Federalism, the Supreme Court, and the Seventeenth Amendment

The Irony of Constitutional Democracy

Ralph A. Rossum

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Ralph A. Rossum

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Federalism, the Supreme Court, and the Seventeenth Amendment

To my wife, Constance,
and our children, Kristin, Brent, and Pierce

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Preface

This book had its origins in a course on the American founding that Professor John Baker of the Louisiana State University Law Center and I team-taught with Justice Antonin Scalia at the University of Aix-Marseille Law School in Aix-en-Provence in the summer of 1987. One day Justice Scalia commented that the people of the United States demonstrated that they no longer believed in federalism when they ratified the Seventeenth Amendment, providing for direct election of the United States Senate. By ending the Constitution's original mode of electing senators by state legislatures, he argued that the Seventeenth Amendment eliminated the most important structural feature of the Constitution for protecting the interests of states as states. His comment came as he reflected on the Supreme Court's then-recent decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), in which it upheld the constitutionality of a congressional enactment that withheld 5 percent of federal highway funds from those states that permitted the sale of alcoholic beverages to persons under twenty-one years of age. He said that, while he saw no constitutional problem with what Congress had done, he could not imagine that a pre-Seventeenth Amendment Senate would have approved such a measure, for the senators would have known that, to be reelected, they would eventually have to appear before their state legislators and explain to those who had power over their reelection why they had so little confidence in their state legislature to address the

issue of drunken driving by young people and why they felt justified in voting to impose this burdensome regulation on their state.

Justice Scalia's commentary was provocative; I had not heard that argument before. I soon made it my own and used it through the years to respond to my undergraduate students at Claremont McKenna College and my graduate students at Claremont Graduate University who defended the Supreme Court's invalidation of New Deal economic legislation on the grounds that it was protecting the original federal design. I would point out that (1) a Senate elected by state legislatures would not have agreed to these measures that gave so much power to the federal government at the expense of the states, (2) the Seventeenth Amendment changed not only how senators were elected but also the principal structural protection of federalism and, therefore, the very nature of federalism itself, and (3) it is not the proper job of the Court to fill the gap in the structural wall protecting federalism introduced by the Seventeenth Amendment.

While my argument worked well in class, I did not have the opportunity to undertake the detailed research sufficient for me to know if what Justice Scalia had announced and I had subsequently asserted could be sustained in print. That opportunity presented itself when I was asked by Gary L. Glenn of the Department of Political Science at Northern Illinois University to prepare a paper for delivery at a panel he had organized for the 1998 American Political Science Association annual meeting. The very positive response to that paper encouraged me to expand it initially into a law review article and eventually into this book.

I wish to acknowledge my gratitude to the many organizations and individuals who have assisted me in bringing this project to completion. The appointment as a visiting scholar at the Liberty Fund, Inc., Indianapolis, Indiana, provided me the time and resources to undertake the first phases of this study. A subsequent year-long sabbatical granted by Claremont McKenna College provided a break from teaching to complete "The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment," *San Diego Law Review* 36 (summer 1999): 671-741. It also allowed me to complete the research on the congressional history of what was an eighty-six-year campaign to secure direct election of the Senate. Charles R. Kesler, director of the Salvatori Center for the Study of Individual Freedom in the Modern World at Claremont McKenna College, and Ken Masugi, director of the Center for Local Government at the Claremont Institute for the Study of Statesmanship and Political Philosophy, invited me to deliver papers at conferences they were organizing, thereby providing me the occasion to undertake additional research and the opportunity to incorporate the helpful comments of discussants. At the

invitation of Gary L. McDowell, director of the Institute of United States Studies at the University of London, I presented a version of what became chapter 4 at the Institute's Seminar on American Politics and Law. Bradley C. S. Watson, conference director at the Center for Economic and Policy Education at St. Vincent College, asked me to deliver the center's 1999 Constitution Day lecture, which allowed me to receive valuable reactions to what became chapters 2 and 3. Judge Susan A. Ehrlich of the Arizona Court of Appeals, George W. Carey of Georgetown University, Charles A. Lofgren of Claremont McKenna College, and James McClellan of the Institute of United States Studies at the University of London provided valuable and much appreciated comments on various drafts. Melanie Marlowe, my graduate assistant at Claremont Graduate University, provided able research assistance; without her help, this book would have been much more difficult to complete. To all of them, I am most grateful. I also wish to express my appreciation to the *San Diego Law Review* for allowing me to incorporate major portions of my article into this book.

Ralph A. Rossum
Claremont, California
March 23, 2001

About the Author

Ralph A. Rossum is the director of the Rose Institute of State and Local Government and the Henry Salvatori Professor of American Constitutionalism at Claremont McKenna College; he is also a member of the faculty of Claremont Graduate University. He earned his M.A. and Ph.D. from the University of Chicago and has published seven books, including *American Constitutional Law* (with G. Alan Tarr), a two-volume work now in the fifth edition, *Reverse Discrimination: The Constitutional Debate, The Politics of the Criminal Justice System: An Organizational Analysis,* and *The American Founding: Politics, Statesmanship, and the Constitution* (with Gary L. McDowell), and over sixty book chapters or articles in law reviews and professional journals.

Mr. Rossum has served as associate dean of the Graduate School at Loyola University of Chicago, as vice president and dean of the faculty at Claremont McKenna College, as a member of the Board of Trustees of the Episcopal Theological Seminary of Claremont, and as president of Hampden-Sydney College. He is currently chairman of the Council of Scholars of the American Academy of Liberal Education.

Mr. Rossum has an extensive record of public service. He was a member of the Police Reserve in Memphis, Tennessee. He served as deputy director for data analysis of the Bureau of Justice Statistics in the U.S. Department of Justice. He has also served as a member of the Advisory Board of the National Institute of Corrections in the U.S. Department of Justice and as a member of the Board of the Robert Presley Institute of Corrections Research and Training for the State of California.

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Introduction

This book is a critical commentary on the spate of controversial federalism decisions recently handed down by an activist United States Supreme Court. Twelve times since 1976 (and, with much greater frequency, eleven times since 1992), the Court has invalidated federal laws—many of them passing both houses of Congress by wide margins—in order to preserve what it has described as "the original federal design."[1] This book challenges the Court's fundamental jurisprudential assumptions about federalism and argues that (1) the framers did not expect federalism to be protected by an activist Court but rather by constitutional structure—in particular, by the mode of electing the United States Senate;[2] (2) the political and social forces that culminated in the adoption and ratification of the Seventeenth Amendment eliminated that crucial structural protection and thereby altered the very meaning of federalism itself; and (3) as a consequence, the original federal design has been amended out of existence and is no longer controlling—in the post-Seventeenth Amendment era, it is no more a part of the Constitution the Supreme Court is called upon to apply than, for example, in the post-Thirteenth Amendment era, the Constitution's original fugitive slave clause.[3]

The framers understood that federalism would be protected by the manner of electing (and, perhaps more importantly, reelecting) the Senate. This understanding was perfectly captured in a July 1789 letter to John

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Adams in which Roger Sherman emphasized that "[t]he senators, being eligible by the legislatures of the several states, and dependent on them for reelection, will be vigilant in supporting their rights against infringement by the legislative or executive of the United States."[4] The adoption and ratification of the Seventeenth Amendment, providing for direct election of the Senate,[5] changed all that.

After an eighty-six-year campaign, the Seventeenth Amendment was approved by the United States Congress and ratified by the states to make the Constitution more democratic.[6] Progressives argued forcefully, persistently, and ultimately successfully that the democratic principle required the Senate to be elected directly by the people rather than indirectly through their state legislatures. The consequences of the ratification of the Seventeenth Amendment on federalism, however, went completely unexplored, and the people, in their desire to make the Constitution more democratic, inattentively abandoned what the framers regarded as the crucial constitutional means for protecting the federal-state balance and the interests of the states as states.[7]

Following ratification of the Seventeenth Amendment, there was a rapid growth of the power of the national government, with the Congress enacting measures that adversely affected the states as states[8]—measures that, quite simply, the Senate previously would never have approved.[9] Initially, i.e., during the period from the amendment's ratification in 1913 to *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*[10] in 1937, and then again since *National League of Cities* v. *Usery*[11] in 1976, the United States Supreme Court's frequent reaction to this congressional expansion of national power at the expense of the states was and has been to attempt to fill the gap created by the ratification of the Seventeenth Amendment and to protect the original federal design. It has done so by invalidating these congressional measures on the grounds that they violate the principles of dual federalism; go beyond the Court's narrow construction of the commerce clause; "commandeer" state officials to carry out certain federal mandates; exceed Congress's enforcement powers under Section 5 of the Fourteenth Amendment, or, most recently, trench on the states' sovereignty immunity. In so doing, it has repeatedly demonstrated its failure to appreciate that the Seventeenth Amendment not only eliminated the primary structural support for federalism but, in so doing, altered the very nature and meaning of federalism itself.

There is irony in all of this: An amendment, intended to promote democracy, even at the expense of federalism, has been undermined by an activist Court, intent on protecting federalism, even at the expense of the democratic principle. The irony is heightened when it is recalled that

federalism was originally protected both structurally and democratically—the Senate, after all, was elected by popularly elected state legislatures. Today, federalism is protected neither structurally nor democratically—the ratification of the Seventeenth Amendment means that the fate of traditional state prerogatives depends entirely on either congressional sufferance (what the Court calls "legislative grace") or whether an occasional Supreme Court majority can be mustered.[12]

This book argues that federalism as it was understood by the framers—i.e., the "original federal design"—effectively died as a result of the social and political forces that resulted in the adoption and ratification of the Seventeenth Amendment. The Court, however, has had trouble learning this lesson—it took it until *Jones & Laughlin* in 1937 to learn it initially, and, since *National League of Cities* in 1976, it has repeatedly forgotten it. It argues that the Court—typically by the slimmest of majorities—has refused to acknowledge that its efforts to revive federalism—by drawing lines between federal and state power that the framers denied could be drawn and that they never intended for the Court to try to draw—are merely futile attempts to breathe life into a corpse.

Chapter 1 introduces the Supreme Court's efforts since 1976, and especially since 1992, to protect federalism by examining its reasoning in *National League of Cities* v. *Usery*,[13] *New York* v. *United States*,[14] *Lopez* v. *United States*,[15] *Seminole Tribe of Florida* v. *Florida*,[16] *City of Boerne* v. *Flores*,[17] *Printz* v. *United States*,[18] *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*,[19] *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*,[20] *Alden* v. *Maine*,[21] *Kimel* v. *Florida Board of Regents*,[22] *United States* v. *Morrison*,[23] and *Trustees of the University of Alabama* v. *Garrett*.[24] These decisions reveal an activist Court that has utterly failed to appreciate that the original federal design it is so committed to protecting is no longer a part of our constitutional system, as it was fundamentally altered by the Seventeenth Amendment.

Chapters 2 and 3 discuss why the framers valued federalism and how they understood that the mode of electing the Senate (rather than reliance on the Supreme Court) would be the principal means not only for protecting the interests of the states as states but also for identifying the line demarcating federal from state powers.

Chapter 4 provides three case studies from the First Congress that illustrate how well the framers' expectation that federalism would be protected by the mode of electing the Senate initially played out in practice. It examines the adoption of the Bill of Rights, the enactment of the Judiciary Act of 1789, and the passage of the act establishing the first Bank of the United States.

Chapter 5 shows how fully Chief Justice John Marshall appreciated the framers' understanding that federalism was to be protected structurally and not judicially. It argues that he felt free to construe Congress's enumerated powers broadly in cases such as *United States* v. *Fisher*,[25] *McCulloch* v. *Maryland*,[26] and *Gibbons* v. *Ogden*,[27] because he trusted that the Senate would be vigilant and not approve legislation that adversely affected the states as such.

Chapter 6 examines in detail the political and social forces at work in the states, and the legislative debates in the United States Congress, that ultimately led to the adoption and ratification of the Seventeenth Amendment and, thereby, to the public's inattentive alteration of the structural protection of federalism. It focuses on four interrelated factors: (1) legislative deadlocks over the election of senators brought about when one party controlled the state assembly or house and another the state senate; (2) scandals brought on by charges of bribery and corruption in the election of senators; (3) the growing strength of the Populist movement, with its deep-seated suspicion of wealth and influence and its penchant for describing the Senate as "an unrepresentative, unresponsive 'millionaires club,' high on partisanship but low in integrity";[28] and (4) the rise of Progressivism and its belief in "the redemptive powers of direct democracy,"[29] i.e., its conviction that the solution to all the problems of democracy was more democracy.

Chapter 7 reviews the post-Seventeenth Amendment congressional expansion of national power at the expense of the states as well as the Court's sporadic attempts to fill the gap created by the Seventeenth Amendment and to protect "the original federal design." It argues that judicial second-guessing of Congress's use of its plenary powers has never effectively protected federalism and never can, and that, as a consequence, the Court should announce that (1) federalism died with the ratification of the Seventeenth Amendment, (2) it is therefore explicitly withdrawing from attempting to draw lines between permissible and impermissible federal power, and (3) it will hereafter treat federalism questions as political questions, acknowledging in the language of *Baker* v. *Carr*,[30] that there are no "judicially discoverable and manageable standards for resolving" them and that the resolution of these questions is "constitutionally commit[ted]"[31] to the Congress alone. It includes a detailed and critical examination of *City of Boerne* v. *Flores*, the most blatant example to date of the Supreme Court's effort to protect a pre-Seventeenth Amendment understanding of federalism at the expense of the people's post-Seventeenth Amendment commitment to democracy. In *City of Boerne*, the Supreme Court, in

the name of protecting the "federal balance," struck down the Religious Freedom Restoration Act of 1993, passed unanimously by the United States House of Representatives and by a vote of ninety-seven to three in the Senate and enthusiastically signed into law by President William J. Clinton. The Court asserted that the Congress unconstitutionally exceeded the powers conferred on it by Section 5 of the Fourteenth Amendment and thereby upset federalism. *City of Boerne* has quickly become an extremely influential precedent. The Court has subsequently relied on it to declare unconstitutional federal laws abrogating state sovereign immunity in cases in which the states were charged with violating trademark or patent laws or were sued by their own employees for discrimination on the basis of age or disability or for refusing to pay the minimum wage; it has also employed it to strike down a key provision of the Violence against Women Act. In each of these cases, the Court has perversely transformed Section 5 of the Fourteenth Amendment, intended by its drafters to be a sword by which Congress could protect individuals from constitutional violations of their rights by the states, into a shield by which state governments are protected from the consequences of their constitutional violations.

The conclusion offers a brief reflection on a passage in Abraham Lincoln's Lyceum Speech, in which he worried that the founding principles of the republic were "fading" from view and that, as a consequence, the "walls" of our Constitution would ultimately be "leveled" by "the silent artillery of time."[32] That passage perfectly describes the fate that has befallen the structural supports of federalism. The framers designed the Constitution so that federalism would be protected structurally through the election of the Senate by state legislatures. Over time, however, the public's understanding of the reasons for that structural protection "faded," and the walls of federalism were leveled by the "silent artillery of time," i.e., by an eighty-six-year campaign to make the Constitution more democratic resulting in the adoption and ratification of the Seventeenth Amendment.

Notes

1. In 1976, the Supreme Court invalidated Congress's 1974 amendments to the Fair Labor Standards Act, extending minimum wage/maximum hours requirements to employees of states and their political subdivisions. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). For the next sixteen years, the Court held its hand and, in fact, in 1985, reversed its 1976 decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). However, starting again in 1992, the Court has become very active, striking down eleven laws in ten years. It declared unconstitutional:

- ◊ in 1992, the Low-Level Radioactive Waste Policy Amendments Act of 1985, mandating that the states themselves must take title to radioactive waste within their borders if they fail otherwise to provide for its disposition, *New York* v. *United States,* 505 U.S. 144 (1992);
- ◊ in 1995, the Gun-Free School Zone Act of 1990, banning firearms within "a distance of 1,000 feet from the grounds of a public, parochial or private school," *Lopez* v. *United States,* 514 U.S. 549 (1995);
- ◊ in 1996, the provision of the Indian Gaming Regulatory Act of 1988 mandating the states to negotiate in good faith with Indian tribes to form compacts governing certain gaming activities and authorizing them to be sued by the tribes in federal court if they fail to do so, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996);
- ◊ in 1997, both the Religious Freedom Restoration Act of 1993, barring all governments (federal, state, and local) from burdening the free exercise of religion without a compelling state interest, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and a key provision of the Brady Handgun Violence Prevention Act of 1993, mandating state law-enforcement officers to conduct background checks for all individuals wishing to buy handguns, *Printz* v. *United States*, 521 U.S. 898 (1997);
- ◊ on a single day at the end of the Court's 1998-99 term, the Trademark Remedy Clarification Act of 1992 subjecting states to suit under the Trademark Act of 1946, *Florida Prepaid Postsecondary Education Expense Board.* v. *College Savings Bank*, 527 U.S. 627 (1999); the 1992 amendments to the Patent Remedy Act expressly abrogating state sovereign immunity in patent cases, *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); and those 1974 amendments to the Fair Labor Standards Act authorizing private actions against the states in their own courts without their consent, *Alden* v. *Maine*, 527 U.S. 706 (1999);
- ◊ in 2000, the provisions of the Age Discrimination in Employment Act of 1967 subjecting states to suits filed by state employees for age discrimination, *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and the provisions of the Violence against Women Act of 1994, allowing victims of gender-motivated violence to bring suit in federal court to

recover compensatory and punitive damages for the injuries sustained, *United States* v. *Morrison*, 529 U.S. 598 (2000); and

◊ in 2001, the provisions of the Americans with Disabilities Act of 1990 allowing suits in federal court by state employees seeking to recover money damages by reason of a state's failure to comply with the Act's provisions, *Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001).

2. There are, of course, other structural protections of federalism in the Constitution—the states' involvement in the election of the president by the electoral college (Article II, Section 1) and in the amendment process (Article V) are two of them. This book focuses on the mode of electing the Senate, for it was that structural provision on which the framers placed most emphasis, and it is the only structural provision formally removed by constitutional amendment.

3. See Ralph A. Rossum, "The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment," *San Diego Law Review* 36, no. 1 (August/September 1999): 671-741.

4. Philip B. Kurland and Ralph Lerner (eds.), *The Founders' Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), 2: 232.

5. The text of the Seventeenth Amendment is as follows:

> 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 Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State 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.

6. See Christopher H. Hoebeke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* (New Brunswick, N.J.: Transaction Publishers, 1995).

7. The phrase, "the interests of the states as states," refers to their interests as political rather than merely geographical entities. See Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (New York: Hilliard & Gray, 1833), § 454, 1: 441. See also Jay S. Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," *Northwestern University Law Review* 91 (1997): 547.

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