the basic presumption of state autonomy, but merely to codify additional exceptions to that presumption.

In short, even after the adoption of the Reconstruction amendments, the idea of state autonomy remained a central feature of the constitutional structure. While subsequent amendments have made a number of relatively minor, narrowly-targeted inroads into the prerogatives of the states, none has challenged the basic premise that the states, rather than the federal government, should generally be the locus of decision-making authority. It is this premise, rather than some imagined constitutional value of democracy, that underlies the most persuasive justification for deference by the Supreme Court in cases arising from actions by state governments.

V. CONCLUSION

From a purely rhetorical perspective, an emphasis on state autonomy is far less attractive to advocates of judicial deference than an appeal to the concept of democracy. At least in the abstract, the concept that the nation should be governed by the rule of the majority in almost universally viewed as the bedrock of the American political system. By contrast, support for the idea that states should generally have to govern their own affairs, free from national interference, is less widespread and more contingent.

But for analytic purposes, rhetoric must yield to reality. While many scholars and judges might cherish the illusion that the Constitution embodies a strong commitment to the principle of democratic rule, in fact one searches in vain for such a commitment in either text, structure, or history. Instead, one finds a preoccupation with the nature of federal-state relations, with an ongoing concern for the preservation of state autonomy. When, as in *Pruneyard*, the Court defers to the judgments of an institution of state government, the justices honor this feature of the Constitution.[162] Decisions such as *Lawrence*, by contrast, run directly counter to the basic structure of our constitutional system.[163]

162. *Pruneyard*, 447 U.S. at 74.
163. *Lawrence*, 539 U.S. at 558.