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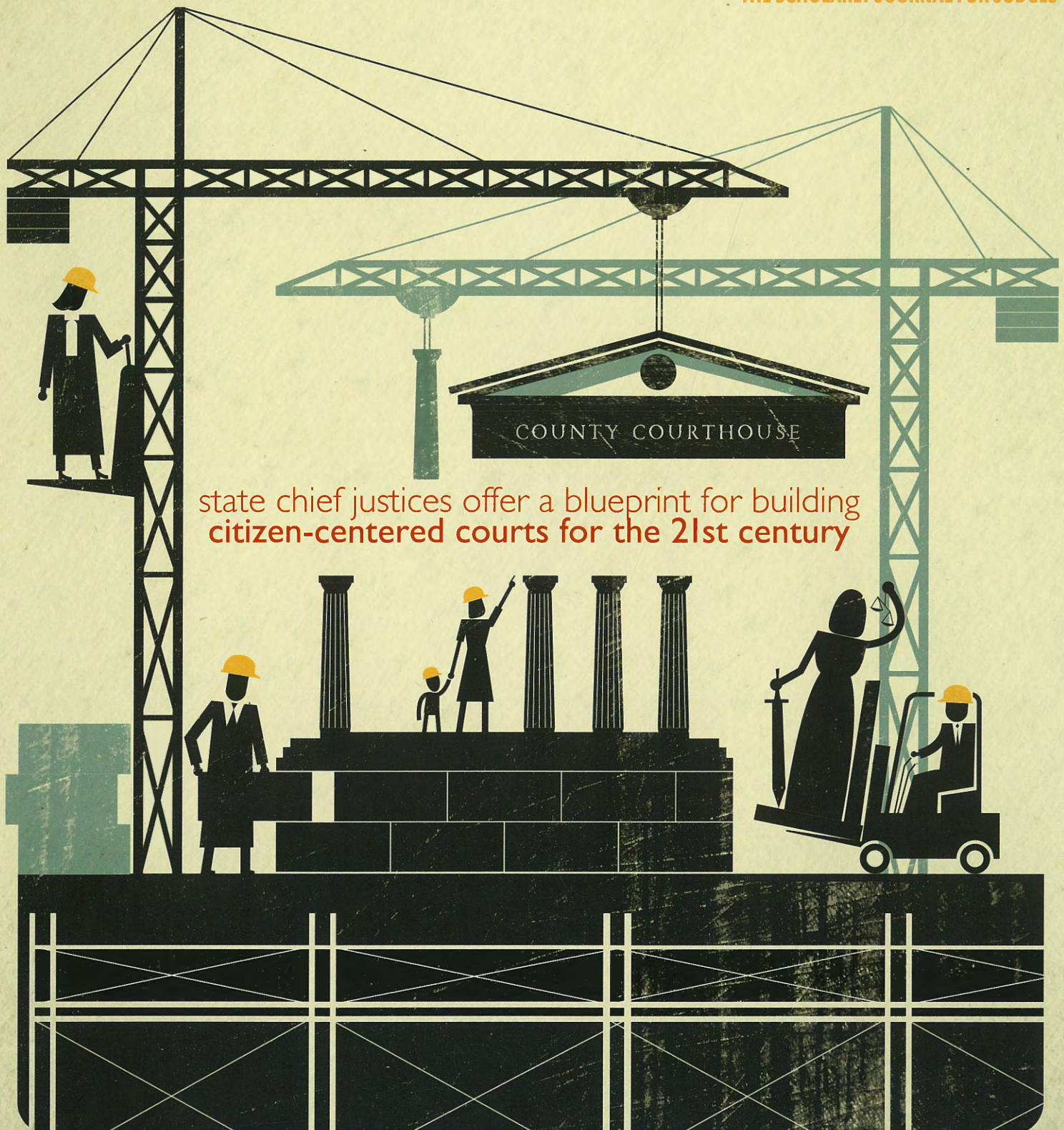

state chief justices offer a blueprint for building **citizen-centered courts for the 21st century**

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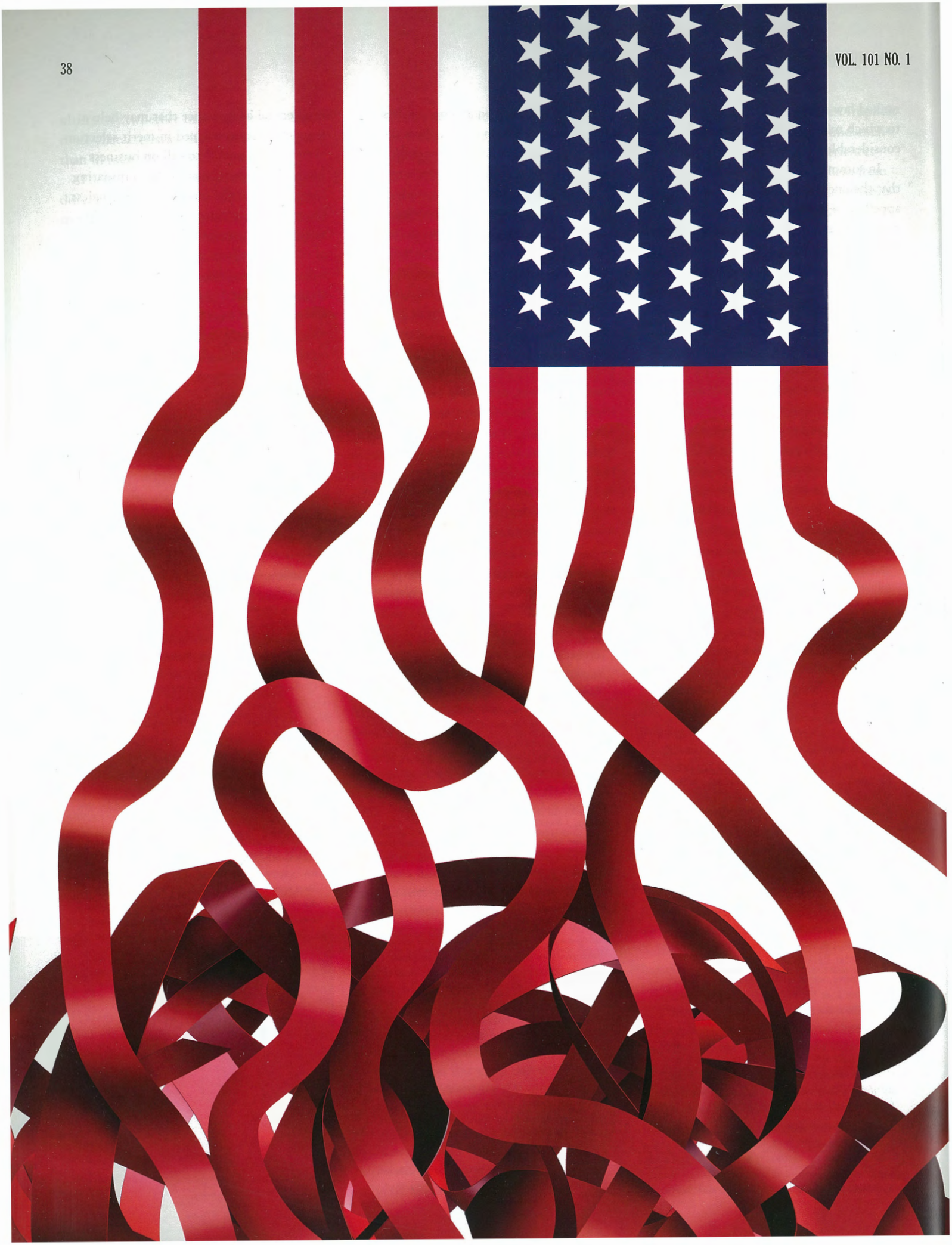

Our own history affords rich experience of the scope and limits of the judiciary as the instrument of a federated nation. If problems affecting the jurisdiction of the federal courts are recognized as one aspect of the great, persisting problem of harmonizing the forces of state and national life, legislation and adjudication affecting federal jurisdiction will be seen and treated, not as dry technicalities, but in the perspective of the dynamic struggle between the national government and the states which, with the emphasis shifting now in one direction, now in the other, has been going on from the day that the Constitution was ordained. That struggle will never cease. In its fate the jurisdiction of the federal courts will always be enmeshed.

– Felix Frankfurter & Wilber G. Katz, Cases and Other Authorities on Federal Jurisdiction and Procedure (1931)

Foundations of U.S. Federalism

BY LEE H. ROSENTHAL AND GREGORY P. JOSEPH[1]

What precisely is American federalism? In their seminal work on federal jurisdiction, Felix Frankfurter and Wilber Katz allude to a "dynamic struggle" between federal and state power, the ebb and flow of competing, sometimes conflicting, spheres of federal and state power and influence. In many respects, the story of American government is the story of how that struggle has been resolved.

The antecedents of American federalism trace to colonial days, when the concept of divided sovereign power began to take shape. At the beginning of the Revolutionary War, the thirteen colonies declared themselves to be free and independent states. During the hostilities and at the War's end, the newly formed states recognized that they needed to operate together to function adequately on the new national stage and to enter the world stage.

America's first attempt to codify federalism — the Articles of Confederation of 1781 — failed. Replaced by the Constitution of 1787, this sturdy document and the government it established have survived the tenuous early days of the Republic, a Civil War, serious economic depressions, America's involvement in two World Wars, and 227 years of innumerable internal and external challenges. This paper briefly outlines how American federalism developed and how it serves as the basic organizing principle of American government.

AMERICAN FEDERALISM: PREREVOLUTIONARY UNDERPINNINGS

Reflecting on America's early political development, Alexis de Tocqueville commented that "[i]n America . . . it may be said that the township was organized before the county, the county before the state, the state before the union."[2] America's earliest political associations were forged at a local level. Early colonists found themselves separated from their sovereign's authority and protection by a vast ocean and from their fellow colonists by a vast geographic expanse. As a consequence, they organized and largely governed their day-to-day lives independently and locally.

In 1643, the first American effort to create a political union among the colonies ▸

began in Boston. Faced with the need to defend and maintain security over a large territory — and with little hope of receiving aid from England due to the "sad distractions" of the English Civil War — the New England settlers found themselves "convinced . . . of the necessity of banding together to resist destruction. . . ."[3] Delegates from Massachusetts, New Plymouth, Connecticut, and New Haven formed the New England Confederation, "a firm and perpetual league of friendship and amity for offense and defense, mutual advice and succor upon all just occasions, both for preserving and propagating the truth and liberties of the Gospel and for their own mutual safety and welfare."[4] Their union lasted four decades, until James II folded these colonies into the new Dominion of New England in 1684.[5]

Approximately a century after forming the New England Confederation, the colonies again found the need to confederate due to mutual pressing concerns, including relations with Native Americans and each other and the possibility of a French attack. Representatives from the British North American Colonies adopted the Albany Plan of Union on July 10, 1754. The Plan provided that each colony would select members of a Grand Council and the British government would appoint a "president General."[6] One of the most prominent Plan supporters was Benjamin Franklin. His well-known "Join, or Die" political sketch, first published in Franklin's *Pennsylvania Gazette* on May 9, 1754, shows a snake cut into eight pieces. Each piece is labeled with the initials of one of the colonies, except that the four New England colonies are represented by "N.E." at the snake's head.[7] "Join, or Die" later became a rallying cry for the Revolutionary War and is perhaps the earliest pictorial representation of the nation's budding federalism.

Neither the New England Confederation nor the Albany Plan of Union sought to sever or even to weaken ties with England. To the contrary, Franklin hoped that the Albany Plan would increase the British participation in the colonies. "Britain and her Colonies should be considered as one Whole, and not as different States with separate Interests."[8] The New England Confederation, and the Albany Plan of Union — even though it failed — formed precedent for the idea that the colonies could join together to pursue mutual interests, while simultaneously retaining individual power over day-to-day political activities.

In 1775, Silas Dean wrote to Patrick Henry that, "[i]f a reconciliation with G Britain take place, it will be obtained on the best terms, by the Colonies being united, and be the more like to be preserved, on just and equal Terms; if no reconciliation is to be had without a Confederation We are ruined to all intents and purposes."

THE IMPACT OF THE REVOLUTIONARY WAR: AN IMPETUS TO FEDERALISM AND THE FAILURE OF THE ARTICLES OF CONFEDERATION

The need for some degree of centralization among the various colonies became clear during the Revolutionary War. The demands of raising the army, putting it under a central command, supplying it, and raising funds for it exceeded state and local government capabilities. The revolutionaries recognized that some confederation was needed, but they remained deeply suspicious of centralized power.[9] The implications of failure were not lost on the revolutionaries. In 1775, Silas Dean wrote to Patrick Henry that, "[i]f a reconciliation with G Britain take place, it will be obtained on the best terms, by the Colonies being united, and be the more like to be preserved, on just and equal Terms; if no reconciliation is to be had without a Confederation We are ruined to all intents and purposes."[10]

The wartime urgency and the necessity of union, combined with the fear of a new overarching sovereign, led the revolutionaries to ratify the Articles of Confederation on March 1, 1781. The Articles left the states as the source of sovereign power but created a new central government with its powers derived from the consent of the states.[11]

Americans were cautious in creating this new centralized government. "Whatever their collective commitments to new government, the revolutionaries were in no mood to issue blank checks in the form of another strong central government that could become as harmful as the one they fought to remove."[12] The central government under the Articles was relatively feeble. The states delegated the central government limited powers and even more limited resources. That government was unable to levy taxes or regulate commerce and depended on the states for revenue; there was no executive and no independent judiciary; there were no standing land or sea forces; and any change to the Articles required the states' unanimous vote. Exercising the limited powers the new government did have, including making treaties and coining money, often required a majority or supermajority vote.

Postrevolutionary Needs

The Articles proved unworkable. Disputes among states were difficult to resolve, and the central government was underfunded and unable to compel delinquent states to pay their shares of common expenditures. By 1784, a disagreement over the use of the Potomac River highlighted these problems:

> First, all the other States were asked to agree to send delegates to the meeting, and all the States hardly ever agreed to do anything; second, if the meeting did take place it must agree upon a report to the States, and there was no reason to expect greater harmony in this assemblage than there was in the Continental Congress, where discord reigned; third, if a plan should be agreed upon, under the terms of the call of the meeting every State must accept it before it could become effective, and it seemed preposterous to expect such unanimity from such antagonistic elements. But affairs were rushing to a crisis, and it

> was clear that something must be done to save the Union from disintegration and America from disgrace. Far-seeing men began seriously to apprehend that soon the people who had won a glorious victory against Great Britain would fall back under the yoke of that or some other foreign power. The most dangerous and demoralizing inclinations of weak human nature were becoming more and more in the ascendancy in the State governments — a tendency to pass law by which the fulfillment of contracts might be avoided, to stamp paper with figures and promises and call it money, to repudiate debts and avoid obligations of honest men.[13]

The challenge was to preserve state sovereignty within a national polity that could operate on a world stage, resolve interstate differences, and facilitate common interests. Fears that a central government would accumulate too much power and erode state sovereignty persisted, along with the fear that no central authority could govern such a huge expanse of territory.

The solution the Framers posited and the states adopted was the federalism embodied in the Constitution. "The Framers split the atom of sovereignty. The genius of their idea was that American citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[14] One scholar has described this federalism "as a new-modeled creation cobbled together out of a mix of necessity (the existence of the states) and theory (the belief that republics could not be easily maintained across a large territory)."[15] The basic structural characteristics of this "more perfect union" formed the basis of the system of American government that continues to the present.

Developing "A More Perfect Union"

Between May and September of 1787, the Constitutional Convention met in Philadelphia to address and try to remedy the failures of the Articles of Confederation. Although the word "federalism" appears nowhere in the Constitution, it pervades the structure of the government the document creates.

Article I, Section 8 specifically enumerates the powers of Congress. At the time of the founding, there was little controversy that many of these powers were best suited for national regulation, including the power to provide for a common defense, declare war, raise an army and maintain a navy, regulate naturalization, coin money, regulate international commerce, and punish piracy and violations of international law.[16]

Other powers in Article I, Section 8, however, have proved controversial and have been interpreted to permit the expansion of the federal government and restrictions on powers of the states. The Commerce Clause, which empowers Congress to "regulate commerce . . . among the several states . . . ,"[17] is among the most controversial. "Commerce" can be read restrictively, to refer to a category of activities distinct from, for example, manufacturing, farming, or mining, preventing the federal government from using the Commerce Clause to regulate these and similar activities. This narrow reading is consistent with the Supreme Court's interpretation for the first century after ratification, and with current scholarship on the original meaning of the Clause.[18] The Commerce Clause can also be, and has been, read to allow Congress to regulate any activity that in the aggregate has an effect on a national market, even if the conduct is purely intrastate.[19]

The Constitution's Taxation Clause, which provides Congress with the power to tax and spend to "provide for the . . . general Welfare of the United States,"[20] similarly has been "controversial since it first saw the light of day."[21] Does this phrase mean that Congress can spend only in connection with the powers otherwise granted to Congress or for any good purpose? Does it permit Congress to regulate through spending? These questions have been the subject of heated debate,[22] and the answers have had a substantial impact on the balance of federal and state power.[23]

Finally, the Necessary and Proper Clause, which grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" its other enumerated powers,[24] has profound federalism implications, depending on how broadly or narrowly the term "necessary" is interpreted.[25]

In addition to Article I, Section 8, other parts of the Constitution provide key features of the federalist system. Article I, Section 10 prohibits states from regulating in certain areas. Article VI makes the "Constitution, and the Laws of the United States . . . and all Treaties made . . . the supreme Law of the Land." Under the constitutional structure, all powers the Constitution neither delegated to the federal government nor prohibited to the states are reserved to the states or to the people. This structure was later made explicit in the Tenth Amendment.

In their *Federalist Papers*, Alexander Hamilton, James Madison, and John Jay promoted state ratification of the Constitution. In Federalist No. 9, Hamilton attempted to assuage the concerns that the states would lose sovereignty under the new Constitution:

> So long as the separate organization of the members be not abolished . . . though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty . . . and leaves in their possession certain exclusive and very important portions of sovereign power.[26]

In Federalist No. 51, Hamilton argued that federalism would help limit the ability of the proposed new central government to abuse its powers:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[27]

The *Federalist Papers* repeatedly address concerns that the proposed federal govern-

ment would run roughshod over the states.[28] Federalist No. 39 focused on the limited powers of the federal government and the continuing sovereignty of the states:

> Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution. . . .
>
> [T]he proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact . . . .[29]

Federalist No. 39 maintained that there must be some arbiter to resolve disputes among the states and that this limited sacrifice of state sovereignty was preferable to resolution by "the sword and a dissolution of the compact." Equally noteworthy is the distinction drawn between a national and federal government, the former indicative of a boundless overarching power, the latter representing a government of limited enumerated powers.

While the *Federalist Papers* emphasized that the states retained their sovereignty, the authors stressed that some limits on state sovereignty were essential for the welfare of the American people:

> [I]f, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form?[30]

There was fervent opposition to the federalism built into the Constitution. Robert Yates and John Lansing, New York's delegates to the Constitutional Convention, wrote to New York Governor George Clinton on Dec. 21, 1787, that, in addition to lacking authority to consider the idea of a new government, a central authority would also oppress faraway citizens:

> [W]e entertained an opinion that a general government, however guarded by declarations of rights, or cautionary provisions, must unavoidably, in a short time, be productive of the destruction of the civil liberty of such citizens who could be effectually coerced by it, by reason of the extensive territory of the United States, the dispersed situation of its inhabitants, and the insuperable difficulty of controlling or counteracting the views of a set of men (however unconstitutional and oppressive their acts might be) possessed of all the powers of government, and who, from their remoteness from their constituents, and necessary permanency of office, could not be supposed to be uniformly actuated by an attention to their welfare and happiness . . . .[31]

They were also concerned that "the expense of supporting" the new government "would become intolerably burdensome" and that many citizens would be "necessarily . . . unknown" to the national representatives given the size of the new country.[32]

The antifederalists were well aware that the stakes were high:

> If the constitution, offered to your acceptance, be a wise one, calculated to preserve the invaluable blessings of liberty, to secure the inestimable rights of mankind, and promote human happiness, then, if you accept it, you will lay a lasting foundation of happiness for millions yet unborn; generations to come will rise up and call you blessed. . . . But if, on the other hand, this form of government contains principles that will lead to the subversion of liberty — if it tends to establish a despotism, or, what is worse, a tyrannic aristocracy; then, if you adopt it, this only remaining asylum for liberty will be shut up, and posterity will execrate your memory.[33]

Many antifederalists, fearful of a powerful central government, demanded a Bill of Rights, which, in 1791, became the first ten amendments to the Constitution.

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Writing in 1833, Justice Joseph Story noted that the Ninth Amendment "was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others . . . ."[34] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment made explicit 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."[35]

On June 21, 1788, the ninth state, New Hampshire, ratified the Constitution, and it became effective.[36] According to one scholarly view, federalism was "the greatest of American contributions to the art of government."[37] Alexis de Tocqueville celebrated this singular achievement: "This Constitution . . . rests upon a novel theory, which may be considered as a great invention in modern political science . . . .

[A] form of government has been found out which is neither exactly national nor federal . . . . [T]he new word which will one day designate this novel invention does not yet exist."[38]

Federalism In Practice: The Early Precedents

The federal courts quickly became the arbiter of federalism, defining the relative powers of the federal and state governments. In 1810, the Supreme Court, then a young institution still establishing its authority, ruled in *Fletcher v. Peck*[39] that Georgia's legislature could not invalidate a contract because the federal Constitution did not permit bills of attainder or *ex post facto* laws. Chief Justice John Marshall carefully noted that the Court did not intend any "disrespect of the legislature of Georgia, or of its acts."[40] Despite this deferential tone, *Fletcher v. Peck* established the principle that the Supreme Court has the power to strike down an unconstitutional state law.

In 1816, the Supreme Court ruled that it could also override state courts in *Martin v. Hunter's Lessee*.[41] Four years earlier, the Supreme Court had ruled in *Fairfax's Devisee v. Hunter's Lessee*[42] that the Jay Treaty between the United States and Britain precluded Virginia from appropriating the property of a loyalist. The Virginia Supreme Court ruled that it was not bound by the Supreme Court's ruling, stating: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court . . . ."[43] In *Martin*, the Supreme Court reemphasized that it walked carefully when it reviewed state-court judgments. "The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us."[44] The Supreme Court again balanced this respect and deference with the recognition that "[t]he constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"[45] The Supreme Court ruled that

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state courts were subject to its appellate jurisdiction on constitutional matters. By 1816, the Supreme Court had declared that it could overrule state courts and invalidate unconstitutional state laws.

That same year, Congress chartered the Second Bank of the United States, a private corporation that handled all fiscal transactions for the federal government. Two years later, Maryland passed legislation to impose a tax on the Bank, which Bank employee James M'Culloch refused to pay. The Maryland state courts upheld the legality of the tax. In *M'Culloch v. Maryland*,[46] the Supreme Court made two critical rulings. First, it declared that the Necessary and Proper Clause of Article I, Section 8 of the Constitution granted Congress discretion in choosing the means by which to execute its enumerated powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[47] Despite the absence of an enumerated power to incorporate, the Supreme Court held that creating the Bank was constitutional under Article I, Section 8 as "necessary and proper" to carry out Congress's other enumerated powers. Second, the Court concluded that while Article I, Section 8 gave Congress the power to create the Bank, Article VI's Supremacy Clause meant that Maryland lacked the power to tax that Bank. "The government of the Union, though limited in its powers, is supreme within its sphere of action . . . and its laws, when made in pursuance of the constitution, form the supreme law of the land."[48]

In 1824, one of the most significant cases on congressional powers came before the Supreme Court. *Gibbons v. Ogden*[49] involved competing steamboat ferry owners whose vessels operated in the waters between New York and New Jersey. Ogden obtained an exclusive license from the State of New York authorizing him to operate along the contested route and sought an injunction to stop Gibbons from operating along the same route. In response, Gibbons argued that a 1793 act of Congress regulating coastal commerce allowed him to compete with Ogden. He lost in the trial and appellate courts in New York, but the Supreme Court reversed. The Court's decision for Gibbons rested on its first interpretation of the Commerce Clause, which provides that "Congress shall have power . . . [t]o regulate commerce . . . among the several States . . . ."[50] The Court found that the word "commerce" included navigation among the states, and the word "among" before the phrase "the several States" meant that Congress's commerce power did not "stop at the external boundary line of each State, but may be introduced into the interior."[51] The New York law granting Ogden an exclusive license was a "nullity" in light of Congress's conflicting act and the Constitution's Supremacy Clause.[52] *Gibbons* significantly expanded the authority of the federal government by recognizing Congress's broad power to regulate commercial activity.

By the Civil War, the federal courts had established several key principles of

federalism, including the power of federal courts to invalidate unconstitutional state laws, to nullify conflicting state-court rulings, and to ensure the supremacy of federal law enacted within the enumerated powers the Constitution delegated to the federal government. Nonetheless, during this period, the federal government remained small and had little impact on the lives of most citizens. Most Americans identified more with their states than with the nation.

THE CIVIL WAR AND RECONSTRUCTION

Civil War: Federalism in Crisis

The Civil War threatened the survival of the American experiment. Could states legitimately claim a right to secede from the nation? President Lincoln vehemently opposed the idea. "Plainly, the central idea of secession, is the essence of anarchy."[53] There was the bond of geography: "Physically speaking, we cannot separate."[54] And there was the bond of the constitution itself: "[N]o State, upon its own mere motion, can lawfully get out of the Union."[55]

Secessionists strongly disagreed. Future Confederate President Jefferson Davis, announcing his departure from the United States Senate following Mississippi's decision to secede, declared: "I have for many years advocated, as an essential attribute of State sovereignty, the right of a State to secede from the Union."[56] He explained:

> Secession belongs to a different class of remedies. It is to be justified upon the basis that the States are sovereign. There was a time when none denied it. I hope the time may come again, when a better comprehension of the theory of our Government, and the inalienable rights of the people of the States, will prevent any one from denying that each State is a sovereign, and thus may reclaim the grants which it has made to any agent whomsoever.[57]

The South's defeat in the Civil War greatly expanded the power of the federal government and "destroyed the doctrine that the Constitution was a compact among sovereign states, each with the right to interpose or nullify an act of Congress, and each with the ultimate right to secede legally from the Union."[58] Under modern conceptions of federalism, states retain sovereignty. The Civil War, however, removed any doubt that the federal government — which derives its sovereign power from "the People," not the states — is supreme when acting within the scope of its enumerated powers. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals, and for other constitutional ends."[59]

The Supreme Court ruled that the Privileges or Immunities Clause protected the privileges of United States citizenship but did not require the states to grant its citizens any particular privileges. The Court stressed that it considered these questions as vital to federalism and therefore to the nation.

Post Civil War: Reconstructing Federalism

When the Civil War ended, the country entered "Reconstruction," a period that included rebuilding the roles of the federal and state governments. There was significant disagreement in the country about how to treat the former Confederate states, implicating whether the basic relationship between the federal and state governments that existed before the War was to be restored, or whether it was necessary to make fundamental alternations in that relationship to prevent the continuation of the causes of the conflict.

Ultimately, three constitutional amendments, commonly referred to as the Reconstruction Amendments, were ratified in the five years after the Civil War ended, altering the balance of federalism in America. The Thirteenth Amendment abolished slavery[60] and the Fifteenth Amendment guaranteed African Americans the right to vote.[61] The Fourteenth Amendment imposed substantial restrictions on state power and expanded the power of the federal government.[62]

Section 1 of the Fourteenth Amendment, which overruled the Supreme Court's 1857 ruling in *Dred Scott v. Sandford*[63] holding that African Americans were not entitled to any of the rights of citizenship, provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside" and prohibits states from passing any law that abridges "the privileges or immunities of citizens of the United States."[64] The breadth and meaning of the phrase "privileges or immunities" remains uncertain. One theory is that the phrase was intended to be limited to certain natural rights, such as property ownership. Others argue that the phrase was intended to extend to all positive law, whether provided by state law or the Bill of Rights.[65] However, "the standard view of the effect intended by the drafters of the Privileges or Immunities Clause seems to be that it 'has been a mystery since its adoption.'"[66]

Section 1 of the Fourteenth Amendment also prohibits the states from depriving "any person of life, liberty, or property, without due process of law," or "deny[ing] to any person within its jurisdiction the equal protection of the laws."[67] The Due Process Clause has since been interpreted to incorporate almost all of the provisions of the Bill of Rights against the states,[68] and the Due Process and Equal Protection Clauses have since been interpreted to restrict or bar state regulation in diverse areas, including contraception,[69] abortion,[70] and same-sex marriage.[71]

Significantly, Section 5 of the Fourteenth Amendment grants Congress

the power to enforce the Fourteenth Amendment, providing a potentially broad grant of federal power.

The restriction of state sovereignty was a principal basis for the opposition to the Fourteenth Amendment, as reflected in a published letter of Interior Secretary Orville Browning that President Andrew Johnson — a Reconstruction opponent — reportedly approved:

> The object and purpose are manifest. It is to subordinate the State judiciaries in all things to Federal supervision and control; to totally annihilate the independence and sovereignty of State judiciaries in the administration of State laws, and the authority and control of the States over matters of purely domestic and local concern. . . . [I]f adopted, every matter of judicial investigation, civil or criminal, however insignificant, may be drawn into the vortex of the Federal judiciary.[72]

Supporters of the Fourteenth Amendment found Browning's attack to be little more than the same states' rights argument that had led to, and been defeated by the Union's victory in, the Civil War:

> In a few words the great fear of Mr. Browning is that this amendment in its operation will do away with State sovereignty, legislative and judicial, and will put the legislatures and courts of the several States under Congress and the federal courts . . . . We hold that this old Southern theory of our government was demolished at Petersburg and surrendered at Appomattox Court House with Lee's army; and so we dismiss this branch of the argument.[73]

The Fourteenth Amendment was ratified in July 1868. By 1870, however, support for a very strong version of Reconstruction had begun to wane. As part of this trend, the Supreme Court narrowly interpreted the Privileges or Immunities Clause when it first addressed the Fourteenth Amendment in the *Slaughter-House Cases*.[74] These cases concerned a Louisiana law permitting only one slaughterhouse in the New Orleans area, ostensibly to promote health and safety. Competing butchers were allowed to slaughter, but only at the approved slaughterhouse. Critics contended that the state law unconstitutionally deprived the other butchers of the "privilege" of practicing their profession, violating their "privileges or immunities" under the Fourteenth Amendment.

The Supreme Court ruled that the Privileges or Immunities Clause protected the privileges of United States citizenship but did not require the states to grant its citizens any particular privileges. The Court stressed that it considered these questions as vital to federalism and therefore to the nation:

> No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.[75]

The Court analyzed the historical underpinnings of the Fourteenth Amendment, emphasizing the "pervading purpose" of the Reconstruction Amendments as freeing the slaves, securing that freedom, and protecting the new freemen from oppression. The Court refused to interpret the Privileges or Immunities Clause as a dramatic general reworking of the federal-state balance:

> The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.
>
> Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government. But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.
>
> But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.[76]

The Equal Protection Clause of Section 1 of the Fourteenth Amendment was effectively nullified when the Supreme Court ruled in 1896 that "separate, but equal facilities" were constitutional in *Plessy v. Ferguson*, authorizing state-sanctioned segregation.[77] It was not until 1954 that the Supreme Court reversed that decision in *Brown v. Board of Education*, ruling that "separate educational facilities are inherently unequal."[78]

PROGRESSIVE ERA: FEDERALISM GROWS

Rapid industrialization in the late nineteenth and early twentieth centuries raised a variety of economic and social issues that in turn produced a series of political reforms. This period has been described as characterized by a "growing conviction that government at all levels ought to intervene in the socioeconomic order to enact

antitrust and regulatory legislation, labor and welfare measures, and tax reform."[79] The nation adopted several constitutional amendments, including the Sixteenth, which authorized direct federal income taxes, and the Seventeenth, which provided for the citizens in each state to elect their senators directly rather than through their state legislatures. Federal power continued to expand and become entrenched.

The Sixteenth Amendment: Taxation

The Sixteenth Amendment, ratified on Feb. 3, 1913, is considered the first Progressive Era constitutional amendment. In 1895, in *Pollock v. Farmers' Loan & Trust Company*,[80] the Supreme Court had invalidated a federal income tax as an unconstitutional direct tax because it was not apportioned to the states based on their respective populations. The Sixteenth Amendment overturned this ruling.[81] Some opponents saw this as a federal "power grab" designed to further weaken the states:

> A hand from Washington will be stretched out and placed upon every man's business; the eye of the federal inspector will be in every man's counting house. . . . An army of Federal inspectors, spies and detectives will descend upon the state. . . . I do not hesitate to say that the adoption of this amendment will be such a surrender to imperialism that has not been since the Northern states in their blindness forced the fourteenth and fifteenth amendments upon the entire sisterhood of the Commonwealth.[82]

Following the Sixteenth Amendment, the federal government began using its expanded resources to pass legislation approving federal funding for social welfare programs, including the 1921 Sheppard Towner Act to fund child and maternity care, described as the "first venture of the federal government into social security legislation."[83] Over time, the Sixteenth Amendment significantly impacted the balance of federal-state power. Together with an expansive interpretation of the congressional spending power, the taxing power permitted the substantial growth of the federal government in myriad areas it previously had not occupied or regulated.

The Seventeenth Amendment: Direct Election of Senators

The Seventeenth Amendment, adopted on May 31, 1913, provided for the voters of each state to elect their Senators directly, rather than having state legislatures select them. This abrogated one of the original, fundamental structural protections for the states by affording direct state influence over the operations of the federal government.

INCORPORATING THE BILL OF RIGHTS

The Reconstruction Amendments profoundly impacted the federal-state balance by applying the Bill of Rights through the Fourteenth Amendment ("incorporating" the Bill of Rights in the Fourteenth Amendment) to limit or invalidate state action. Before the Civil War, the Supreme Court held that the Bill of Rights did not apply to the states. In 1833 the Supreme Court ruled in *Barron v. City of Baltimore*[84] that the Constitution's Fifth Amendment prohibition against government confiscation of property without just compensation was a limit only on the power of the federal government. "Had the people of the several States, or any of them, required changes in their Constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves."[85] Years after the Civil War, in 1875, the Court ruled that the First Amendment right to free assembly and the Second Amendment right to bear arms did not apply to the states.[86] In so holding, the Court emphasized the existence of more than one sovereign in the federal system:

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.[87]

This changed over time, as the Supreme Court slowly applied specific protections afforded by the Bill of Rights to the states. The Court relied on the commandment in the Fourteenth Amendment's Due Process Clause that no state may "deprive any person of life, liberty or property, without due process of law." In 1925, the Supreme Court used the Clause to apply the First Amendment to the states. In *Gitlow v. New York*,[88] the Court stated: "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[89] In 1931, the Supreme Court relied on the Clause to remove any doubt that the First Amendment rights of freedom of the press applied to the states[90] and, in another case, to recognize that a defendant's right to legal representation in capital cases applied to the states.[91] As recently as 2010, the Court recognized that the Second Amendment applies to the states through the Fourteenth Amendment, restricting the states' ability to regulate gun ownership.[92]

EXPANDING FEDERAL POWER: THE NEW DEAL

After his election in 1933, President Franklin Roosevelt initiated a series of economic and regulatory programs to address the Great Depression. Congress passed the National Industrial Recovery Act, authorizing the promulgation of fair competition codes. The Roosevelt administration adopted a series of these codes, including one governing the poultry industry. That led to the *Schechter Poultry Corporation* case, invalidating the legislation as exceeding constitutional limits on federal powers.

The Schechter Poultry Corporation was charged with violating the Live Poultry Code. Schechter sued, claiming that the federal government had exceeded its authority by issuing the code. The Supreme Court agreed, holding that Article I of the Constitution vested the Congress, not the President, with the power to legislate, and the National Industrial Recovery Act unconstitutionally authorized the President to do so. The

Court also held that the Code regulated intrastate commerce, making the Code unconstitutional because the Commerce Clause authorized Congress to regulate only interstate commerce.[93]

Between 1933 and 1936, the Supreme Court invalidated other pieces of New Deal legislation. In 1936, buoyed by his landslide reelection, President Roosevelt proposed a plan that would reshape the Court, allowing him to select additional justices who would approve his policies. Dubbed "court packing" by his critics, his plan was opposed even by some of his fervent supporters. It was never enacted, in part because the Supreme Court began approving Roosevelt's New Deal legislation.[94] A series of decisions gradually recognized the Commerce Clause as providing constitutional authorization for expanding federal government power.

In 1937, the Supreme Court ruled in *NLRB v. Jones & Laughlin Steel Corporation*[95] that Congress may regulate isolated economic activities, like labor relations, under the Commerce Clause, because that activity has a "close and substantial relationship" to interstate commerce. In *United States v. Darby*,[96] the Court found the Fair Labor Standards Act constitutional under the Commerce Clause, barring states from enacting lower standards to obtain a commercial advantage over other states. In *Wickard v. Filburn*,[97] the Supreme Court declared that the Commerce Clause empowered federal regulation of wheat grown by a farmer for his own use, on his own farm, that never crossed state lines, because of its effect on interstate commerce. "A new era of judicial construction had been launched" and "[a]reas of authoritative action that previously had been left to the states' sphere of sovereignty or to the private sector now fell within the powers of Congress."[98]

FEDERALISM TODAY

How America interprets the balance of federal and state power has changed over two hundred years. Those changes reflect, and helped us survive, challenges that almost destroyed the nation. How best to strike that balance continues to pervade critical aspects of modern American government, including healthcare, race, civil liberties, the environment, and foreign policy.[99] Federalism also directly affects tax policy,[100] elections,[101] and domestic relations.[102]

More than 200 years after the nation's founding, fundamental questions implicating federalism remain unsettled. That is nowhere more apparent than in the Supreme Court's June 2015 decision on same-sex marriage, Obergefell v. Hodges.

Yet more than 200 years after the nation's founding, fundamental questions implicating federalism remain unsettled. That is nowhere more apparent than in the Supreme Court's June 2015 decision on same-sex marriage, *Obergefell v. Hodges*.[103]

Historically, the view had been that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the States and not the laws of the United States."[104] Over time, Supreme Court decisions began to recognize limitations on the states' traditional power to regulate marriage. In *Loving v. Virginia*,[105] for example, the Supreme Court applied the Fourteenth Amendment to overturn a Virginia prohibition on interracial marriage. In *Kirchberg v. Feenstra*,[106] the Court similarly applied the Fourteenth Amendment to strike down state laws deeming the husband "head and master" of the household.

The Supreme Court initially declined to apply Fourteenth Amendment principles to state restrictions on same-sex marriage. The first time the Supreme Court addressed same-sex marriage, it issued a "one-line summary decision . . . in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question."[107] As recently as two years ago, in *United States v. Windsor*,[108] the Supreme Court relied on the states' primacy in domestic relations to strike down a congressional attempt to define marriage as "a legal union between one man and one woman as husband and wife" for purposes of federal statutory law.[109] This year, however, the Court held in *Obergefell* that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[110] The definition of marriage is no longer the exclusive province of the states.[111]

Recent jurisprudence under the Second Amendment, addressing the right to bear arms, presents another example of the fluid nature of American federalism. For years, states were thought to have virtually unbridled authority to regulate the ownership, possession and use of firearms within their borders. That understanding changed dramatically in a short period. In 2008, the Supreme Court held in *District of Columbia v. Heller*[112] that the Second Amendment conferred an individual right to keep and bear arms, precluding the District of Columbia from banning handguns in the home and requiring firearms to be kept inoperable at all times. Subsequently, in *McDonald v. City of Chicago*,[113] the Court ruled that the Second Amendment applies to the states through the doctrine of incorporation. Together, *Heller* and *McDonald* dramatically altered firearms regulation by prohibiting the states from banning handgun possession outright, and by circumscribing the states' ability to regulate firearms to an extent that remains to be determined.

In addition to these examples, Commerce Clause jurisprudence continues to present a source of contested but expansive federal power, with uncertain scope. In 2000, for example, the Supreme Court ruled in *United States v. Morrison*[114] that the federal Violence Against Women Act's civil remedy for victims of gender-motivated violence exceeded congressional power under the Commerce Clause. By contrast, in 2005, the Court concluded in *Gonzales v. Raich*[115] that federal criminalization of intrastate marijuana growers

and users did not violate the Commerce Clause. Perhaps most notably, in *National Federation of Independent Business v. Sebelius*,[116] the Court held that the Patient Protection and Affordable Care Act was constitutional under Congress's power to tax, but was not a proper use of the Commerce Clause power because although the federal government can regulate interstate commerce, it cannot compel it.[117]

Recent interpretations of the Supremacy Clause also illustrate some of the shifting contours of federalism. Under the preemption doctrine, when Congress acts within the scope of its enumerated powers, or a federal agency acts within the scope of its statutory mandate, their action may preempt conflicting state laws or, if federal action is sufficiently pervasive, may even bar state regulation within that field.[118] Over the past decade, state laws have been held preempted under this doctrine in such divergent areas as aviation,[119] food and drug regulation,[120] immigration,[121] trucking[122] and locomotive equipment,[123] arbitration agreements,[124] regulation of emissions,[125] state age-verification requirements for the shipment and delivery of tobacco,[126] and even the treatment and processing nonambulatory animals in a slaughterhouse.[127] At the same time, preemption has been denied in multiple other contexts.[128]

As this discussion suggests, the only safe prediction about the future of American federalism is that none can be made with certainty. But while the interpretation of the balance of federal and state power has changed from the colonial period to the present, federalism continues to be a foundational principle defining America and a principal tool used to build its government.

The Supreme Court continues to look to the Framers for guidance in resolving important questions raising federalism issues or implicating federalism concerns. In *District of Columbia v. Heller*,[129] for example, the Court noted that "[d]uring the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."[130] The Court echoed the concerns America's founders had over 200 years ago about the danger to democracy posed by the new federal government. "But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution."[131]

As the nation has grown and become established, so have both federal and state power. That path has been neither smooth nor linear. Dispute and even armed conflict have marked the way. But throughout, the Constitution has served as the source of federal and state government powers and their limits. The courts continue to be the first, and often last, arbiters of the struggle to define both. That has worked so far, although far from perfectly or, at times, even well. But no one has devised an alternative approach, much less a better way.

The problems of federalism, like many aspects of the work judges across legal systems confront, are real. A great judge and legal scholar, Benjamin Kaplan of Massachusetts, described one aspect of why judges' work is so difficult and so compelling. Rules and principles, however long established and seemingly clear, cannot "solve [the] problems fully and forever. If the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them."[132]

The judiciary has many grave responsibilities. Shaping and protecting federalism continue to be among the most important and enduring of those obligations. It is a responsibility and a joy that we in the United States and the United Kingdom share.

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[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. II (Henry Reeve trans., Bantam Classics 2004) (1835).

[3] ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 21 (2011).

[4] ARTICLES OF CONFEDERATION OF THE NEW ENGLAND CONFEDERATION of 1643.

[5] LACROIX, *supra* note 2, at 21–22.

[6] ALBANY PLAN OF UNION of 1754, http://avalon.law.yale.edu/18th_century/albany.asp

[7] Georgia and Delaware (then part of Pennsylvania) were also omitted.

[8] Letter from Benjamin Franklin to Peter Collinson, THE PAPERS OF BENJAMIN FRANKLIN (May 28, 1754), http://franklinpapers.org.

[9] John Witherspoon made this point succinctly in a July 30, 1776, debate with Benjamin Franklin: "We all agree that there must and shall be a Confederation, for this War. It will diminish the Glory of our Object, and depreciate our Hope. It will damp the Ardor of the People. The greatest danger We have is of Disunion among ourselves." Notes of Debates in Congress (1776), *in* 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR 303 (Scott J. Hammond et al. eds., 2007).

[10] LACROIX, *supra* note 2, at 128.

[11] *See* ARTICLES OF CONFEDERATION AND PERPETUAL UNION of 1777 (ratified Mar. 1, 1781), http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=127.

[12] LARRY N. GERSTON, AMERICAN FEDERALISM: A CONCISE INTRODUCTION 24 (2007).

[13] GAILLARD HUNT, THE LIFE OF JAMES MADISON 93–94 (1902).

[14] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[15] Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 L. & HIST. REV. 451, 452 (2010).

[16] *See* U.S. CONST. art. I, § 8, cl. 1, 3, 4, 10–13.

[17] U.S. CONST. art. I, § 8, cl. 3.

[18] *See United States v. Lopez*, 514 U.S. 549, 553–54 (1995); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

[19] *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 15–21 (2005) ("Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

[20] U.S. CONST. art. I, § 8, cl. 1.

[21] Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 3 (2003).

[22] *Id.* at 3–10.

[23] *See infra* p. 28 (discussion of the Patient Protection and Affordable Care Act).

[24] U.S. CONST. art. I, § 8, cl. 18.

[25] *Compare* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), http://avalon.law.yale.edu/18th_century/bank-tj.asp ("[T]he Constitution allows only the means which are '*necessary*,' not those which are merely 'convenient' for effecting the enumerated powers."), *with* Alexander Hamilton, *Opinion on the Constitutionality of the Bank of the United States* (Feb. 23, 1791), http://avalon.law.yale.edu/18th_century/bank-ah.asp ("[N]ecessary often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say, that it is necessary for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing.").

[26] THE FEDERALIST NO. 9 (Alexander Hamilton).

[27] THE FEDERALIST NO. 51 (Alexander Hamilton).

[28] THE FEDERALIST NOS. 26, 31 (Alexander Hamilton).

[29] THE FEDERALIST NO. 39 (James Madison).

[30] THE FEDERALIST NO. 45 (James Madison).

[31] Letter from Robert Yates and John Lansing to George Clinton, Governor of New York (Dec. 21, 1787), http://www.constitution.org/afp/yatesltr.htm.

[32] *Id.*

[33] Letter from Brutus to the Citizens of the State of New York (Oct. 18, 1787), http://www.constitution.org/afp/brutus01.htm.

[34] Joseph Story, COMMENTARIES ON THE CONSTITUTION 3:§ 1898 (1833), http://press-pubs.uchicago.edu/founders/documents/amendIXs9.html.

[35] *Id.* at § 1900.

[36] *See* U.S. CONST. art. VII. The remaining four of the original thirteen states completed ratification of the Constitution by May 29, 1790.

[37] GERSTON, *supra* note 11, at 6 (quoting Leslie Lipson, The Democratic Civilization 143 (1964)).

[38] TOCQUEVILLE, *supra* note 1, at ch. VIII.

[39] 10 U.S. 87 (1810).

[40] *Id.* at 134.

[41] 14 U.S. 304 (1816).

[42] 11 U.S. 603 (1812).

[43] *Martin*, 14 U.S. at 323.

[44] *Id.* at 324.

[45] *Id.*

[46] 17 U.S. 316 (1819).

[47] *Id.* at 421.

[48] *Id.* at 405–06.

[49] 22 U.S. 1 (1824).

[50] U.S. CONST. art. I, § 8.

[51] *Gibbons*, 22 U.S. at 194.

[52] *Id.* at 210.

[53] Abraham Lincoln Inaugural Address (Mar. 4, 1861), http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm.

[54] *Id.*

[55] *Id.*

[56] Letter from Jefferson Davison to the United States Senate (Jan. 21, 1861), http://jeffersondavis.rice.edu/Content.aspx?id=87.

[57] *Id.*

[58] DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 74 (2D ED. 2000).

[59] *New York v. United States*, 505 U.S. 144, 181 (1992).

[60] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[61] U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

[62] U.S. CONST. amend. XIV.

[63] 60 U.S. 393 (1857).

[64] U.S. CONST. amend. XIV, § 1.

[65] *See* Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1207 (2015) (citations omitted).

[66] John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 n.5 (1992) (citing ROBERT H. BORK, THE TEMPTING OF AMERICA 166 (1989)).

[67] U.S. CONST. amend. XIV, § 1.

[68] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

[69] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[70] *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[71] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[72] John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1457–58 (1975) (citing THE CINCINNATI COMMERCIAL, Oct. 26, 1866, at 2, col. 4).

[73] *Id.* at 1462–63 (citing NEW YORK HERALD, Oct. 25, 1866, at 6, col. 4).

[74] 83 U.S. 36 (1872).

[75] *Id.* at 67.

[76] *Id.* at 82.

[77] 163 U.S. 537 (1896).

[78] 347 U.S. 483, 495 (1954).

[79] John D. Buenker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 184 (1981).

[80] 57 U.S. 429 (1895).

[81] Buenker, *supra* note 78, at 185.

[82] ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 70 (The Lawbook Exchange Ltd., 2006) (quoting RICHMOND TIMES-DISPATCH, Mar. 3, 1910).

[83] J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776, 776 (1969).

[84] 32 U.S. 243 (1833).

[85] *Id.* at 249.

[86] *United States v. Cruikshank*, 92 U.S. 542 (1875).

[87] *Id.* at 549.

[88] 268 U.S. 652 (1925).

[89] *Id.* at 666.

[90] *Near v. Minnesota*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

[91] *Powell v. Alabama*, 287 U.S. 45 (1932).

[92] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[93] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[94] WALKER, *supra* note 57, at 92.

[95] 301 U.S. 1, 37 (1937).

[96] 312 U.S. 100 (1941).

[97] 317 U.S. 111 (1942).

[98] WALKER, *supra* note 57, at 92.

[99] In 2011, the Supreme Court held that the federal government's attempt to prosecute a woman who tried to poison her husband's mistress pursuant to the Chemical Weapons Treaty could be challenged on the grounds that it violated the Tenth Amendment and basic principles of federalism: "States are not the sole intended beneficiaries of federalism. . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . . Fidelity to principles of federalism is not for the States alone to vindicate." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

[100] *Neb. Dep't of Revenue v. Loewenstein*, 513 U.S. 123 (1994).

[101] *Perry v. Perez*, 132 S. Ct. 934 (2012).

[102] *Rose v. Rose*, 481 U.S. 619 (1987).

[103] 135 S. Ct. 2584 (2015).

[104] *In re Burrus*, 136 U.S. 586, 593–94 (1890).

[105] 388 U.S. 1 (1967).

[106] 450 U.S. 455 (1981).

[107] *Obergefell*, 135 S. Ct. at 2598 (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

[108] 133 S. Ct. 2675 (2013).

[109] *Id.* at 2683, 2691–92.

[110] *Obergefell*, 135 S. Ct. at 2604.

[111] The dissents in *Obergefell* emphasized the federalism implications of the Court's decision. *See id.* at 2611 (Roberts, J., dissenting) ("Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition."); *id.* at 2643 (Alito, J., dissenting) ("The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not . . . . The majority today makes that impossible.").

[112] 554 U.S. 570 (2008).

[113] 561 U.S. 742 (2010).

[114] 529 U.S. 598 (2000).

[115] 545 U.S. 1 (2005).

[116] 132 S. Ct. 2566 (2012).

[117] In dissent, four justices maintained that the Commerce Clause supplied the necessary Congressional power, emphasizing federalism issues. *See id.* at 2615 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The Commerce Clause, it is widely acknowledged, 'was the Framers' response to the central problem that gave rise to the Constitution itself.' . . . Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable . . . . The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation 'in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.'") (citations omitted); *see also id.* at 2609 ("Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm . . . . The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it.").

[118] *See Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594–95 (2015).

[119] *See Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014).

[120] *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

[121] *See Arizona v. United States*, 132 S. Ct. 2492 (2012).

[122] *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013).

[123] *See Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012).

[124] *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

[125] *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

[126] *See Rowe v. N.H. Motor Transport Ass'n.*, 552 U.S. 364 (2012).

[127] *See Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012).

[128] *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1591 (2015) (state antitrust claims arising from natural gas pricing); *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014) (state statutes of repose in certain environmental cases); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2013) (state law class action arising from bank certificates of deposit).

[129] 554 U.S. 570 (2008).

[130] *Id.* at 598.

[131] *Id.* at 599.

[132] Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 500 (1969).