BYU Law Review

Volume 1989 | Issue 1 Article 1

3-1-1989

# The Effects of the Sixteenth and Seventeenth Amendments in Changing the Role of the States in the Federal System

Scott G. Crowley

# The Effects of the Sixteenth and Seventeenth Amendments in Changing the Role of the States in the Federal System

*Scott G. Crowley**

## I. INTRODUCTION

Most students of government and politics agree that the role of the states in the American federal system has declined. This essay posits that the states' decline is partly attributable to structural changes in federalism caused by the sixteenth and seventeenth amendments to the United States Constitution. Empowering Congress to tax personal income through the sixteenth amendment, and selecting United States Senators by direct popular vote through the seventeenth amendment nullified constitutional safeguards designed to protect the role of the states in the federal system. Indeed, these amendments gave the United States Government political advantages over the states. As a result state autonomy has diminished and most of the important governmental power is now exercised by the federal government. In short, the sixteenth and seventeenth amendments changed the basic structure of federalism to allow the national government to dominate the states.

The sixteenth amendment removed the equal apportionment limit on the federal government's power to tax income. This meant that federal taxes were no longer paid by the states, according to population, but could be levied against citizens individually. This change resulted in the federal government's control of the income tax, an important source of government revenue. The federal government uses this control to influence the states' activities by collecting tax revenue at the expense of the states and distributing it to the states through grants subject to conditions and regulations.

---

* B.A., Brigham Young University (1985); J.D., Brigham Young University Law School (1988). Law Clerk to the Honorable J. Daniel Mahoney, Circuit Judge, United States Court of Appeals for the Second Circuit.

The seventeenth amendment required United States senators to be chosen by popular vote of the people rather than by state legislatures. The states lost their direct representation in Congress because they could no longer send delegates to the Senate. While senators were once loyal to their state's autonomy interests, their allegiance is now to the people. This distinction is important because constituent interests are often different from and injurious to state autonomy interests.

Federalism, the governmental arrangement of dividing autonomy between national and regional governments,[1] was outlined in the Constitution. Since the Founding, American federalism has passed through various stages. Broadly speaking, a system of "dual" federalism first originated, whereby the national government and the states operated independently in different spheres.[2] Next, federalism became more "cooperative" in nature, with the federal government and the states combining their energies to achieve common goals.[3] In recent times, feder-

---

1. "Federalism is a system of government that includes a national government and at least one level of subnational governments (states, provinces, local governments) and that enables each level to make some significant decisions independently of the other(s)." D. NICE, FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS 3 (1987).

Federalism has been more formally defined as:

> [A] mode of political organization that unites separate polities with an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both. . . . In its simplest form, federalism means political integration through the compounding of political systems that continue to exist with the new whole.

D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 2 (3rd ed. 1984).

For purposes of this essay "federalism," the "federal system," or the "federal relationship" refers to the division of governmental power between the United States Government and the various state governments.

2. "Dual" federalism has been described in an early Supreme Court case as follows:

> There are within the territorial limits of each state two governments, restricted in their sphere of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, authorize any interference therein by its judicial officers with the action of the other.

Tarbel's Case, 80 U.S. (13 Wall) 397, 406 (1872).

3. "Cooperative," or "creative," federalism describes a period of time, roughly between 1930 and 1970, when the federal and state governments became partners rather than competitors. R. SHAPEK, MANAGING FEDERALISM: EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM 6, 8 (1981). Morton Grodzins contrasted cooperative federalism with the layered cake description of dual federalism by depicting cooperative federalism as a "rainbow or marble cake, characterized by an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and

alism has become more "co-opting," with the federal government dictating the policy agenda, and requiring the states to implement federal programs with federal funds.[4]

This essay explores certain effects the sixteenth and seventeenth amendments to the Constitution had on American federalism and concludes that these amendments permitted the federal government to assume the dominant role it has today, while depriving the states both the power and the will to resist. The essay details instances of the federal government's usurpation of power from the states. However, this essay does not advocate the repeal of the sixteenth or seventeenth amendments. It is recognized that the amendments are important additions to the Constitution by providing for, respectively, revenues for the federal government's operations, and more political participation by the citizenry. The problems these amendments pose are only incidental. Rather, it is recommended that the courts become active in resolving federalism disputes, and that a constitutional jurisprudence demarcating and protecting state and local interests be developed.

This thesis on the changed structure of federalism is important in two respects. First, it explains some of the ways the federal government evolved into the dominant power in the federal relationship. Although the imbalance in the federal system has been extensively documented,[5] there has been little explanation

---

unexpected swirls. As colors are mixed in a marble cake, so functions are mixed in the American Federal System." Grodzins, *The Federal System* in GOALS FOR AMERICANS: PROGRAMS FOR ACTION IN THE SIXTIES, REPORT OF THE PRESIDENT'S COMMISSION ON NATIONAL GOALS AND CHAPTERS SUBMITTED FOR THE CONSIDERATION OF THE COMMISSION 265 (1960).

4. Professor Hanus describes the change from cooperative to co-opting federalism in the following manner: "While promotion of activities thought to be in the national interest continued to mark intergovernment aids, less emphasis was placed on attracting the cooperation of subnational governments and more on requiring them to perform designated tasks." Hanus, *Intergovernmental Authority Costs*, in INTERGOVERNMENTAL RELATIONS IN THE 1980's 57, 58 (R. Leach ed. 1983).

Unlike the two previous phases, the co-opting phase of federalism has not been widely acknowledged. Nonetheless, it will be shown that the federal relationship has taken that form.

5. Some of the better sources which describe the imbalance include ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR), THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH—AN AGENDA FOR AMERICAN FEDERALISM: RESTORING CONFIDENCE AND COMPETENCE (1981); ACIR, AWAKENING THE SLUMBERING GIANT: INTERGOVERNMENTAL RELATIONS AND FEDERAL GRANT LAW (1980) [hereinafter AWAKENING]; J. ARONSON & J. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS (4th ed. 1986); C. BARFIELD, RETHINKING FEDERALISM: BLOCK GRANTS AND FEDERAL, STATE, AND LOCAL RESPONSIBILITIES (1981); G. BREAK, FINANCING GOVERNMENT IN A FEDERAL SYSTEM (1980); D.

of how the imbalance occurred.[6] Most scholarly attention has focused either on the expanded legislative and judicial interpretation of Congress' power under the commerce clause or the correspondingly restrictive interpretation of the tenth amendment as justifications of the increase in federal power. The mechanical changes in federalism—the forces which allowed the federal government to dominate the federal relationship without meaningful resistance from the states—have seldom been examined.

Second, this thesis challenges the notion that the federal relationship can be regulated through the national political process. In *Garcia v. San Antonio Transit Authority*,[7] the United States Supreme Court declined to restrict the federal government's exercise of power on the states, reasoning that the states were represented in national politics through their representatives in Congress such that federalism disputes can be resolved in that forum. Though this idea may have once been accurate, and may have even been the way intended by the Founders to balance national and local concerns, the changes to the constitutional structure of federalism engendered by the sixteenth and seventeenth amendments left the states out of the political process.

This article is organized as follows. Section II discusses the fiscal change of the sixteenth amendment. Section III discusses the representational change of the seventeenth amendment. Section IV proposes a judicial role for restoring balance in the federal system.

---

ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3rd ed. 1984); D. KETTL, THE REGULATION OF AMERICAN FEDERALISM (1983); R. LEACH, AMERICAN FEDERALISM (1970); S. MATHESON & J. KEE, OUT OF BALANCE (1986); THE NATIONALIZATION OF STATE GOVERNMENT (J. Hanus ed. 1981); D. NICE, FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS (1987); M. REAGAN, THE NEW FEDERALISM (1972); R. SHAPEK, MANAGING FEDERALISM: EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM (1981). Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

An exhaustively documented study of the Framer's intentions regarding federalism is R. BERGER, FEDERALISM: THE FOUNDER'S DESIGN (1987).

6. Much of this theory has not been explored or developed in other sources. The seventeenth amendment, as a cause of the states' decline, has been mentioned without development by the Supreme Court in Garcia v. San Antonio Transit Auth., 469 U.S. 528, 565 n.9 (Powell, J., dissenting); *Id.* at 584 (O'Connor, J., dissenting). The sixteenth amendment, as a cause of the states' decline, has been mentioned without development by Professor Field in Field, Garcia v. San Antonio Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 99 (1985).

7. 469 U.S. 528 (1985).

## II. The Fiscal Effect of the Sixteenth Amendment

One constitutional change reducing the states' role in the federal system was the sixteenth amendment. This amendment permitted the federal government to tax individual and corporate incomes without regard to apportionment among the states. Following the amendment Congress was not required to divide the federal income tax burden among the states according to their population. The purpose was to provide the federal government with a more efficient source of revenue and to cause the nation's wealthier citizens to contribute a greater share toward government's costs.[8] The amendment, however, permitted the federal government to dominate collection of the income tax, an important source of revenue for government. An effect of this fiscal change is that the federal government expands its influence and reduces state autonomy.

The following sections discuss how the pre-sixteenth amendment constitional structure protected the states' role by preserving their fiscal integrity and also how the amendment permitted the federal government to take fiscal control of the states. The federal grants-in-aid programs are described as an example of this fiscal control.

### *A. Fiscal Federalism Before the Sixteenth Amendment*

The Constitution originally provided that "[r]epresentatives and direct Taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers. . . ."[9] Another provision gave the same charge: "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[10] These provisions required the federal government to assess taxes of the states rather than directly from the people.[11] This precluded the federal government raising rev-

---

8. A history of the amendment is contained in R. Blakey & G. Blakey, The Federal Income Tax 1-21, 60-70 (1940); S. Ratner, Taxation and Democracy in America 248-320 (1942); J. Witte, The Politics and Development of the Federal Income Tax 67-76 (1985).

9. U.S. Const. art. I, § 2, cl. 3. Of course, this provision is still contained in the Constitution, but it has been superceded by the sixteenth amendment.

10. U.S. Const. art. I, § 9, cl. 4.

11. The sixteenth amendment also prescribed that taxes be assessed of the states according to state population instead of state land holdings. The tax burden, like state representation in the House of Representatives, was to be proportionate to state popula-

enue at the expense of the states.[12] By distributing the tax proportionately, with each state's share related to its population, the states would know the percentage each was to contribute to the federal budget. This knowledge, coupled with the states' voice in Congress through its selected senators,[13] would help the states restrict the fiscal resources going to the federal government. Thus, in return for granting to Congress the power to indirectly and concurrently tax the people,[14] "each state [would] know precisely how much it [was] called upon to contribute."[15] Reserving this power to the states was crucial in order to preserve their political strength since they could remain viable entities only so long as they protected their source of revenue.[16] Therefore, part of the constitutional structure of federalism was to limit the revenues that could be raised from the states. This was designed to prevent the federal government from depleting the resources the states needed to preserve their sovereign integrity.[17]

---

tion, since "taxation and representation go together." Pollock v. Farmers' Trust & Loan Co., 157 U.S. 429, 556 (1895).

12. THE FEDERALIST Nos. 32 & 36 (A. Hamilton); *Pollock*, 157 U.S. at 560-61.

13. This is discussed below in the section regarding the representational change of the seventeenth amendment, *infra*, notes 72-100.

14. *Pollock*, 157 U.S. at 561.

15. *Pollock*, 157 U.S. at 462 (argument for appellant).

16. Alexander Hamilton viewed the apportionment requirement as a safeguard of state fiscal independence:

> Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each state, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection.

THE FEDERALIST No 36, at 220 (A. Hamilton)(C. Rossiter ed. 1961). Hamilton did not conceive that the federal government could harm the states' ability to raise revenue, but conceded that such "an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution." THE FEDERALIST No. 32, at 197-98 (A. Hamilton)(C. Rossiter ed. 1961).

17. In *Pollock*, 157 U.S. at 429, the income tax of 1894 was invalidated because it was not apportioned among the states. The Supreme Court ruled that the taxation of income from real or personal property constituted a so-called "direct" tax—to which the apportionment requirement applied. (In Hylton v. United States, 3 U.S. (3 Dall.) 171, 176-81 (1796), involving a federal tax on carriages, the Supreme Court interpreted the words "direct tax" to include only land and poll taxes. In four later cases the Court decided that an income tax was not a direct tax. Pacific Ins. Co. v. Soule, 7 U.S. (7 Wall.) 433, 444-46 (1868); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540-48 (1869); Scholey v. Rew, 90 U.S. (23 Wall.) 331, 346-48 (1874); Springer v. United States, 102 U.S. 586, 595-

The sixteenth amendment dismantled the constitutional structure that preserved the states' fiscal autonomy. The amendment states that "Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."[18] This change became necessary as Congress was not politically able to apportion taxes among the states according to population, wealth not being as evenly spread among population as it had been at the Founding.[19] The structure to protect the states' fiscal integrity was, it turned out, too successful and the federal government raised insufficient revenue. But the amendment left the states unprotected. Indeed, when the amendment was enacted it was opposed by some as abrogating "one of the fundamental principles of the Constitution."[20] It was urged that the states could not afford "to give the federal government this or any indefinite increased taxing power."[21] And it was predicted that the amendment would invite the federal government "to invade [their] territory, to oust [their] jurisdiction and to establish a federal dominion within the innermost citadel of the reserved rights of the [states]."[22]

This essay does not advocate the repeal of the sixteenth amendment since the federal government has significant obligations for which it needs an efficient source of revenue. However, the amendment has had negative effects on the states' role in the federal system. The following section examines how the income tax has affected federalism.

---

602 (1880)). The Court, however, stated that the taxing of wages and salaries would be "indirect," and would not have to be apportioned. Presumably, Congress could have taxed wages, as it does today, notwithstanding the apportionment clauses. Yet, following *Pollock* no individual income tax of any kind was enacted until ratification of the sixteenth amendment. *See* J. WITTE, *supra*, note 8, at 73-74; R. BLAKEY & G. BLAKEY, *supra*, note 8, at 17-20; S. RATNER, *supra*, note 8, at 193-214. Professor Seligman has attacked the decision in *Pollock* as economically and legally unsound. E. SELIGMAN, INCOME TAX 538, 579-81 (1911). Thus, prior to its ratification, the constitutional scheme for protecting the fiscal integrity of the states was somewhat effective.

18. U.S. CONST. amend. XVI.

19. R. BLAKEY & G. BLAKEY, *supra* note 8, at 63, citing 44 CONG. REC. 4392 (statement of Rep. Clark).

20. 44 CONG. REC. 4391 (statement of Rep. McCall), *quoted in* R. BLAKEY & G. BLAKEY, *supra* note 8, at 63.

21. Statement of Stuyvesant Fish, a prominent New York banker and railroad executive, *quoted in* R. BLAKEY & G. BLAKEY, *supra* note 8, at 65.

22. Statement of Rep. Richard E. Byrd, Speaker of the House of Representatives, *quoted in* R. BLAKEY & G. BLAKEY, *supra* note 8, at 70.

### *B. The Fiscal Imbalance*

Prior to the sixteenth amendment, the federal government and the states did not concurrently tax the same objects. Thus, there was no direct competition for revenues. The federal government raised most of its funds from custom duties and the states had exclusive right to their own internal wealth.[23] With the emergence of the federal income tax, however, the federal government encroached upon the states' fiscal domain. Today, the heavy use of the income tax by the federal government restricts its use by the states.

In 1978, the federal government collected nearly 85% of all income taxes in the United States.[24] Income taxes account for 88% of all federal tax receipts.[25] Although the states have other sources of revenue, primarily sales and other excise taxes,[26] they must also share that source of revenue since the federal government collects nearly half of all excise taxes as well.[27]

The states cannot make greater use of the income tax, it is here asserted, because 1) there is only a certain level of taxation that can be assessed by government in general beyond which the public reacts in opposition; and 2) the public usually reacts against state-imposed taxes before federal government-imposed taxes because the state governments are, being closer to the people, more responsive to taxpayer demands to keep tax rates

---

23. R. BLAKEY & G. BLAKEY, *supra* note 8, at 2. The federal government was also financed by receipts from the sale of public lands, and from temporary excise and other internal taxes. Prior to the sixteenth amendment, the only individual income taxes were the Civil War taxes, levied from 1861 to 1871 to finance the war, and also the tax of 1894, which was invalidated by the Supreme Court as unconstitutional in 1895 in Pollock v. Farmers' Trust & Loan Co., 157 U.S. 429 (1895). In 1909, the same year that the sixteenth amendment was proposed, Congress enacted a tax on corporations. R. BLAKEY & G. BLAKEY, *supra* note 8, at 1-21.

24. G. BREAK, *supra* note 5, at 32. The federal government collects 84% of individual income taxes and 86% of corporate income taxes. *Id.* The 85% figure was formulated by aggregating these other two figures.

25. *Id.* at 10. In 1978, individual income taxes accounted for 65.8% of total federal government receipts, and corporate taxes account for 21.7%. *Id.* The 88% figure was formulated by aggregating these other two 1978 figures.

26. M. REAGAN, *supra*, note 5 at 37. As of 1968, 64% of all state revenues came from sales taxes. *Id.*

27. *Id.* In 1982 the federal government further encroached upon the states' revenuing producing capacities by taxing interest earned from state and local bonds. Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 310(b)(1); *see also* South Carolina v. Baker, 108 S. Ct. 1355 (1988), that affirmed the constitutionality of section 310(b)(1) against a challenge on tenth amendment and intergovernmental tax immunity principles. The case is discussed *infra* notes 110-11 and accompanying text.

low.[28] As a result the federal government may more freely tax income according to its need for revenues. Moreover, the income tax can be more efficiently raised than the less elastic sales or property taxes.[29] It is not unreasonable to suppose that if the federal government reduced its income tax rate the states could increase their tax revenues. Control of the income tax provides the federal government a powerful fiscal advantage over the states.

This fiscal advantage affects the federal/state balance and may be partly responsible for the shift of power in favor of the federal government. In 1902, the federal government's share of total government outlays was 19%, and the combined state and local government share was 81%.[30] However, by 1984 the federal government's share was 42% while the combined state and local government share was 58%.[31] During the 1960's and 1970's the federal government's share had reached as high as 71%, while the state and local government share was as low as 17% and 12% respectively.[32] Although the states and municipalities have reduced their share of outlays, they have not reduced the level of services provided. Currently, the states meet their service obligations only with assistance from the federal government. Re-

---

28. Indeed, the federal government seldom experiences direct organized tax opposition, whereas several states have faced intense tax limitation pressure in the past years, often in the form of direct voter initiative. Since Proposition 13 in California and Proposition 2½ in Massachusetts, many states have faced tax limitation and rollback initiatives of some sort.

29. Income taxes are more elastic than either sales or property taxes in that the income tax is more responsive to economic expansions. As personal wealth increases, the taxpayer automatically pays more in real terms by moving into a higher bracket. In an inflationary economy, federal income tax receipts rise without an increase in the tax rate. State and local governments must raise the rate of sales tax or increase the property value assessment to collect greater revenues. M. REAGAN, *supra* note 5, at 38-39.

30. J. ARONSON & J. HILLEY, *supra* note 5 at 13-15. This is calculated from the "originating" level—the level of government that raised the revenue—as opposed to the "disbursing" level—the level of government that expended the funds. Thus, any funds raised by the federal government and transferred to the states is included in the federal government's share in this figure.

31. *Id.*

32. The federal share of government outlays has been steadily declining after reaching the high of 71% in 1960. G. BREAK, *supra* note 5, at 5. The most dramatic decline has occurred since the late 1970's. C. BARFIELD, *supra* note 5 at 21-22. This shift away from the federal share of government outlays toward the state and local share is caused by federal government budget pressures. However, it is also caused by the federal government directing the state and local governments to take a greater role in administering federal programs. *See, e.g., infra* notes 53-58 and accompanying text.

ceipt of federal financial assistance is a primary cause of the states' decline in the federal system.

### C. *Federal Assistance Through Grants-in-Aid*

Much of the money the federal government collects from the sources it taxes in common with the states is, ironically, returned to the states through grants-in-aid. Federal grants totalled $99 billion dollars in 1984,[33] up from $1.5 billion dollars in 1948.[34] This accounted for 17.3% of the federal budget,[35] and constituted on average 26.7% of the funds spent by the state governments.[36] These grants represent funds that should have been raised by state governments themselves, without federal conditions or obligations placed on their use. These conditions upset the federalism balance.

#### 1. *Effects of grant conditions*

*a. Grant conditions diminish state autonomy.* Grant conditions often cause states to take action that they otherwise would not take, thereby diminishing their autonomy. For instance, in 1987 Congress conditioned receipt of federal highway funds on the states raising their legal drinking age to twenty-one.[37] The Supreme Court affirmed this condition, holding that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[38] The Court reasoned that states retained a choice whether to raise their drink-

---

33. J. ARONSON & J. HILLEY, *supra* note 5, at 21.

34. Kaden, *supra* note 5, at 871.

35. G. BREAK, supra note 5, at 125.

36. *Id.*

37. South Dakota v. Dole, 107 S. Ct. 2793 (1987). In 23 U.S.C § 158 (1982 & Supp. III), Congress directed the Secretary of Transportation to withhold a percentage of federal highway funds from states "in which the purchase or public possession of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."

38. *Id.* at 2797.

ing ages,[39] but no state has withstood this intrusion into its police powers.[40]

Some grants have caused states to amend their constitutions to comply with conditions. Federal grants to implement the National Health Planning and Resources Act of 1974[41] required states to regulate construction of public and private health facilities to assure that such facilities were needed.[42] The Constitution of North Carolina prohibited such "certificates of need." However, North Carolina's legal challenge to the grant condition, which alleged that the condition unconstitutionally impinged on state autonomy, was rejected.[43]

> Simply because one state, by some oddity of its constitution may be prohibited from compliance is not sufficient ground, though, to invalidate a condition which is legitimately related to a national interest sought to be achieved by a federal appropriation and which does not operate adversely to the rights of other states to comply. . . . The validity of the power of the federal government under the Constitution to impose a condition on federal grants made under a proper [c]onstitutional power does not exist at the mercy of the State Constitution or decisions of the State Courts.[44]

Other grant conditions have required states to alter their governmental organization.[45]

---

39. *Id.* at 2799. The Court also stated:

> Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' Here, however, Congress has directed only that a state desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

*Id.* at 2798 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

40. Wyoming was the last holdout, finally raising its drinking age in 1988.

41. 42 U.S.C. § 300k (1982). The federal health planning legislation was designed to improve the quality and control the costs of health services within states by establishing planning and development agencies. 42 U.S.C. § 300k-2 (b) (1982).

42. 42 U.S.C. § 300k-2(b)(2) (1982).

43. North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978).

44. *Id.* at 535.

45. For instance, provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (1982), which helped states meet the costs of providing services for handicapped persons, required states to designate agencies to administer the funds. 29 U.S.C. § 721(a)(1)(A) (1982). The State of Florida sued, arguing that the obligation to adopt a particular gov-

The consequences of a state's noncompliance with the conditions of grant programs often extends beyond simple termination of funds under that program. For example, noncompliance with the National Health Planning and Resources Act of 1974 results in termination of funds for all health programs within a state. Such termination would cripple a state's public health care system thus making grants under the program virtually coercive in nature.[46] Nevertheless, the Supreme Court summarily upheld these grant conditions.[47]

Federal grant conditions pervade intergovernmental relations. In 1980, 500 programs disbursed grant money; only 160 programs existed in 1960.[48] Grants are accepted by, and therefore affect, 37,000 of the 38,000 state and local governments in the United States.[49] It has been estimated that some local governments are subject to as many as 1,200 federal conditions and regulations.[50]

The Reagan Administration's experience with grant reform demonstrates that autonomy cannot be easily returned to the states. President Reagan's New Federalism proposal sought to decrease federal transfers to the states in return for increased state autonomy.[51] The federal tax rate was also to be cut to allow the states to collect higher revenues. Yet, although the amount of grant funds was reduced, the regulations were not. The states lost funds and received no commensurate increase in power.[52]

*b. State government expands to comply with federal directives.* Although the state share of outlays has decreased, the state bureaucracy has grown exponentially. From 1949 to 1979 the state bureaucracy has increased 246%.[53] The federal bureau-

---

ernmental structure violated the tenth amendment's protection of state autonomy. However, a federal district court upheld the condition because "the federal intrusion is wholly indirect and limited to measures meant to ensure the proper functioning of federally funded programs." Florida Dep't of Health and Rehab. Servs. v. Califano, 449 F. Supp 274, 284 (N.D. Fla.), *aff'd*, 585 F.2d 150 (5th Cir. 1978).

46. Madden, *The Law of Federal Grants*, in (ACIR), AWAKENING, *supra* note 5 at 17-18.

47. *Id.* at 23 n.71. The act was sustained by the Supreme Court in North Carolina v. Califano, 435 U.S. 962 (1978), see *supra* notes 41-44 and accompanying text.

48. Hanus, *supra* note 4, at 57-58.

49. *Id.* at 58.

50. *Id.*

51. C. BARFIELD, *supra* note 5, at 23-34; D. KETTL, *supra* note 5, at 130-31.

52. D. KETTL, *supra* note 5, at 131-32.

53. J. ARONSON & J. HILLEY, *supra* note 5, at 14. From 1949 to 1979 the state bu-

cracy increased only 41%.[54] The primary explanation for this surprising phenomenon is that expansion of federal domestic spending forces an even greater expansion of state and local spending and bureaucracy. Federal policies create new obligations on states and municipalities to share in the cost and administrative burdens of public services.[55]

Indeed, the purpose of many grant conditions is to increase federal programs and influence without expanding the federal bureaucracy.[56] Apparently the states and municipalities cannot afford this growth for while state and local governments collected $104 billion in 1984, they needed $99 billion from the federal government to meet their obligations.[57]

Often the monies in a federal grant do not cover the administration and capital costs incurred in implementing the federal program. One study found that for some grants, the capital and operating costs to the states and municipalities of complying with the conditions roughly equalled the amount received in the grant.[58] In these circumstances the states receive little increase in funds in exchange for their loss in autonomy.

*c. The federal government by-passes the states to deal directly with local governments or non-governmental organizations.* The share of grants given directly to municipalities has increased from 9.1% in 1952 to 28.6% in 1978.[59] This direct funding of local governments further erodes state sovereignty since municipalities usually have no independent status but are appendages of the states. A similar practice that erodes state sovereignty is the federal funding of non-governmental organizations beyond the control of the states. For example, the National Health Planning and Resources Development Act of 1974[60] pro-

---

reaucracy increased from approximately 1,037,000 employees to 3,590,000 employees. The municipal bureaucracy increased from approximately 3,119,000 employees to 9,270,000 employees. *Id.*

54. *Id.* The federal bureaucracy increased from approximately 2,047,000 employees to 2,895,000 employees. *Id.*

55. Kaden, *supra* note 5, at 847.

56. *Id.* at 870; C. BARFIELD, *supra* note 5, at 14-15.

57. J. ARONSON & J. HILLEY, *supra* note 5, at 21. In 1984, state and local governments expended a total of $203.3 billion, adding together the amounts that those governments raised through their own tax systems and what funds the federal government transferred to them. *Id.*

58. Muller & Fix, *Federal Solicitude, Local Costs: The Impact of Federal Regulation on Municipal Finances*, 4 REGULATION, July-Aug. 1980, at 29-36.

59. Kaden, *supra* note 5, at 874.

60. 42 U.S.C. § 300k (1982).

vides grants to non-governmental health units and prohibits local governments from overruling decisions of these units.[61] A suit challenging these regulations on state autonomy grounds was dismissed because the grants supposedly did not "displace local initiative with federal directive."[62] According to the court "[t]he act mandates essentially a cooperative venture among the federal government and state and local authorities."[63]

*d. The states lobby Washington for funds and favors.* Since the federal government controls the purse strings, the states must lobby the federal government for funds. The "Intergovernmental Lobby,"[64] consisting of governors, mayors, and other elected officials, and acting through their Washington-based organizations, such as

> the National Governors Conference, the Council of State Governments, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, the International City Management Association, and the National Legislative Conference, and through alliances of them [engages in] continual, almost day-to-day activity . . . offering advice and pressing requests before the executive and legislative branches of the federal government.[65]

One former governor asserted that the most worthwhile action he took to protect his state's interests was to establish a Washington office.[66] However pragmatic such an action may be, it does not provide the same benefits as a co-equal and autonomous relationship with the federal government.

### 2. *Objections to Grants and Grant Conditions*

Grants-in-aid are often justified as redistributions of financial resources among states of varying fiscal capacity.[67] Very little fiscal redistribution occurs, however. Although funds are

---

61. 42 U.S.C. § 300k-1(c) (1982).

62. Montgomery County, Md. v. Califano, 449 F. Supp. 1230, 1243-50 (D. Md. 1978).

63. *Id.* at 1247.

64. Professor Beer coined this term in Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 17 (1978).

65. *Id.* at 18; *see also* D. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974).

66. S. MATHESON & J. KEE, *supra* note 5 at 16. The governor was Scott Matheson of Utah.

67. Kaden, *supra* note 5, at 873.

sometimes disbursed according to local need, the system is not designed to reduce fiscal inequities.[68]

Grant conditions are justified as a *quid pro quo* for receipt of federal money. According to this view the conditions are not coercive since states can decline the funds.[69] However, it is here asserted that declining grant money is not a realistic option for states. For one, states would be hard pressed to refuse grants on state autonomy principles since constituents are generally unconcerned with which level of government funds their services. Most citizens recognize no fundamental distinction between federal and state government. It would also be difficult for states to decline grants since the grants are generated from the income tax revenues of the constituents. Finally, states cannot collect sufficient revenues to operate without federal grants.[70] In this sense the federal government's taxation the states' source of revenue and returning the money back to the states with conditions attached violates the notion of federalism.[71]

---

68. *Id.* at 873 n.160.

69. This rationale was used by the federal district court in Macon v. Marshall, 439 F. Supp. 1209, 1217 (M.D. Ga. 1977). At issue in *Macon* were regulations governing the rights of municipal employees, which would have been unconstitutional under National League of Cities v. Usery, 426 U.S. 833 (1976), except that the district court noted that, contrary to *National League of Cities*, in *Macon* the states were free to accept or reject the federal funds and obligations. 439 F. Supp at 1217.

70. This is because the federal government dominates collection of the income tax and precludes the states from collecting enough for their needs. *See supra* notes 24 to 32 and accompanying text.

71. Former New York City Mayor Abraham D. Beame asked the following two pertinent questions:

> Can a state—or local—government afford to refuse a federal grant if it finds the rules and regulations accompanying that grant unreasonable? Should a state be required to make the uncomfortable choice between accepting federal money and losing local control when the grant and its concomitant conditions apparently infringe on the states' decisionmaking institutions and political process?

ACIR, AWAKENING, *supra* note 5, at iii.

In United States v. Butler, 297 U.S. 1 (1936), the last instance in forty years in which the Court overruled a congressional act on federalism grounds, the Court stated "there is an obvious difference between a statute stating that the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Id.* at 73. The Court went on to warn that if Congress' spending clause power is not limited that Congress will be able to "tear down the barriers to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *Id.* at 78.

### *D. Summary of the Fiscal Change on the Federal Relationship*

The fiscal imbalance between the federal government and the states has allowed the federal government to dominate the federal relationship. When federal and state interests coincide, the federal government often dictates to the states a course of action. In some respects, the federal government regulates the states as administrative units; the states implement federal programs with federal funds. One commentator noted that "as the states find their resources and energies increasingly consumed in meeting obligations imposed by the national government, they confront a system of federalism more co-opting than cooperative, in which the basic values of pluralism, creativity, participation, and liberty are progressively undermined."[72] The Advisory Commission on Intergovernmental Relations[73] following an eleven-volume review of the federal system concluded

> that the current network of intergovernmental relations has become dangerously over-loaded, to the point that American federalism's most trumpeted traditional traits—flexibility and workability—are critically endangered. The Commission further concludes that this threatening condition largely has come about as a consequence of a rapid expansion in the overall scope, range of specific concerns, and coercive character of the federal role in the federal system, *because of the erosion of various political, judicial, and fiscal factors that formerly disciplined the national political process.* . . . Finally, the Commission concludes that neither equity (in the sense of giving due attention to jurisdictions or people in need), nor administrative effectiveness, nor economic efficiency, nor above all political, electoral, or administrative accountability are furthered by this tendency to inter-governmentalize practically all domestic questions, nearly all subnational governmental func-

---

72. Kaden, *supra* note 5, at 868. According to another observer, "through the 'carrot and stick' approach of conditioning federal aid to state and local government, 'the long arm of Washington is extending its reach across the nation and threatening to seize what is left of states' control over their own affairs.' " Rhyne, *State and Local Governments in the Supreme Court of the United States*, in ACIR, AWAKENING, *supra* note 5, at 64, quoting former Delaware Governor Pierre DuPont in U.S. NEWS & WORLD REP., June 12, 1978, at 41.

73. The Advisory Commission on Intergovernmental Relations (ACIR) is a federal government-sponsored study group on federalism, consisting of representatives from all levels of government.

> tions, and the bulk of the national government's own civil governmental obligations.[74]

The federal government's sixteenth amendment power to tax state citizens has expanded its role in the federal system. That fiscal advantage has probably been a primary cause of the decline of the states' role within the constitutional structure of federalism.

## III. THE REPRESENTATIONAL CHANGE OF THE SEVENTEENTH AMENDMENT

The seventeenth amendment reduced the states' role in the federal system by changing from state selection to the popular election of senators. This was an important change because state autonomy interests are different from the interests of the people in terms of governmental functions. The amendment resulted in eliminating the direct voice the states had in Congress.

### *A. The Original System*

Originally, the Constitution provided that United States senators would be chosen by the various state legislatures. "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof. . . ."[75] The clause protected state autonomy, according to James Madison, by "giving to the state governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems."[76] Indeed, Madison believed that the distinction between representation of a state's autonomy interest and direct representation of the peoples' interests was the very basis for a bicameral legislature.

> The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular state. So far the government is *na-*

---

74. ACIR, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH—AN AGENDA FOR AMERICAN FEDERALISM: RESTORING CONFIDENCES AND COMPETENCE 107-08 (1981) (emphasis added).

75. U.S. CONST. art. I, § 3.

76. THE FEDERALIST No. 62, at 377 (J. Madison)(C. Rossiter ed. 1961); *see also* J. CHOPER, JUDICIAL REVIEW AND THE POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176 (1980).

> *tional, not federal.* The Senate, on the other hand, will derive its powers from the states as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal, not national.*[77]

According to Alexander Hamilton, "[t]he proposed Constitution, far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate."[78] In short, the Founders structured Congress with separate bodies to represent the people and the states.

### *B. Departure from the Original System*

The seventeenth amendment dissolved direct state representation in the Senate. The amendment reads: "The Senate of the United States shall be . . . elected by the people thereof . . . ."[79] The amendment was adopted as part of a populist movement to increase the democractic nature of government.[80] Proponents hoped that the popular election of senators would end the corruption of state legislative selections and increase public accountability of Congress.[81] Yet the proposal was not new in 1913; bills providing for the popular election of senators were introduced in every session of the House since 1826, with most passing by comfortable margins. When the Senate finally approved the measure the amendment was quickly ratified by the states.

Although the seventeenth amendment had immense popular support it had incidental and unintended negative effects on the states as sovereign entities. The states' influence in Congress declined when they lost their senator's allegiance. Senators thereafter ensured their political value by providing the people, who are generally unconcerned with which level of government provides services, services from the federal level, even though the

---

77. THE FEDERALIST No. 39, at 244 (J. Madison) (C. Rossiter ed. 1961).

78. THE FEDERALIST No. 9, at 76 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton continued: "This fully corresponds, in every rational import of the terms, with the idea of a federal government." *Id.*

79. U.S. CONST. amend. XVII, § 1.

80. For a history of the passage of the seventeenth amendment *see* B. Daynes, The Impact of the Direct Election of Senators On the Political Process 1-24 (1971) (unpublished Ph.D dissertation, available in The University of Chicago Library and The Brigham Young University Law School Library).

81. *Id.*

federal programs sometimes intrude on state autonomy.[82] As a result state autonomy interests are no longer protected in Congress.

This author feels that the problem with governing the nation through only one level of government is that political power is concentrated rather than diffused. One unfortunate experience of human kind is that authority over others is nearly always exercised in some capricious manner. The virtue of maintaining a federal system is two-fold: First, authority is less prone to abuse, tyranny of the government over the governed less likely. Second, if one level of government is not responsive to the democratic will, another level of government may be appealed to. But these two virtues of federalism sometimes conflict. If the people allow the federal government to weaken the states because the federal government is more responsive to the public, the check each level has over the other is lost—precisely when that check may be most needed. If the federal government accepts the people's mandate to exercise national power at the expense of the state governments, the short term effect may be to answer public demands, but the long term effect is to dismantle the system which prevents abuses of power.

Some opponents of the amendment recognized that increasing the people's participation in choosing senators would create unintended and undesirable consequences for state autonomy. Senator Elihu Root of New York stated: "Let me tell the gentlemen who are solicitous for the preservation of the sovereignty of their states that there is but one way in which they can preserve that sovereignty, and that is by repudiating absolutely and forever the fundamental doctrine on which this resolution proceeds."[83] Another opponent spoke some truth in his otherwise

---

82. Professor Daynes recognized that denying the state governments this influence with the senator enhanced the people's representation:

> Once Senators were directly selected by the states' voters it is reasonable to suppose, for example, that voters would be more adequately represented than they had been before 1913. After all, the Senator's attention could now be focused directly on the state itself and its voters without the interference of an intermediary institution such as the state legislature. Because Senators prior to 1913 owed direct allegiance to the state legislators, the temptation to ignore the state's voters in preference to the wishes of the state legislators was probable.

B. Daynes, *supra* note 80, at 63-64. Since the change, however, the pendulum has swung to the other extreme, with the state governments having virtually no representation in Congress.

83. 46 CONG. REC. 2243 (1911) (remarks of Sen. Elihu Root) *quoted in* B. Daynes,

unfulfilled prophesy that "[t]he next step that would inevitably follow would be the placing of all elections under national control, with the result that the rights of the states would be overthrown and a consolidated government erected on the ruins of our beautiful federal system."[84]

### C. *Effects of the Change*

#### 1. *Concern for state sovereignty is not reflected in congressional voting behavior*

Following the seventeenth amendment the Senate mirrors the House in representing the people over the states. A study of the voting behavior of members of House members revealed that a member's constituency was a leading determinative factor in reaching a decision.[85] Concern for the autonomy of a member's state had no measurable significance as a factor influencing voting behavior.[86] Congressmen are concerned with providing services for their constituents and funneling a share of federal money to their districts.[87] They know that voters are uncon-

---

*supra* note 80, at 23.

84. O'Neal, *The Election of United States Senators by the People*, 188 N. AM. REV. 713 (1908), *quoted in* B. Daynes, *supra* note 80, at 20.

Most likely, proponents of the seventeenth amendment actually desired to reduce the role and influence of the state legislatures. According to Professor Daynes,

> supporters contended that passage of this Amendment would restructure the political system by altering the function of the state legislatures and their position within the political system. Upon passage of this Amendment, supporters argued, Senators would no longer be forced to make account of their actions to state legislators and, hence, no longer would state legislators be concerned with national affairs.

B. Daynes, *supra* note 80, at 17-18.

85. J. KINGDON, CONGRESSMEN'S VOTING DECISIONS 18-19 (2d ed. 1981).

86. In addition to constituency, the other important factors in influencing a House member's vote were, in order of importance, fellow congressmen, interest groups, the administration, reading materials, the member's staff, and party leadership. *Id.*

To avoid creating a mistaken impression, it should be noted that state autonomy was not a factor the congressmen were asked to comment upon in the survey. However, the fact that concern for state autonomy was not listed as a factor to be asked is somewhat telling in itself.

87. Professor Kettl had this view of congressmen's representational priorities and the effect on the political system:

> [M]ost members of Congress have reelection as their primary goal, and that goal shapes the way members spend their time; they tend to seek chores in which they can claim credit and to shun jobs that promise little public attention. The result is that members of Congress concentrate on constituency problems—from a senior citizen's difficulty in getting a social security check to

cerned if federal services diminish state autonomy. Selecting senators through the same process as House members means that senators will become as unconcerned as House members about the autonomy of their state governments in making decisions affecting their constituents.[88]

### 2. *Post-seventeenth amendment senators vote more often to expand the federal government*

This proposition that senators do not represent their state's autonomy interest is supported empirically. A study on the impact of the seventeenth amendment demonstrated that senators voted more often after the amendment for measures that increased the federal government's role at the expense of the states than before the amendment.[89] This study correlated votes on "New Deal type issues," which were defined as those involving "primarily government regulation and expansion," for six sessions of Congress.[90] This data indicates that the senators elected by the people approved an increased role for the federal government and were less protective of their state autonomy interests than senators chosen by state legislatures.

---

> a mayor's struggles with a federal agency over a grant program—gives members of Congress the opportunity to demonstrate to constituents both their effectiveness and their responsiveness. The growing popularity of the formula grant programs in the 1960's and 1970's, furthermore, gave more members of Congress a chance to roll the pork barrel. The formula grants were particularly porcine because they gave all members of Congress a chance to bring home federal dollars to their districts. As party leadership in Congress weakened, guaranteed distributions by formula became the glue that held also gave individual members of Congress the chance to bring the bacon home.

D. KETTL, *supra* note 5, at 115-16 (1983).

88. In fairness it must be noted that a senator's district is not limited to a segment of a state like a congressional district, but encompasses the entire state. It could be asserted that since the senator represents the state, he or she may have greater concern for the state's autonomy interest than a House member. Yet, this author feels that this distinction has a negligible effect on their respective voting behavior since the result of having a constituency of the people is the same. It may also be asserted that a senator is more concerned with state autonomy because of the six year rather than the two year term of office. However, the effect of this distinction is diluted by the fact that a third of the Senate runs for reelection every two years, so that the Senate feels the pressure to please constituents to near the same extent as the House.

89. B. Daynes, *supra* note 80, at 167.

90. *Id.* Such legislation was supported more in the four congressional sessions measured after the amendment was enacted than the two sessions measured before the amendment.

*3. Senators oppose state officials on legislation affecting state government*

The Senate's relative disregard for state autonomy is apparent in amendments Congress passed to the Fair Labor Standards Act requiring states and municipalities to pay their government employees the national minimum wage. The Senate voted by a wide margin to impose these standards upon the states. Yet states and municipalities challenged the amendments as unconstitutional for interfering with their right to set salaries for their employees and otherwise govern themselves. Of twenty-two states filing briefs opposing the legislation, seven had both senators vote for the bill. Twelve states had one of its senators vote for the bill, and only three states had neither senator vote for the bill. These votes were, in effect, cast against their states' sovereign autonomy. The senators represented both major parties and the mainstream ideologies.[91] In *National League of Cities v. Usery*,[92] the Supreme Court agreed with the states and municipalities and struck down the provisions. This author believes that decision shows that senators do enact measures that harm the states as institutions. Often senators have the interests of constituents in mind (in this case state government employees), rather than the concerns of the state government itself.

*4. Congress enacts legislation which restricts the states*

Congressional legislation increasingly restricts state activities. The Clean Air Act,[93] for example, authorizes the Environmental Protection Agency to promulgate emission standards for air pollution, and requires the states to design plans which meet the standards. However, EPA has the power to disapprove the plans and to promulgate revised plans with which the states are obliged to comply.[94] In effect, the Act only allows the states freedom to satisfy federal administrators. Another act of Congress, the Surface Mining Control Act,[95] encourages coal-producing states to enact enforcement mechanisms in accordance with na-

---

91. J. CHOPER, supra note 76, at 182-84. Dean Choper concludes from this same data, peculiarly, that the senators in Washington are more representative of the states' interest than the governors and attorneys general who opposed the unconstitutional law. *Id.*

92. 426 U.S. 833, 840-52 (1976).

93. 42 U.S.C. §§ 7401-7642 (1982).

94. 42 U.S.C. § 7410 (1982).

95. 30 U.S.C. §§ 1201-1328 (1982).

tional standards in order to avoid elaborate federal controls.[96] States are confronted with the choice of either enacting federal policies or having the federal government impose them. It is not unreasonable to suppose that there would be little federal legislation obliging the states to conform to federal standards had the state legislatures retained their direct voice in the Senate.

### *D. Justifications of National Dominance*

Some commentators justify the federal dominance of the states with the "political safeguards" theory.[97] This theory was first introduced by Professor Herbert Wechsler and asserts that since states preside over the selection of congressional representatives state autonomy is adequately protected by the national political process.[98] According to Professor Wechsler "the political process in the United States—and especially the role of the states in the composition and selection of the central government is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[99]

This thesis is not as persuasive today since states have less control over voter qualifications and congressional districting than previously. The Voting Rights Act and "one man-one vote" jurisprudence now largely dictate qualifications and districting standards.[100] Furthermore, Professor Wechsler's theory is really only valid for justifying federal preemption of fields of private activity traditionally regulated by state governments. Such preemption is permissible because the same citizenry elects both the state and the federal government lawmakers. However, the theory does not justify federal government control of the states or the use of the states as administrative units to implement federal policies.[101] The states' existence is guaranteed by the

---

96. 30 U.S.C. § 1235 (1982).

97. This topic is also discussed in section four regarding a judicial role for the courts. *See infra* note 108-10 and accompanying text.

98. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). This theory was implicit in the Supreme Court's rejection of a city's federalism challenge of a federal law in Garcia v. San Antonio Transit Auth., 469 U.S. 528 (1985). *See id.* at 565 n.9 (Powell, J., dissenting). For a discussion, *see infra* notes 105-08 and accompanying text.

99. *Id.* at 558. Wechsler believed that state interests are protected through their control over voter qualifications and congressional districting. *Id.* at 548-52.

100. Kaden, *supra* note 5, at 860-62; Comment, *State Autonomy After* Garcia: *Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527, 1544-45 (1986).

101. La Pierre, *Political Accountability in the National Political Process—The Al-*

Constitution and cannot be eliminated through federal statute or directive. By presiding over the congressional selection process the states do not consent to domination by Congress.

In sum, the seventeenth amendment altered the constitutional and political structure of federalism. This amendment provided one of the mechanisms through which the role of the states declined without their direct resistance. Because the structure of federalism has changed from that envisioned by the Founders, the question arises how can the balance be restored. It is recommended in the section below that the judiciary become more active in balancing power between the federal and state governments.

## IV. Defining a Role for the Judiary in Federalism Disputes

One way to restore balance in the federal system is for the courts to resolve federalism disputes between the national government and the states. This is preferable to repealing the sixteenth and seventeenth amendments since those amendments constitute necessary additions to the Constitution. Only incidental effects of the amendments hurt federalism, effects that could be addressed through the active intervention of the judiciary.

As of yet, however, the courts have not arbitrated federalism disputes. Rather, this author believes the courts have tolerated and even justified the federal government's encroachments on state autonomy. The courts have permitted the federal government to regulate state activity, regulate private activity traditionally regulated by the states, and completely preempt areas of law from state jurisdiction. These intrusions have usually been approved under expansive interpretations of Congress's commerce power under the Constitution. Between 1936 and 1975, the Supreme Court did not invalidate any federal law on state autonomy grounds.[102]

In 1976, a divided Supreme Court did invalidate federal wage legislation for state and local employees on state autonomy grounds in *National League of Cities v. Usery*.[103] The Court majority said that requiring state governments to pay employees

---

*ternative to Judicial Review of Federalism*, 80 Nw. U.L. Rev. 577, 626-29 (1985).

102. In United States v. Butler, 297 U.S. 1 (1936), the Supreme Court struck down the Agricultural Adjustment Act on federalism grounds.

103. 426 U.S. 833 (1976).

the federal minimum wage hindered their ability to provide services, thus impeding their sovereign integrity.

> [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.' This exercise of congressional authority does not comport with the federal system embodied in the Constitution.[104]

This analysis, however, was never extended to other legislation and was short lived. The 1984 case of *Garcia v. San Antonio Transit Authority*,[105] overruled the *National League of Cities* theory for protecting state autonomy. The Court removed itself from resolving federalism controversies reasoning that judicial protection of traditional state functions was "unworkable." Since no legal or political theory for distinguishing between federal and state interests could be articulated, any assessment of competing state and national interests proves "impracticable and doctrinally barren."[106] The Court also said that since the states were represented in Congress through their elected officials, the national political process provided an adequate safeguard for the states' role in the federal system.[107] Therefore, no need existed for the courts to review federal legislation on state autonomy grounds.[108]

This view was reaffirmed by the Supreme Court four years later in *South Carolina v. Baker*[109] when the Court held that federal taxation of interest earned on state and local government bonds does not violate the tenth amendment. The majority opinion stated that limits on the federal government vis-a-vis the states "are structural, not substantive—*i.e.*, that states must find their protection from congressional regulation through the

---

104. 426 U.S. at 852, *quoting* Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

105. 469 U.S. 528 (1985).

106. *Id.* at 557.

107. *Id.* at 551-52. The Court stated that "the Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. *Id.* at 552.

108. The Court stated, "we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." *Id.* at 550.

109. 108 S. Ct. 1355 (1988).

national political process, not through judicially defined spheres of unregulable state activity," and that only "extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."[110]

The idea that the national political process is capable of regulating federalism interests, derived from Professor Wechsler's "political safeguards" theory, may have once been valid. But it is here asserted that the constitutional structure of federalism has changed so that the political system can no longer adequately safeguard the sovereignty of the states. The national political process no longer entertains state and local interests, and the states have little influence in national politics. Only the judiciary is left to balance the states' interests with those of the federal government.

The fact that no workable principle for distinguishing between federal and state functions has been articulated does not mean that no principle should be developed. The Supreme Court has a duty to preserve the governmental structure which the Constitution mandates. The Court neglects its duty when it ignores that structure because of difficulty in finding a workable standard for maintaining it. By tolerating the incongruity in the federal system, the nation loses the benefit of two independent levels of government balancing one another. In reality, offering a comprehensive state autonomy theory for the review of congressional legislation is beyond the scope of this article. However, the following are some ideas which may be further expanded upon.

In formulating a legal theory of state autonomy, it would be possible to revive the test used in *National League of Cities*. A federal law which regulated the states would be invalid if it met each of these three criteria:

First, there must be a showing that the challenged statute reg-

---

110. *Id.* at 1360. Chief Justice Rehnquist and Justice Scalia concurred in the judgment that taxation of the interest on state and local bonds would not affect the fiscal power of the states but objected to the majority's restrictive view of federalism as a judicially-protectible institution. *Id.* at 1369 (Scalia, J., concurring), 1370 (Rehnquist, C.J., concurring). Justice O'Connor dissented, believing that federalism prevents "Congress from taxing or threatening to tax the interest paid on state and municipal bonds." *Id.* at 1370 (O'Connor, J., dissenting). Justice O'Connor further stated that "the Court shirks its responsibility because it fails to inquire into the substantial adverse effects on state and local governments that would follow from federal taxation of the interest on state and local bonds." *Id.* at 1371 (O'Connor, J., dissenting).

> ulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And, third, it must be apparent that the states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."[111]

Unfortunately, this test is more a checklist than a comprehensive theory for preserving state autonomy. But other attempts at articulating a theory are being made. For instance, Chief Justice William Rehnquist outlined an approach for reviewing federal legislation which intrudes on the states' sphere in his concurrence to *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[112] involving federal standards for state regulation of coal mining. According to the Chief Justice, Congress can regulate state activity under the commerce clause only if the regulated activity has a *substantial effect* on interstate commerce.[113] Moreover, Congress' finding that a particular activity substantially affects interstate commerce must be supported by a *rational basis*.[114] And this finding is reviewable by the courts.[115] "In short, unlike the reserved police power of the states, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause."[116] Chief Justice Rehnquist continued:

> In sum, my difficulty with some of the recent Commerce Clause jurisdiction is that the Court often seems to forget that legislation enacted by Congress is subject to two different kinds of challenge, while that enacted by the states is subject to only one kind of challenge. Neither Congress nor the states

---

111. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981). *Hodel* was a federal/state relations case which was decided after *National League of Cities*. It was the *Hodel* decision that coined this 3-part test from the holding in *National League of Cities*. According to Professor Rex Lee, re-formulation of the *National League of Cities* holding into this 3-part test, all of whose points must be satisfied to invalidate a federal regulation on state autonomy grounds, probably diluted the force of that decision. Lecture by Professor Lee, 1986-87 BYU Law School Constitutional Law Class (Oct. 1986).

112. 452 U.S. 264, 307 (1981).

113. *Id.* at 310-11.

114. *Id.* at 311.

115. *Id.*

116. *Id.*

> may act in a manner prohibited by any provision of the Constitution.[117]

Requiring Congress to justify the exercise of its broad powers would reintroduce a healthy contention between the two levels of government. This would benefit the political system by providing a viable competitor for the federal government.[118] If federal power over the states is exercised too frequently, the tendency is not toward bi-governmental cooperation, but toward federal government control of the states.[119] The courts must take a more active role in restraining federal government intrusion into state activities. In this way the federal system would again resemble that envisioned by the Founding Fathers.

## V. CONCLUSION

There is no doubt that the states have a much smaller role in the federal system than intended by the Founders of the Constitution. Federal statutes bind the states, and the states cannot raise the revenue needed to maintain the position designed for them. The states survive by accepting virtual bribes from the federal government: Grant money is received in exchange for the states accomplishing the federal government's will. As a result, the states have lost their "effectiveness as instruments of self-government."[120]

There are probably countless reasons why the states' role has declined. Two specific and identifiable causes are the sixteenth and seventeenth amendments. The sixteenth amendment allowed the federal government to tax the internal sources of the states, undermining their fiscal integrity. The seventeenth

---

117. *Id.* at 312-313. That is, congressional acts are subject to substantial effect and rational basis analysis, whereas, state enactments are subject only to rational basis analysis.

118. *See* R. LEE, A LAWYER LOOKS AT THE CONSTITUTION 65 (1981).

119. U.S. Supreme Court Justice Sandra Day O'Connor criticized the prevalent view of the states' role by declaring:

> State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended review. Instead, each state is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.

FERC v. Mississippi, 456 U.S. 742, 777 (1982)(O'Connor, J., dissenting).

120. Garcia v. San Antonio Transit Auth., 469 U.S. 528, 575 (1985)(Powell, J., dissenting), quoting Brief for the State of California et al. at *Amici Curiae* 50.

amendment deprived the state legislatures the power to select United States Senators, eliminating their voice in Congress. After these two safeguards of state autonomy were dismantled, the federal government was able to consolidate power. The states have lost the power to withstand.

Since the constitutional structure of federalism no longer protects state sovereignty, and since it is not desirable or possible to repeal the sixteenth and seventeenth amendments, the judiciary should resolve federalism disputes. Part of the judiciary's task is restraining one level of government from dominating the other. If the courts are actively involved in balancing the federal relationship, that relationship will be restored to its proper vibrant form.