

## TOWARD A JUDICIAL BULWARK AGAINST CONSTITUTIONAL EXTRAVAGANCE—A PROPOSED CONSTITUTIONAL AMENDMENT FOR STATE CONSENT OVER FEDERAL JUDICIAL APPOINTMENTS

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Since the beginning of our nation’s history, the line dividing federal and state power has been debated. The federal courts, however, have determined the placement of that boundary line. Originally, federal judges were chosen by the President with the consent of a Senate, which was chosen by legislatures of the States. Today, federal judges are still chosen by the President with the consent of the Senate, but the Senate is no longer chosen by the State legislatures. As a result of this constitutional change, which proponents wrongly argued would not affect state sovereignty, the States lost an important say over the make-up of the federal judiciary that the framers intended for them to have.

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Winston Churchill praised the “rigidity of the Constitution of the United States” as “the shield of the common man.”<sup>1</sup> In truth, our Constitution has not changed, except through amendment. In practice, however, each of the three branches of the federal government has exceeded its delegated constitutional authority, often to the detriment of state sovereignty.<sup>2</sup>

The framers intended for one of the three federal branches—the judiciary—to especially serve as a hedge against federal expansion beyond the authority of the Constitution. In the Federalist No. 78, for example, Alexander Hamilton wrote that the federal courts would serve as the “bulwarks of a limited constitution against legislative encroachments.” During the Pennsylvania ratification convention, James Wilson remarked that the judiciary’s “duty” was to “pronounce [] void” acts of the federal legislature that “transgress[ed] the bounds” of the Constitution. Accordingly, “under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department.”<sup>3</sup>

It was not long after ratification of the Constitution, however, that it became apparent that the federal courts would tend, not toward restraint of federal power as the framers intended, but instead toward expansion.<sup>4</sup> This trend has since continued.

Absent fundamental change in the make-up or direction of the federal judiciary, federal expansion is certain to continue. The Senate, of course, has oversight over selection of the federal bench. Originally,

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1. Winston Churchill, *What Good's A Constitution?* (1936).

2. See generally Steven T. Voigt, *Two Early Events that Can Help Us Better Understand the Commerce Clause*, 30 J.L. & Pol. 16 (2015) (“the true scope of federal authority, particularly under the commerce clause, is much narrower than its modern application.”); Steven T. Voigt, *The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power*, 12 U.N.H. L. REV. 85, 105 (2014) (“The presumption has been for a long time to justify big government somehow, some way, rather than to place the onus on the federal government to prove to the people and the states that the power it claims to have it actually holds.”); Steven T. Voigt, *The General Welfare Clause: An Exploration of Original Intent and Constitutional Limits Pertaining to the Rapidly Expanding Federal Budget*, 43 CREIGHTON L. REV. 543, 543 (2010) (“If today’s federal government actually tried to justify the federal budget under the Constitution, the argument could not be based on the enumerated powers of the Constitution because the scope of federal spending reaches far beyond those enumerated powers.”).

3. James Wilson, Remarks in the Pennsylvania Convention, in 1 COLLECTED WORKS OF JAMES WILSON 203-04 (Liberty Fund, Inc. 2007).

4. For example, in 1821, Thomas Jefferson wrote that the federal judiciary was “working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the States and the government be consolidated into one. To this I am opposed.” Letter from Thomas Jefferson to Charles Hammond (1821), available at <http://www.thefederalistpapers.org/founders/jefferson/thomas-jefferson-danger-from-a-powerful-central-government>

under Article I Section 3, the Constitution provided that Senators would be chosen by the legislatures of the States. The Seventeenth Amendment, ratified in 1913, changed this and provided for the direct election of Senators by the people. After this amendment, regardless whether they elected to do so, States no longer had even the *opportunity* to select Senators who pledged to protect state sovereignty using the Senate's oversight of the federal bench.

One possibility that would give States more say over the selection of federal judges is a constitutional amendment conferring upon each State the power of consent over each federal judicial appointment within the jurisdiction of that State. This, in turn, would allow States more active participation in selecting those federal judges who will ultimately decide the placement of power between federal and state authority. Such an amendment, by no means is an answer to all constitutional excess. Such an amendment, however, would likely have both populist and state appeal, and would also lay the groundwork for moving application of the Constitution back to the framer's intent.

#### I. FROM THE START, THE COURTS EXPANDED FEDERAL POWER

During the Constitutional Convention, framer John Dickinson, advocating for a Congress elected in part by the people and in part by the legislatures of the States, stated, "Let our Government be like that of the solar System; let the General Government be the Sun and the States the Planets repelled yet attracted, and the whole moving regularly and harmoniously in their respective Orbits."<sup>5</sup> Dickinson argued that a Congress arising from the two sources would encourage a well-functioning government. Unfortunately, it was not long before Dickinson's metaphor began to topple and federal power grew while state sovereignty shrunk.<sup>6</sup>

Thomas Jefferson, James Madison, and other framers were deeply troubled by the early Supreme Court's tendency toward broadly interpreting federal authority under the Constitution. Jefferson wrote in 1820 that of the three branches of the federal government, "we have most to fear" from the judiciary. He argued vividly that the judiciary "is

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5. John Dickinson, as quoted in WILLIAM MURCHISON, *THE COST OF LIBERTY, THE LIFE OF JOHN DICKINSON* 192 (ISI Books 2013); *see also* 1 ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 399 (1876).

6. *See generally* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 1 (Princeton University Press 2004) ("The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers.").

the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated republic. They are construing the constitution from a co-ordination of a general and special government to a general and supreme one alone.”<sup>7</sup>

Likewise, in 1823 in a letter to Justice William Johnson, Jefferson wrote that “The States supposed that by their tenth amendment, they had secured themselves against constructive powers.” But, he said, the States were not “aware of the slipperiness of the eels of the law.” Even though the “States can best govern our home concerns, and the General Government our foreign ones,” Jefferson worried that the judiciary would erode the “distribution of powers established by the constitution” and “all offices” would be “transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market.”<sup>8</sup>

Madison similarly wrote in 1800 that judicial interference with the relationships of “the rights of the parties to the constitutional compact” would “annul the authority delegating” the judiciary’s powers and threaten to “subvert forever” the Constitution.<sup>9</sup> In 1819, Madison wrote that while it “was foreseen at the birth of the Constitution” that “differences of opinion might occasionally arise in expounding terms & phrases” in the Constitution, “especially those which divide legislation between the General & local Governments,” “few if any of the friends of the Constitution” anticipated that the judiciary would use the overly “broad” and “pliant” construction that was in fact taken by the judiciary.<sup>10</sup> He warned against “expounding” the Constitution “with a laxity” that “may vary its essential character, and encroach on the local sovereignties with [which] it was meant to be reconcilable.”<sup>11</sup>

## II. THE IMPORTANCE OF STATE SOVEREIGNTY TO THE FRAMERS

Our government is one of checks, balances, and separation of power. The people delegated certain powers to the States. Acting through their citizenship in the separate States, the people granted other

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7. Thomas Jefferson’s Letter to Thomas Ritchie (Dec. 25, 1820) in JEFFERSON WRITINGS 1446 (The Library of America 1984).

8. Thomas Jefferson’s Letter to Justice William Johnson, June 23, 1823 in JEFFERSON WRITINGS 1476 (The Library of America 1984)

9. James Madison, On the Alien and Sedition Acts (1800), in MADISON WRITINGS 614 (The Library of America 1999).

10. James Madison Letter to Spencer Roane (Sept. 2, 1819) in MADISON WRITINGS 735 (The Library of America 1999).

11. *Id.* at 736.

powers to the three branches of the federal government at the respective State ratifying conventions. Other authority remains to this day undelegated and rests with the people. Other authority—natural rights—can never be justly delegated. As among the people, the States, and the federal government, *any increase in power held by one necessarily results in a decrease in power of the others.*

The States have always held a crucial role in our governance. This is apparent from many sources, including the role of the States in ratification of the Constitution and the discussion of the proposed Constitution at the ratifying conventions and elsewhere, as well as other writings of the founding fathers.

#### *A. The Role of the States During Ratification*

Despite the phrase “We the People” in its preamble, the Constitution was not ratified by a nationwide popular vote. Instead, it was submitted for ratification to conventions of the States, as stated in Article VII: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Thus, the States did not *legislatively* ratify the Constitution. Rather, the States acted by the expressed will of their citizens at the ratifying conventions.

The Constitutional Convention of 1787 resolved that the proposed Constitution should “be laid before the United States in Congress assembled” and “afterwards be submitted to a Convention of Delegates, chosen in each State by the people thereof, under Recommendation of its Legislature, for their Assent and Ratification.”<sup>12</sup> In a letter to Congress on the same day, the Convention wrote, “That [the proposed Constitution] will meet the full and entire approbation of every State is not perhaps to be expected.”<sup>13</sup>

Nor does “We the People” in the preamble eliminate the significance of the States in ratification, particularly considering the history of this phrase. On August 6, 1787, during the Constitutional Convention, the Committee of Detail circulated a draft of the Constitution that opened with “We, the people of the states” and enumerated the thirteen States.<sup>14</sup> The draft began:

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12. Resolutions of the Convention Concerning the Ratification and Implementation of the Constitution (Sept. 17, 1787) in *DEBATE ON THE CONSTITUTION PART ONE 967* (The Library of America 1993).

13. Letter from the Constitutional Convention to the President of Congress (Sept. 17, 1787) in *DEBATE ON THE CONSTITUTION PART ONE 966* (The Library of America 1993).

14. 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE*

We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish, the following Constitution for the government of ourselves and our posterity:—

ARTICLE I. The style of this government shall be “The United States of America.”<sup>15</sup>

On August 7, 1787, the Convention agreed to this form of the preamble in the Constitution.<sup>16</sup> Toward the end of the convention, the draft (with this preamble) was sent to the five-member Committee of Style for the “finish given to the style and arrangement of the Constitution.”<sup>17</sup> William Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King sat on the Committee of Style. Morris is recognized as penning the final version of the Constitution with its final stylist revisions.<sup>18</sup> Among the changes Morris made was to revise the beginning of the preamble to the form we know today—“We the people of the United States.”<sup>19</sup> Morris omitted the names of the thirteen States because the Constitution would go into effect only after it was ratified by nine of the States and it was not known at the time which States would ratify it.<sup>20</sup> On September 12, 1787, the Committee of Style reported the preamble to the convention in its revised form.<sup>21</sup>

James Madison, the “father of the Constitution,” wrote that “all” of the “discussions” over ratification of the Constitution “justified and recommended” it on the basis “that the powers not given to the [federal] government, were withheld from it”, and because “the Constitution was submitted to the ‘States’” and “the ‘States’ ratified it”, “they are consequently parties to the compact from which the powers of the Federal Government result.”<sup>22</sup> In the Federalist No. 39, Madison wrote that assent and ratification of the Constitution was to be given by the

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UNITED STATES OF AMERICA 119 (D. Appleton and Co. 1889).

15. WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787* 32 (J.B. Lippincott Co. 1900).

16. *Id.*

17. MELANIE RANDOLPH MILLER, *AN INCAUTIOUS MAN, THE LIFE OF GOUVERNEUR MORRIS* 79 (ISI Books 2008) (quoting Madison) (emphasis in original).

18. Bancroft *supra* note 15, at 207.

19. *Id.*

20. *Id.* at 208.

21. MEIGS, *supra* note 16.

22. James Madison, Report on the Alien and Sedition Acts in *MADISON WRITINGS* 610 (The Library of America 1999).

people, “not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves.” Likewise, in his essay published under the pen-name “Alfredus,” Samuel Tenny of New Hampshire penned: “The Constitution now before the public is not a compact between individuals, but between several sovereign and independent political societies already formed and organized.”<sup>23</sup>

When the Constitution reached the State ratification conventions, a number of representatives objected to the phraseology of the preamble, arguing either that it exceeded the authority of the convention or that it could be misunderstood to designate larger power to the federal government than truly existed. In Virginia’s ratifying convention, for example, Patrick Henry demanded to know what right the framers had to say “We, the people” instead of “We, the states.”<sup>24</sup> In North Carolina’s ratifying convention, Mr. Caldwell argued that “We the people” was improper if it meant “the people at large.”<sup>25</sup> Those objections continued after ratification. In 1823, for example, John Taylor of Caroline, Virginia, in his treatise *New Views of the Constitution of the United States*, argued that the federal government is derived from the States.<sup>26</sup>

Not surprisingly, notable correspondence during the time of the ratifying conventions typically referred to States or conventions of States as ratifying the Constitution (not to the people as a whole): “the general convention of the state of Delaware has unanimously ratified the new constitution”,<sup>27</sup> “Connecticut has adopted the constitution”,<sup>28</sup> and “The state of New Hampshire have this moment adopted the federal constitution . . . .”<sup>29</sup>

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23. Samuel Tenny, “Alfredus,” in *FRIENDS OF THE CONSTITUTION, WRITINGS OF THE “OTHER” FEDERALISTS, 1787-1788* 252 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

24. 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, 375 (Houghton Mifflin Co. 1916).

25. JONATHAN ELLIOT, *THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 15 (1876).

26. JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* 184 (Way and Gideon 1823).

27. LETTER OF OTTO TO MONTOMORIN (Dec. 15, 1787), reprinted in 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 454 (D. Appleton and Co. 1889).

28. LETTER OF KNOX TO WASHINGTON (Jan. 14, 1788), reprinted in 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 455 (D. Appleton and Co. 1889).

29. LETTER OF JOHN LANGDON TO RUFUS KING (June 21, 1788), reprinted in 2 GEORGE

Ultimately, after the Constitution was ratified, the Tenth Amendment followed soon thereafter and reiterated that all powers not delegated to the federal government were left with the States or with the people. Certainly, the States, even with the advent of the union, were intended to continue to have a vital role in governance of our nation. As James Iredell, a Justice of the Supreme Court in the 1790s, wrote: “A State does not owe its origin to the government of the United States, in the highest or any of its branches. It was in existence before it.”<sup>30</sup> And “[b]y a State forming a republic I do not mean the Legislature of the State, the executive of the State, or the judiciary, but all the citizens which compose that State and are . . . integral parts of it.”<sup>31</sup>

*B. The Constitution was Ratified Based on the Understanding that the States held Greater Power*

One could assemble volumes compiling the founding fathers’ statements that the States retained more powers than the federal government. Briefly, however, a few examples follow.

In the Federalist No. 32, Alexander Hamilton wrote, “But as the plan of the Convention aims only at partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States.”<sup>32</sup> In the Federalist No. 45, Madison wrote:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects . . . The powers reserved to the several States 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.<sup>33</sup>

Roger Sherman penned: “The powers vested in the federal government are clearly defined, so that each state still retain its sovereignty in what concerns its own internal government, and a right to

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BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 471 (D. Appleton and Co. 1889).

30. HENRY CONNOR, JAMES IREDELL LAWYER, STATESMAN, JUDGE 36 (1912) (quoting *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

31. *Id.* at 43 (quoting *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54 (1795)).

32. THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasis in original).

33. THE FEDERALIST NO. 45 (James Madison).



exercise every power of a sovereign state not particularly delegated to the government of the United States.”<sup>34</sup> Justice Joseph Story wrote that the Constitution is “an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.”<sup>35</sup> Noah Webster wrote:

The constitution defines the powers of Congress; and every power not expressly delegated to that body, remains in the several state-legislatures. The sovereignty and the republican form of government of each state is guaranteed by the constitution; and the bounds of jurisdiction between the federal and respective state governments, are marked with precision.<sup>36</sup>

And in Pennsylvania’s ratifying convention, James Wilson argued that the “true line” separating federal and state power would not be difficult to ascertain because the federal powers are “enumerated” and “well defined.”<sup>37</sup>

### III. THE ORIGINAL SENATE, CHOSEN BY THE STATES

The States as a whole initially had means to ensure that their power was preserved in the courts: the Senate. While members of the House of Representatives were elected by the people directly,<sup>38</sup> members of the Senate were originally appointed by the legislatures of the States. Consequently, the Senate had the potential to serve as a powerful check against federal encroachment into the authority of the States.

Article I Section 3 provided that the Senators from each State would be “chosen by the Legislature thereof.” Because the legislatures of the States selected Senators, the States had a direct say in federal

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34. Roger Sherman, “A Citizen of New Haven,” in *FRIENDS OF THE CONSTITUTION, WRITINGS OF THE “OTHER” FEDERALISTS, 1787-1788* 267 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

35. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION* 712 (1833).

36. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 1787).

37. James Wilson, Remarks in Pennsylvania Convention, in *1 COLLECTED WORKS OF JAMES WILSON* 238 (Liberty Fund, Inc. 2007).

38. U.S. CONST. art. I §2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

legislation and other federal authority. The framers intended this. During the constitutional convention, George Mason remarked that “the Senate did not represent the *people*, but [rather] the *States*, in their political character.”<sup>39</sup> Madison and Hamilton also commented on the importance of the States’ representation in the federal government through the Senate. In the Federalist No. 39, Madison wrote, “The Senate . . . will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress.” In the Federalist No. 76, Hamilton wrote that the “concurrence” of the Senate “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”

In 1913, the Constitution was amended to provide for the direct election of Senators. During debates over the Seventeenth Amendment in Congress, Representative Mondell said “No disturbance of the balance of sovereignty and jurisdiction between the States and the Federal Government is involved . . .”<sup>40</sup> He was wrong. Once the States lost representation in the federal government through the Senate, they lost significant authority in the federal government, including any ability to have a say over the composition of the judiciary.

Notably, the framers rejected direct elections of Senators by the people. At the Constitutional Convention, James Wilson proposed that the people elect the Senate, but the proposal failed.<sup>41</sup> Thereafter, the convention unanimously voted in favor of John Dickinson’s alternate proposal that the State legislatures elect the Senate.<sup>42</sup>

The line between federal and state power is still being debated in the courts and today, as throughout our nation’s history, the federal judiciary more often than not sides with federal expansion. The trend is not surprising.<sup>43</sup> The legal maxim, *boni judicis est ampliari*

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39. 3 THE PAPERS OF JAMES MADISON, PURCHASED BY ORDER OF CONGRESS; BEING HIS CORRESPONDENCE AND REPORTS OF THE DEBATES IN THE FEDERAL CONVENTION 1306 (Henry D. Gilpin ed., 1840) (emphasis in original).

40. 48 Cong. Rec. 6355 (1912).

41. WILLIAM MURCHISON, THE COST OF LIBERTY, THE LIFE OF JOHN DICKINSON 192 (ISI Books 2013).

42. *Id.*

43. JOHN TAYLOR, NEW VIEWS ON THE CONSTITUTION OF THE UNITED STATES 292 (Way and Gideon 1823) (“In establishing the division of powers between the federal and state governments, another principle as important, and not less true than that of uniting sympathy with power, was kept in view by the convention, namely, that great power is a great temptation to do wrong.”).

*jurisdictionem* (meaning “a good judge will enlarge his jurisdiction”) is at work. Jefferson cited this phrase when criticizing the early federal court, arguing that the federal judiciary intended to “lay all things at” the “feet” of the federal government.<sup>44</sup>

Without a State-controlled Senate ensuring that States have a say in the make-up of the federal judiciary, an important mechanism to maintain the careful balance of federal and state power is gone. The States and the federal government are akin to two professional sports teams where the coaches on one team select all of the referees. The States no longer have a say over who umpires the game.<sup>45</sup>

#### IV. THE ADVICE AND CONSENT AMENDMENT

While some commentators and politicians have called for the repeal of the Seventeenth Amendment, doing so does not appear imminently likely.<sup>46</sup> At least in terms of checks and balances related to the federal judiciary, there is another way to create a hedge against federal expansion into state sovereignty.

An amendment requiring a State’s consent for the appointment of the judges who will decide issues related to that State’s sovereignty is fair. Let us take any State as an example. Call it State X. Right now, State X has no say over the judges who will determine critical issues related to State X’s sovereignty. State X does not choose its Senators. With the consent of the majority of the Senators of the States,<sup>47</sup> none of whom are chosen by the legislatures of any of the States, the President

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44. Thomas Jefferson’s Letter to Thomas Ritchie (Dec. 25, 1820), in *JEFFERSON WRITINGS* 1446 (The Library of America 1984).

45. Notably, the United States fought for its independence based partly on foreign control of the judiciary. See *THE DECLARATION OF INDEPENDENCE* (U.S. 1776) (The King of England “has made Judges dependent on his Will alone . . .”); see also John Dickinson, *Letter from a Pennsylvania Farmer No. 9* (“the time may come, when we may have to contend with the designs of the crown, and of a mighty kingdom. What then must be our chance, when the laws of life and death are to be spoken by judges totally dependent on that crown, and that kingdom.”). Granted, British control over the colonial judiciary is a much different scenario than the judiciary today. But in this matter it is worth remembering the grievances of our founding fathers, see generally Steven T. Voigt, *The International Criminal Court’s Antagonism to the United States Constitution and Our Need to Articulate an Alternative*, in *THE NUREMBERG WAR CRIMES TRIAL AND ITS POLICY CONSEQUENCES TODAY* 164 (Beth A. Griech-Polelle ed., Nomos 2009), and considering that today the people have little practical influence over the appointment of the particular judges of the federal bench. With state approval of judges, however, State representatives—who each have a finite set of constituents—would serve as better conduits for the people to express their voice during the process of deliberating over the arbiters of the law.

46. See *AMENDMENT XVII ESTABLISHING ELECTION TO THE U.S. SENATE* 21 (Jeff Hay ed., Greenhaven Press 2010) (referencing a recent, unsuccessful call for repeal).

47. U.S. Const. art. II, § 2.

determines who will decide these issues for State X. The Senators from States A, B, and C have the same voting power (one vote for each Senator) as do the two Senators from State X, assuming the Senators from State X are even concerned about the sovereignty of State X. Jefferson's maxim—*boni judicis est ampliare jurisdictionem*—suggests otherwise: that federal Senators will choose to expand federal power.

But if State X's legislature had a veto over the State's federal judges, then it would not matter as much which political party is in Washington D.C. and what the inclinations of the Senators from States A, B, and C, and so on, happen to be. Or whether the Senators from State X care about the State's sovereignty. State X's legislature would have the ability to block judges who might tip the balance of power too far in favor of Washington D.C., at least with regard to State X. And Washington D.C. could refrain from nominating judges who might tip the balance too far the other way. The result, while certainly not guaranteed to be perfect, might nevertheless more favorably result in neutral referees who would protect the concept of federalism and ensure that the boundaries of the Constitution are not artificially expanded. This is the mold of a federal judge as envisioned by the framers.

The amendment would have a populist appeal. Individual voters would have more input into the appointment of federal judges by communicating with their local State representatives, who have fewer constituents than do Senators and who are more attuned to local sentiments, issues, and naturally, with fewer constituents, to individual feedback. The people of each State would also know that the people of their State, rather than the people of the forty-nine other States, had a real voice over the judges who would decide the issues applicable to their State. Thus, the amendment would give more power to the people. It also should appeal to States. The States would have their say over judges whose decisions directly affect them, and ideally the joint system would better select "bulwarks of a limited constitution."<sup>48</sup>

As for the Supreme Court, approval by at least two-thirds of the States would safeguard the important voice of the States while avoiding the likely impracticability of unanimity. The more extended consent process that would unfold in the States would allow for better vetting of the nominated justice as each State took the time to consider the merits of the President's selection.

The possible text of such an amendment follows:

### **Amendment XXVIII**

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48. THE FEDERALIST NO. 78 (Alexander Hamilton).

**Section 1.** Federal appellate court judges, district judges, and magistrate judges shall be nominated by the President and thereafter appointed by the President only with the advice and consent of the legislatures of the States wherein the judges have jurisdiction.

**Section 2.** Supreme Court Justices shall be nominated by the President and thereafter appointed by the President only with the advice and consent of at least two-thirds of the legislatures of the States.

## V. CONCLUSION

An amendment giving power to the States to approve federal judges is not a panacea for federal expansion beyond the authority of the Constitution, but it would give States a greater say in who decides the placement of the line that divides federal and state power. The States have, for the most part, been losing the tug-of-war with Washington D.C. since the beginning of our republic. And, absent change, our nation will likely continue down this course. Two hundred years ago, Thomas Jefferson warned that consolidation of power would lead to catastrophe. Then, he asked rhetorically, would “a single State of the Union . . . have agreed to the constitution, had it given all powers to the General Government?”<sup>49</sup> It is past time to start considering workable solutions to get our nation back within the confining authority of our governing document, the Constitution of the United States of America.

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49. Thomas Jefferson’s Letter to Justice William Johnson (June 23, 1823), *in* JEFFERSON WRITINGS 1472 (The Library of America 1984).