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## The Scheme of Enumeration: A Critical Analysis of the New Federalism in the U.S. Supreme Court

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ARTICLE

**THE SCHEME OF ENUMERATION:  
A CRITICAL ANALYSIS OF THE  
NEW FEDERALISM IN THE  
U.S. SUPREME COURT**

SHLOMO SLONIM<sup>1</sup>

Proponents of the New Federalism, including justices of the U.S. Supreme Court, have adopted the premise that federalism was introduced into the Constitution by the Founding Fathers in order to diffuse power between the central government and the states, even as the separation of powers was designed to diffuse power between the three branches of the federal government. From this premise it follows that judicial supervision of relations between national center and state periphery should be applied in the spirit of dual federalism, under which both parties are deemed to be sovereign. The purpose of the present study is to trace the origins of federalism at the 1787 Constitutional Convention and thereby gauge the strength of the above thesis.

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I. THE NEW FEDERALISM: HISTORICAL BACKGROUND<sup>2</sup>

A. *From McCulloch to Dual Federalism and Back*

During the 1930s the United States, as is well known, experienced two revolutions: first, a social-economic revolution in the form of the New Deal, and second, a judicial revolution whereby changes in the Supreme Court led to an expansive view of federal power and the validation of the New Deal program.<sup>3</sup> In truth, the jurisprudence of the Court was not new; it was simply a return to the broad interpretation of the Constitution by Chief Justice John Marshall, as reflected in his historic decision in *McCulloch v. Maryland*.<sup>4</sup> On the basis of a doctrine of implied powers derived from the Necessary and Proper Clause, that celebrated decision found that the federal government was qualified to create a national bank, the Tenth Amendment did not restrict that power, and any attempt by a state to defeat that goal by taxing the institution was a violation of the supremacy clause, and hence unconstitutional.

In the intervening period, from before the Civil War to the 1930s, the Court had adopted a restrictive view based on a doctrine of dual federalism. Under this doctrine, enunciated by Chief Justice Roger Taney, the Court postulated that the national and state levels of government were coequal sovereignties, each supreme within its own sphere.<sup>5</sup> Dual federalism placed particular stress on the Tenth Amendment as assuring the states that their reserved powers would be unfettered by federal regulation. Federal inter-

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2. This survey of American federalism is not intended to be exhaustive. It focuses on the fluctuations that have characterized the Court’s approach. In the preparation of this survey, I have drawn on the extensive writings of Mark Killenbeck on the evolution of the New Federalism.

3. The term “revolution” is used here in the sense employed by Bruce Ackerman in his innovative analysis of the stages of jurisprudential and extra-jurisprudential development in the United States. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS AND TRANSFORMATIONS* (Harvard Univ. Press, 1991 & 1998).

4. 17 U.S. (4 Wheat.) 316 (1819).

5. For an outstanding summary of the influence of dual federalism in Supreme Court jurisprudence, see the relevant chapters in ALFRED H. KELLY, WINFRED A. HARBISON, AND HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (Norton, 6th ed., 1983). The foremost authority on the subject, Edward S. Corwin, defined the doctrine in terms of four postulates: 1) the national government is one of enumerated powers only; 2) the purposes it may constitutionally promote are few; 3) within their respective spheres, the federal and state governments are sovereign and hence equal; and 4) relations between the two centers are characterized by tension rather than collaboration. See *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

vention in areas reserved for the states could not prevail over state legislation since this would violate state sovereignty.

The climax of dual federalism, according to most authorities, was reached in the *Hammer v. Dagenhart* decision of 1918,<sup>6</sup> which declared that a federal law barring interstate traffic in goods produced by child labor was unconstitutional. The purpose of the law, said the Court, was to forbid child labor and not the regulation of interstate commerce. Since child labor was not an enumerated power of the national government, its regulation was beyond the power of Congress. Justice William R. Day, author of the majority opinion, wrote: "The grant of authority over a purely federal matter [such as commerce] was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment."<sup>7</sup> In citing that amendment, he went on to misquote it by asserting that "the powers not expressly delegated to the National Government are reserved" to the states and the people.<sup>8</sup> The word "expressly" does not appear in the Tenth Amendment, and its absence was highlighted in Marshall's *McCulloch* opinion as an indication that the Tenth Amendment was not intended to impinge on the doctrine of implied powers.

With the new appointments to the Court, the doctrine of implied powers was revived, while the Tenth Amendment was defanged and classified as a truism that added no new authority to the powers automatically reserved to the states by virtue of the federal character of the Constitution. State sovereignty was relegated to the margin, as national schemes in innumerable spheres were accorded priority for their promotion of national and social welfare.

Two cases, in particular, illustrate the revolution that returned the United States to the expansive jurisprudence of an earlier age. The first case is that of *United States v. Darby*,<sup>9</sup> decided in 1941. A lumber firm engaged purely in local matters in Georgia was charged with violating the federal law regulating the hours and wages of its employees. The firm argued that the law was unconstitutional, first, because manufacturing was not commerce, and second, because the company was engaged in local business only. The law thus represented an attempt by Congress to extend its authority into purely state affairs. Justice Stone, in a unanimous opinion, rejected this argument on the ground that "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon which the Constitution places no restriction and over which the courts are given no

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6. 247 U.S. 251 (1918). "The theory of dual federalism received its clearest statement in *Hammer v. Dagenhart*." C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTION* 66 (McGraw-Hill, 1959).

7. *Hammer*, 247 U.S. at 274.

8. *Id.* at 275.

9. *See* 312 U.S. 100 (1941).

control.”<sup>10</sup> Since *Hammer v. Dagenhart* deviated from this longstanding principle, it was overruled. Congress has power over intrastate commerce, Stone said, if it has a substantial effect on interstate commerce. He added that the Court’s conclusion was “unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments” as established by the Constitution. It was introduced to “allay” the fears of the states, but changed nothing.<sup>11</sup>

The second case, *Wickard v. Filburn*,<sup>12</sup> demonstrates the reach of the federal interstate commerce power. Filburn, a farmer, violated regulations prescribed under the Agricultural Adjustment Act of 1938 by growing more than his allotted quota of wheat. Filburn argued that his wheat never left the farm and was fed exclusively to his livestock. Since it was not in commerce, it was beyond the interstate commerce power of Congress.<sup>13</sup> The Court ruled that although the impact of Filburn’s consumption of the wheat was indirect and minor, nonetheless, it had an effect on interstate commerce, since he would otherwise have been compelled to go out into the market and purchase that quantity of wheat to feed his livestock. Many farmers might grow crops beyond their quotas and keep the product within the farm, but the result then would be extensive and harmful. Therefore, Filburn’s action came within the embrace of the Commerce Clause, and the law was declared constitutional. The upshot of these two decisions was that once Congress undertakes to adopt legislation under the Commerce Clause, the courts will not search beneath the surface of the law to determine how substantive an association with commerce really exists.

In the wake of these and similar decisions, the Doyen of constitutional analysis at that time, Edward S. Corwin, was prompted to publish a law article entitled: “The Passing of Dual Federalism.”<sup>14</sup> For some forty years Congress had free reign. During this period the federal government adopted numerous social welfare laws, applicable throughout the country, designed to improve the lives of American citizens. Rarely in that era did a measure based on the Commerce Clause come before the Court on the ground that it lacked constitutional license.

### *B. The Rehnquist Court and the Emergence of the New Federalism*

Change came to the Court in 1971, with the appointment of Associate Justice William H. Rehnquist, who strongly espoused a philosophy of states’ rights. He expressed his views in several cases, but it was only in

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10. *Id.* at 115.

11. *Id.* at 123–24.

12. 317 U.S. 111 (1942).

13. *See id.* at 112–14.

14. Corwin, *supra* note 5, at 1–24.

1976, in the case of *National League of Cities v. Usery*, that he was able to prevail and secure a majority.<sup>15</sup>

The opinion, delivered by Rehnquist, declared unconstitutional an amendment to the federal Fair Labor Standards Act extending federal hours and wages regulations to nearly all state employees. The Court said that the Act spoke “directly to the States *qua* States.”<sup>16</sup> But “there are limits upon the power of Congress to override state sovereignty.”<sup>17</sup> “A State . . . is itself a coordinate element in the system established by the Framers for governing our Federal Union.”<sup>18</sup> It was an “undoubted attribute of state sovereignty” for a state to be free to fix the wages and hours of its employees.<sup>19</sup> Rehnquist cited the famous 1869 pronouncement of Chief Justice Salmon P. Chase: “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>20</sup> As a result, “this exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.”<sup>21</sup> In a powerful dissent, Justice Brennan argued that the Court’s opinion repudiated “principles governing judicial interpretation” since John Marshall established that “restraints upon exercise by Congress of its plenary commerce power lie in the political process, and not in the judicial process.”<sup>22</sup>

The *National League of Cities* ruling did not survive for even a decade. It was overridden in the 1985 decision of *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>23</sup> because of the complexity of sorting out which state employees should be immune from federal regulation and which should not.<sup>24</sup> The *Garcia* opinion, authored by Justice Harry Blackmun, echoed Brennan’s dissent in *National League* by noting that state interests were most effectively protected by means of state participation in the Congress. Citing the writings of Herbert Wechsler and Jesse Choper, the Court declared: “The political *process* insures that laws that unduly burden the States will not be promulgated.”<sup>25</sup>

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15. See 426 U.S. 833 (1976). Timothy J. Conlan and Francois Vergniolle de Chantal present a pithy summary of the New Federalism cases in the opening part of their incisive article, *The Rehnquist Court and Contemporary American Federalism*, 116 POL. SCI. Q. 253 (2001). The second half of their paper analyzes the implications of the New Federalism doctrine for the future of the United States.

16. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 847 (1976).

17. *Id.* at 842.

18. *Id.* at 849.

19. *Id.* at 845.

20. *Id.* at 844 (citing *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)).

21. *Nat’l League of Cities*, 426 U.S. at 852.

22. *Id.* at 857 (Brennan, J., dissenting).

23. 469 U.S. 528 (1985).

24. This was apparently the issue that led Justice Blackmun to switch sides, support the majority in *Garcia*, and write the opinion of the Court.

25. 469 U.S. at 556 (emphasis in original).

Nonetheless, the *National League* opinion is important for spelling out the critical issues that the New Federalism doctrine, launched by the Chief Justice, embraces. It is, so to speak, the foundational manifesto relied upon by each of the succeeding cases in assessing how extensively a protective screen operates to provide state immunity from federal impositions. *National League* spotlights the following interrelated issues: 1) state sovereignty; 2) whether the federal law is directed to the states, as such, or to individuals; 3) dual federalism as the underlying principle of the Constitution; 4) the proposition that the Constitution assumed that the states, within their realm of authority, will be free to operate without outside dictation; and 5) whether the Tenth Amendment is more than just a truism.

In explication of these issues, the Court, in the 1991 decision *Gregory v. Ashcroft*,<sup>26</sup> decided that the provision in Missouri's constitution that mandated a retirement age of seventy for judges did not violate the federal Age Discrimination Act. "As every schoolchild learns," said Justice Sandra O'Connor in her majority opinion, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government."<sup>27</sup> Consequently, Missouri's freedom of action in this instance was sustained by the Tenth Amendment and the Guarantee Clause of the Constitution.

In 1992, in *New York v. United States*,<sup>28</sup> Justice O'Connor had a further opportunity to expound on the sovereignty of the states. In 1985, Congress had adopted a law requiring the states to take title for radioactive waste and penalized them if they failed to do so.<sup>29</sup> In her opinion for the Court, O'Connor ruled that the Constitution did not permit Congress to "commandeer" the states "to enact and enforce a federal regulatory program."<sup>30</sup> Citing the record of the Constitutional Convention, she held that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."<sup>31</sup> Consequently, "whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."<sup>32</sup> Further, she said: "State governments are neither regional offices nor administrative agencies of the Federal Government."<sup>33</sup> In dissent, Justices Bryon R. White, Harry Blackmun, and John Paul Stevens contended, *inter alia*, that the historical record in no way denied Congress the right to order the states to carry out

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26. See 501 U.S. 452 (1991).

27. *Id.* at 457.

28. See 505 U.S. 144 (1992).

29. Low-Level Radioactive Waste Policy Amendments Act, Pub. L. No. 99-240, 99 Stat. 1842.

30. *New York v. United States*, 505 U.S. 144, 161 (1992).

31. *Id.* at 166.

32. *Id.* at 177.

33. *Id.* at 188.

federal programs, even as it permitted Congress to oblige individuals to do so.<sup>34</sup> In a separate opinion,<sup>35</sup> Justice Stevens noted that under the Articles of Confederation, the Federal Government had the power to issue commands to the States. Because that power was insufficient for national purposes, the Framers supplemented that power by authorizing the Federal Government to command individuals as well. “Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.”<sup>36</sup>

Several subsequent cases demonstrated the far reach of the New Federalism doctrine. In 1995, in *United States v. Lopez*,<sup>37</sup> Chief Justice Rehnquist for the Court majority ruled that the federal Gun Free School Zones Act of 1990 was unconstitutional. The Act, adopted under the commerce power, made it a federal offense to be carrying a firearm within a school zone.<sup>38</sup> Rehnquist declared that possession of a gun in a school zone had nothing to do with interstate commerce, and the attempt of Congress to regulate such a matter was quite beyond its powers. To acknowledge that Congress could legislate on such a matter would, in effect, “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>39</sup>

The 1997 decision *Printz v. United States* followed on quite naturally from *New York v. United States* in holding that Congress could not compel a state to enact or implement certain legislation.<sup>40</sup> Congress had enacted the Brady Handgun Act, which, *inter alia*, required state law enforcement officers to conduct background checks on prospective purchasers of handguns. The Act was declared unconstitutional on the ground that the Federal Government could not circumvent the *New York* decision by conscripting a state’s officers directly. Justice Scalia, who wrote the majority opinion, declared that “such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>41</sup> “The Framers,” he said, “rejected the concept of a central government that would act upon and through the States [as the Articles of Confederation did], and instead designed a system

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34. *Id.* at 188 (White, J., dissenting).

35. *Id.* at 210 (Stevens, J., concurring and dissenting).

36. *New York*, 505 U.S. at 211.

37. 514 U.S. 549 (1995).

38. 18 U.S.C. § 922 (q)(1)(A) (1988 ed. Supp. V).

39. *Lopez*, 514 U.S. at 567. In the wake of *Lopez*, Congress in 1996 adopted an amendment to the earlier law that had been invalidated. Under the new legislation, Congress found that crime at the local level was “exacerbated by the interstate movement of drugs, guns, and criminal gangs”; that violent crimes in school zones affected the quality of education; and that the Commerce Clause empowered Congress to adopt this legislation. To date, the constitutionality of this Act has not been challenged in court. See LOUIS FISHER & KATY J. HARRIGER, AMERICAN CONSTITUTIONAL LAW 355 (Carolina Academic Press, 10th ed. 2013).

40. See 521 U.S. 898 (1997).

41. *Id.* at 935.



in which the state and federal governments would exercise concurrent authority over the people.”<sup>42</sup> Quoting the *New York* case, he said: “The Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>43</sup> Scalia rejected the minority argument that was based on the Commerce Clause coupled with the Necessary and Proper Clause, because in this instance, reliance on the Commerce Clause violated state sovereignty and was therefore an act of usurpation.<sup>44</sup> Interestingly, although Scalia mentioned the Tenth Amendment as confirming “residual state sovereignty,”<sup>45</sup> he did not invalidate the Brady Law on this basis.<sup>46</sup> In contrast, both Justices O’Connor and Thomas, in their concurring opinions, cited the Tenth Amendment as the crucial factor for declaring the law unconstitutional.<sup>47</sup>

The dissent, authored by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) firmly dismissed the idea that the Tenth Amendment could justify “a rule that immunizes local officials from obligations that might be imposed on ordinary citizens.”<sup>48</sup> The Court’s opinion, charged Stevens, was “bereft of support in the history of the founding.”<sup>49</sup> He cited the conclusion in *Garcia*: “The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”<sup>50</sup>

In another 1997 case, *City of Boerne v. Flores*,<sup>51</sup> the Court held that Congress had overstepped its bounds in adopting the 1993 Religious Freedom Restoration Act (RFRA), based ostensibly on its powers under Section 5 of the Fourteenth Amendment. The case involved an application by Patrick Flores, Catholic Archbishop of San Antonio, for a permit to expand the church building in Boerne, Texas. Local zoning authorities rejected the application on the ground that the proposed changes would harm the historical character of the district. Flores countered by referring to RFRA, requiring a strict scrutiny standard to determine a compelling government interest in any case substantially burdening the free exercise of religion. The majority opinion by Justice Kennedy held that the right to define the substantive rights guaranteed by the Fourteenth Amendment resided exclusively in the Court, and Congress’ attempt to set its own standard was unconstitutional. RFRA, it was said, represents “a considerable Congressional intrusion into

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42. *Id.* at 920–21.

43. *Id.* at 926.

44. *Id.* at 923–24.

45. *Id.* at 919.

46. 521 U.S. at 935.

47. *Id.* at 935–36 (O’Connor, J., concurring); *id.* at 936–39 (Thomas, J., concurring).

48. *Id.* at 942 (Stevens, J., dissenting).

49. *Id.* at 948.

50. *Id.* at 955.

51. *See* 521 U.S. 507 (1997).

the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."<sup>52</sup>

It is noteworthy that the Eleventh Amendment was also enlisted in the majority's campaign to compel respect for state sovereignty, a campaign that the late Professor Gerald Gunther labeled "the antifederalist revival of the 1990s."<sup>53</sup> Casinos on Indian reservations had become a major business, and in 1988 the Indian Gaming Regulatory Act was adopted by Congress, setting out procedures for negotiations between the Indian tribe and the state involved. In the event that the state failed to negotiate, the tribe could sue in federal court to obtain satisfaction. In the 1996 decision, *Seminole Tribe of Florida v. Florida*,<sup>54</sup> the Court majority ruled that Congress lacks power to "abrogate the States' sovereign immunity," and consequently, the law "cannot grant jurisdiction over a State that does not consent to be sued."<sup>55</sup> The decision cited the Eleventh Amendment, which confirmed—and did not establish—a state's sovereign immunity from suits, whether in a diversity claim by a citizen of a different state or in a suit by a citizen of the same state.

In the 1999 decision of *Alden v. Maine*,<sup>56</sup> the Court majority endorsed its thesis regarding the sovereign immunity of states against unauthorized jurisdiction to sue, and extended it to lawsuits against states in state courts. Alden and other probation officers had sued Maine for failing to observe the overtime provisions of the federal Labor Standards Act. Citing *Seminole Tribe*, the Court ruled that federal powers under the Constitution "do not include the power to subject nonconsenting States to private suits for damages in state courts."<sup>57</sup> The Court considered that reliance on the Eleventh Amendment to justify state immunity from private suits was misplaced since "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."<sup>58</sup> . . . States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."<sup>59</sup> The Tenth Amendment affirms this sovereignty and thus presumes that the states will be duly accorded "the dignity and essential attributes inhering in that status."<sup>60</sup> The opinion also referred to the postulate enunciated in *New York v. United States* that the Constitutional Convention explicitly substituted the right of

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52. *Id.* at 534.

53. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 225 (West Publishing, 13th ed. 1997).

54. *See* 517 U.S. 44 (1996).

55. *Id.* at 47.

56. *See* 527 U.S. 706 (1999).

57. *Id.* at 712.

58. *Id.* at 713. This thesis is quite remarkable, since it reduces the Eleventh Amendment to a superfluity.

59. *Id.*

60. *Id.* at 714.

the federal government to regulate individuals in place of regulating states. In conclusion, the Court said that Congress “must accord States the esteem due to them as joint participants in a federal system.”<sup>61</sup>

In his dissent, Justice Souter wondered on what constitutional basis the Court had ascribed sovereign immunity to the states.<sup>62</sup> In *Seminole Tribe*, the majority held that sovereign immunity derived from the Eleventh Amendment; however, now the Court finds that the Eleventh Amendment is not really required, since “sovereign immunity from all individual suits is ‘a fundamental aspect’ of state sovereignty ‘confirmed’ by the Tenth Amendment.”<sup>63</sup> . . . But there is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood.”<sup>64</sup> If it derives from the common law, then it follows that Congress is qualified, by means of its powers under Article I, together with the Supremacy Clause, to abrogate that immunity. Prior to independence, said Souter, the Crown alone possessed sovereign immunity. “The Court calls ‘immunity from private suits central to sovereign dignity,’ and assumes that this ‘dignity’ is a quality easily translated from the person of the King to the participatory abstraction of a republican State.”<sup>65</sup>

The Court also relied on sovereign immunity of states to invalidate the provision in the federal Age Discrimination in Employment Act that allowed state employees to sue the state for violation of that law. In the 2000 case, *Kimel v. Florida Board of Regents*,<sup>66</sup> the plaintiffs did not rely on the Commerce Clause (in view of *Seminole Tribe*), but based their argument on Section 5 of the Fourteenth Amendment to bring suit against Florida. In rejecting this avenue, Justice O’Connor said it was not “appropriate.”<sup>67</sup> The abrogation of the states’ sovereign immunity “exceeded Congress’ authority.”<sup>68</sup> “The Constitution does not provide for federal jurisdiction over suits against nonconsenting States.”<sup>69</sup>

Justice Stevens, on behalf of the dissenters, vigorously challenged the majority opinion. “Congress’ power to regulate the American economy includes the power to regulate both the public and private sectors of the labor market.”<sup>70</sup> The Framers, he said, had not selected “the Judicial Branch as the constitutional guardian of . . . state interests.”<sup>71</sup> They relied on the legislative process, in particular the states’ equal representation in the Senate,

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61. *Id.* at 758.

62. *Alden*, 527 U.S. at 760 (Souter, J., dissenting).

63. *Id.* at 760–61.

64. *Id.* at 761.

65. *Id.* at 802.

66. *See* 528 U.S. 62 (2000).

67. *Id.* at 82.

68. *Id.* at 67.

69. *Id.* at 73.

70. *Id.* at 92–93 (Stevens, J., dissenting).

71. *Id.* at 93.

“to defend state interests from undue infringement.<sup>72</sup> . . . There is not a word in the text of the Constitution supporting the Court’s conclusion that the judge-made doctrine of sovereign immunity limits Congress’ power to authorize private parties, as well as federal agencies, to enforce federal law against the States.”<sup>73</sup>

In the widely criticized 2000 decision *United States v. Morrison*,<sup>74</sup> the Court denied relief to a woman who had brought suit under the federal Violence Against Women Act of 1994. Christy Brzonkala charged that she had been gang-raped by two members of the football team at Virginia Polytechnic Institute, one of whom was Antonio J. Morrison. She brought suit against Morrison under the 1994 Act, which provided a “federal civil remedy for a victim of gender-motivated violence.”<sup>75</sup> In rejecting the suit, the Court based itself on *Lopez* and two nineteenth century decisions on civil rights. Chief Justice Rehnquist’s majority opinion noted that Congress had predicated the law both on Section 5 of the Fourteenth Amendment and on the Commerce Clause. Reliance on the Commerce Clause was dismissed, despite the congressional assertion that violent gender crimes seriously affected interstate commerce, because such “reasoning would allow Congress to regulate any crime” nationwide.<sup>76</sup> The connection with interstate commerce was regarded as too ephemeral and insubstantial.

Nor did the Court accept the argument based on the Fourteenth Amendment, since it held that that provision only provides for federal legislation in instances where state action is involved. The “voluminous” evidence presented to the Court of “bias in various state justice systems against victims of gender-motivated violence” was deemed insufficient to validate the federal law.<sup>77</sup> The Fourteenth Amendment was subject to certain limitations, said the Court, “to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”<sup>78</sup> Justice Thomas, in a concurring opinion, maintained that the “substantial effects” test under the Commerce Clause was inconsistent with the original understanding of Congress’ powers.<sup>79</sup>

Justice Souter, in his dissenting opinion, rejected the argument that the *Lopez* decision controlled the case, since in adopting the present law, Congress had taken care to present a “mountain of data . . . showing the effects of violence against women on interstate commerce.”<sup>80</sup> “The Act,” Souter said, “would have passed muster at any time between *Wickard* in 1942 and

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72. 528 U.S. at 93

73. *Id.* at 96.

74. *See* *United States v. Morrison*, 529 U.S. 598 (2000).

75. 42 U.S.C. § 1398 1(b).

76. *Morrison*, 529 U.S. at 615.

77. *Id.* at 619.

78. *Id.* at 620.

79. *Id.* at 627 (Thomas, J., concurring).

80. *Id.* at 628–29 (Souter, J., dissenting).

*Lopez* in 1995,” by virtue of the understanding that the Commerce Clause, in conjunction with the Necessary and Proper Clause, sanctioned congressional initiatives to deal with “all activity that, when aggregated, has a substantial effect on interstate commerce.”<sup>81</sup> He cited some of the findings upon which Congress had based itself that demonstrated that violence against women was a national calamity in its effect upon interstate commerce, demanding national action. For this reason, he said, Attorneys General from no less than thirty-eight states had urged Congress to adopt the legislation. Given his view of the validity of the law on the basis of the Clause, Souter found no need to analyze the Fourteenth Amendment argument.

In each of the above cases, the Supreme Court—by the standard 5-4 split—declared unconstitutional federal attempts to institute national legislation in relation to social affairs, as unauthorized extensions of federal power. In the 1995 case *U.S. Term Limits v. Thornton*,<sup>82</sup> the division in the Court went in the reverse direction. State legislation was declared to be an unconstitutional arrogation of power. By a 5-4 vote, thanks to the defection of Justice Kennedy from the erstwhile conservative majority, the Court invalidated Arkansas’ attempt to modify the Constitution’s enunciation of qualifications for election to the national legislature.

In a 1992 referendum, the people of Arkansas had adopted an amendment to the state constitution barring a candidate who had served three terms in the House of Representatives or two terms in the Senate from placing his name in a further general election ballot. This attempt by a state to add to the qualifications for candidates spelled out in Article I of the Constitution was held to be “inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States.”<sup>83</sup> The Court opinion relied heavily on the 1969 decision of *Powell v. McCormack*,<sup>84</sup> which ruled that Congress was precluded from adding to the qualifications for members of Congress enumerated in the Constitution, so as to deny membership to a legally elected member. The qualifications for membership in the House were “fixed and exclusive.”<sup>85</sup>

In similar fashion, the Court held that Arkansas was precluded from adding qualifications to those enumerated in the Constitution for candidates for federal office in the national legislature. In a concurring opinion, Justice Kennedy expounded upon the federal character of the National Union:

It is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system. . . . Federalism was our Nation’s own

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81. *Id.* at 637.

82. *See* 514 U.S. 779 (1995).

83. *Id.* at 783.

84. *See* 395 U.S. 486 (1969).

85. *See* 514 U.S. 779, 790 (1995).

discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.<sup>86</sup> . . . It might be objected that because the States ratified the Constitution, the people can delegate power only through the States . . . . But in *McCulloch v. Maryland* the Court set forth its authoritative rejection of this idea.<sup>87</sup>

In conclusion, Kennedy declared: “[t]here can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.”<sup>88</sup>

Justice Thomas, writing for the minority,<sup>89</sup> argued that the *Powell* decision was not controlling in the present case.<sup>90</sup> In *Powell*, Congress, the federal institution, was seeking to add to the qualifications for membership in the House. But the Constitution limits Congress to those powers “expressly” enumerated, or by “necessary implication” accruing to the federal government, and hence Congress lacked authority to impose new conditions.<sup>91</sup> He pointed out that in the present case, a sovereign state is involved, and since the Constitution says nothing that would bar a state from adding to the qualifications of its members to Congress, the state is free to prescribe whatever conditions it wishes. According to Thomas, the Federal Government and the States “face different default rules,” so that where the Constitution is silent, the States can act but Congress cannot.<sup>92</sup> “These basic principles are enshrined in the Tenth Amendment.”<sup>93</sup> Thomas rejected the contention of the majority opinion that the Tenth Amendment could preserve only that which the States possessed up to the adoption of that Amendment, and the right to interfere in the qualifications or prerogatives of members of Congress was never an element in a state’s authority. “If we are to invalidate Arkansas’ Amendment,” said Thomas, “we must point to something in the Federal Constitution that deprives the people of Arkansas of the power to enact such measures.”<sup>94</sup> To Thomas, the Court failed to do that.

Commenting on this case, Kathleen M. Sullivan observed: “To the majority, judicial intervention is needed to protect the federal government from the states; to the dissent, it is needed to protect the states from the federal

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86. *Id.* at 838 (Kennedy, J., concurring).

87. *Id.* at 840.

88. *Id.* at 845.

89. *Id.* at 845 (Thomas, J., dissenting).

90. *Id.* at 875–77.

91. 514 U.S. at 853.

92. *Id.* at 848.

93. *Id.*

94. *Id.* at 850.

government. Justice Kennedy alone would intervene to protect each side from encroachment by the other.”<sup>95</sup> The case is vital for illustrating how far the conservative Justices would go in seeking to fortify state sovereignty, and how far the liberal Justices go in preserving the national character of the Union. As Gunther and Sullivan noted, the majority opinion by Justice Stevens echoes Marshall’s approach in *McCulloch v. Maryland*, while the dissenting opinion by Justice Thomas reflects the Antifederalist criticism of that opinion.<sup>96</sup>

### C. *Dissenting New Federalists: From Raich to Obamacare*

The decisions of the Court based on the New Federalism doctrine have raised concern among some scholars that the ruling majority of justices might be intent on revising the entire welfare program of the New Deal.<sup>97</sup> That program, it will be recalled, was only attained after a minor judicial revolution had taken place, beginning in 1937, and the four firmly conservative justices<sup>98</sup> were replaced by more liberal ones who sanctioned the New Deal program *en masse*. The medium upon which the Court relied to approve the New Deal legislation was the Commerce Clause. So long as Congress declared that the act in question was designed to implement the Commerce Clause, the Court would not question its constitutionality. The New Federalism has rejected this pattern of blind reliance on the Commerce Clause that automatically approved every law affecting federal-state relations. These writers query whether this portends a dangerous judicial proclivity to return the United States systematically to the pre-1937 era, in which so many of the broad-based schemes instituted to accommodate the economic and social needs of the American people in the modern age were invalidated.

More recent decisions of the Court should allay some of these concerns. One or more of the five conservative justices has sided with the erstwhile minority justices to legitimate federal action. Thus, in the case of *Gonzales v. Raich*, decided in 2005, the Court ruled that under the Commerce Clause, Congress may criminalize the production and use of home-grown cannabis even where states approve its use for medicinal purposes.<sup>99</sup>

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95. Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 103 (1995).

96. GUNTHER & SULLIVAN, *supra* note 53, at 113–14.

97. See, for example, William E. Leuchtenberg, *The Tenth Amendment over Two Centuries: More than a Truism*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY* 41–105 (Mark R. Killenbeck ed., Rowan and Littlefield, 2002) and the numerous references cited therein. Conlan and Verginiolle de Chantal sum up their position as follows: “If it is not careful, the Supreme Court risks becoming an agent of states’ rights—a rare position in the Court’s history and one associated with its darkest moments.” *The Rehnquist Court and Contemporary American Federalism*, 116 NO. 2 POL. SCI. Q. 275 (Summer, 2001).

98. Justices James McReynolds, George Sutherland, Willis Van Devanter, and Pierce Butler.

99. 545 U.S. 1 (2005).

Federal law forbade the use of marijuana and made no exception for medical use. In a 1996 referendum, California voters legalized the medical use of marijuana. Angel Raich used home-grown medical marijuana to relieve the excruciating pain she suffered. Her doctor testified that without marijuana, her life was endangered. The marijuana that Raich grew in her garden was subject to confiscation by federal agents. The Ninth Circuit Court of Appeals granted Raich a preliminary injunction against federal action on the ground that she had demonstrated a strong case based on the Commerce Clause. In the Supreme Court, Raich argued that her marijuana was not subject to federal control since it was not in commerce, and certainly not in interstate commerce. In a 6-3 decision, the Court invoked the 1942 *Wickard v. Filburn* ruling that held that even a farmer's consumption of the wheat he grew on his own farm affected commerce, and it ruled that homegrown marijuana would inevitably have an impact on the interstate market, albeit indirectly. "In both cases," the Court stated, "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market."<sup>100</sup>

In dissent, Justice Sandra O'Connor, joined by Chief Justice William Rehnquist, maintained that the *Lopez* decision governed the case, since Raich's use of marijuana was not within the range of interstate commerce.<sup>101</sup> Moreover, she contended, the majority decision stifles innovation by states. Federalism promotes innovation by allowing for the possibility that, as Justice Brandeis said, "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>102</sup> In a separate dissenting opinion, Justice Thomas declared categorically that Raich's cultivation and consumption of marijuana was not "commerce . . . among the several States," within the meaning of the Constitution. And he warned: "If the Federal Government can regulate growing a half-dozen cannabis plants (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits."<sup>103</sup>

Interestingly—indeed, surprisingly—Justice Scalia departed from the dissenters and joined the liberal majority in sustaining the government's position. The present case, Scalia argued, is distinguishable from the *Lopez* and *Morrison* decisions, which dealt with matters quite unconnected to interstate commerce.<sup>104</sup> Without regulation and control, the market for mari-

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100. *Id.* at 19.

101. *Id.* at 42 (O'Connor, J., dissenting).

102. *Id.* The reference was to the dissenting opinion of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

103. *Gonzales v. Raich*, 545 U.S. 1, 65 (2005).

104. *Id.* at 33 (Scalia, J., concurring).



juana would be open game for all. And if Congress can legislate to exclude marijuana from the interstate market, then it is also empowered to ban such activities which, if permitted, would affect the general scheme of regulation. The Necessary and Proper Clause, Scalia contended, works in conjunction with the Commerce Clause to enable Congress to regulate noneconomic intrastate activities where the failure to do so “could . . . undercut” its regulation of interstate commerce.<sup>105</sup>

The Ninth Circuit Court of Appeals provided a sequel to the *Raich* decision. Robert W. Stewart was a convicted felon who sold parts kits to make caliber rifles that he advertised for sale. He was charged with possessing firearms, most specifically machine guns, and he was sentenced to prison for five years. He appealed on the ground that the law in question exceeded congressional authority since the weapons he possessed were not in interstate commerce. In *United States v. Stewart*,<sup>106</sup> the Ninth Circuit Court vacated the conviction on the ground that the relevant provision was unconstitutional as applied. The relationship of the provision to interstate commerce, the Appeals Court declared, was “attenuated.” The section “was intended to keep machine guns out of the hands of criminals – an admirable goal, but not a commercial one.”

The Supreme Court decided not to hear the case but vacated the ruling below and directed the Ninth Circuit to reconsider *Stewart* in light of the *Gonzales* decision. Upon reconsideration, the Appeals Court upheld the conviction, declaring “that Congress had a rational basis for concluding that . . . possession of homemade machineguns could substantially affect interstate commerce in machineguns.”<sup>107</sup>

In 2010, *United States v. Comstock*<sup>108</sup> illustrated starkly the willingness of the Court’s majority to rely on an expansive view of the Necessary and Proper Clause and validate a federal law in an area normally handled by the states. The relevant Act—the Adam Walsh Child Protection and Safety Act—authorized the Attorney General of the United States to certify a person who had completed his sentence in prison to be further detained in the federal penitentiary as a mentally ill, sexually dangerous individual. The Court held that state interests were adequately protected since the federal government would terminate its role if requested by a state. The decision was adopted by a 7-2 vote, with three justices who normally embraced the New Federalism doctrine joining the majority. Justices Thomas and Scalia dissented on the ground that the law was not based on any of the enumerated powers of Congress as listed in Article I, Section 8 of the Constitution. The majority, however, decided that the federal government, no less than a

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105. *Id.* at 36.

106. 348 F.3d 1132 (9th Cir. 2003).

107. 451 F.3d 1071 (9th Cir. 2006).

108. *United States v. Comstock*, 560 U.S. 126 (2010).

state, was empowered to adopt and apply such a law by dint of the Necessary and Proper Clause.

An even more surprising development was the delivery by Chief Justice Roberts of the majority opinion in the case concerning the Patient Protection and Affordable Care Act, known popularly as Obamacare.<sup>109</sup> The decision was 5-4 to uphold the federal law, and it was Roberts' move to join the four liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan) that saved the health program.

The healthcare scheme was enacted by Congress in 2010 and was designed to ensure a health program for some thirty million people who were currently uninsured. There were two parts to the scheme. The first, labeled the "Individual Mandate," required every person to obtain health insurance coverage. Any person not complying with this requirement would be compelled to pay a penalty, to be collected by the Internal Revenue Service as part of the person's taxes. The second part constituted an expansion of Medicaid. It required the states to cover individuals otherwise not included under the program, and the extra cost was to be funded by the federal government. If a state refused to comply with the expansion program and administer it, the state stood to lose funding for even that part of the Medicaid program that it had already accepted and implemented. Among those challenging the new scheme were twenty-six states that sued the federal government claiming that Congress lacked power to impose the scheme on the states and individuals.

In order to appreciate the legal issues in the case, which essentially revolve around the New Federalism doctrine, it is instructive to review the arguments of the joint dissent before addressing the reasoning of the Court. In their joint dissenting opinion, Justices Scalia, Kennedy, Thomas, and Alito, contended that Congress exceeded its powers when it adopted the Affordable Care Act (ACA) requiring every person to have health insurance. Congress can legislate only on the basis of one of the powers enumerated in Article I, Section 8 of the Constitution. The government argued that the law was validated by one of two clauses in that provision—either by the interstate commerce power or by the tax power. But Congress, the minority opinion said, can regulate only persons who are engaged in commerce. Persons who lack an insurance policy are not engaged in commerce; by compelling them to become so engaged, Congress exceeds its powers. It attempts to create commerce, not regulate it.<sup>110</sup>

Furthermore, the dissenters denied that earlier precedents cited to support the government's stand were applicable. In *Wickard v. Filburn*, failure to plant wheat was not the issue; it was overplanting that brought the case within the rubric of interstate commerce and subject to Congressional regu-

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109. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

110. *Id.* at 2644-45 (joint opinion of Scalia, Kennedy, Thomas and Alito, JJ., dissenting).

lation.<sup>111</sup> Nor could the Necessary and Proper Clause expand the Commerce Clause, since in the absence of commerce, there was nothing to expand. “If all inactivity affecting commerce is commerce, commerce is everything.”<sup>112</sup> As for the government’s reliance on *Gonzales v. Raich*, it was also misplaced, since marijuana was a subject of interstate commerce and the prohibition in that case was essential to enforce the law effectively. Thus, reference to the Necessary and Proper Clause was quite apt there, but not in the present instance. The Constitution “enumerates not federally soluble *problems*, but federally available *powers*.”<sup>113</sup> In the absence of an appropriate power, mandating the purchase of health insurance was thus unconstitutional. “The proposition that the Federal Government cannot do everything is a fundamental precept,” and Article I of the Constitution “contains no whatever-it-takes-to-solve-a-national-problem power.”<sup>114</sup>

The dissenters deemed unacceptable the alternative argument of the government, that mandating the purchase of insurance was validated by the tax power. According to the government, if an individual fails to secure insurance, he must make an additional payment when he pays his taxes. Thus, the mandate would be viewed not as “a legal command to buy insurance” but rather as another tax among the many taxes that citizens pay. The question here, according to the dissent, is not whether Congress could have instituted the mandate by means of a tax, but whether they in fact did so. The text of the Act refers repeatedly to the due payment as a penalty, and although, on occasion, a severe tax has been regarded by the Court as a penalty, never has the Court deemed a penalty “so trivial” as to be deemed a tax. To do so in this case “is not to interpret the statute but to rewrite it.”<sup>115</sup> Moreover, the minority justices noted, defining the payment as a tax raises another problem. Under the Anti-Injunction Act, no court can entertain a challenge to a tax until the tax is fully paid. Thus, if it be deemed a tax, then the Supreme Court lacks jurisdiction in the first place. The response of the government was that the payment is not a tax for purposes of the Anti-Injunction Act, but a tax for constitutional purposes. This, in the view of the dissenters, is a “remarkable argument . . . [t]hat carries verbal wizardry too far, deep into the forbidden land of the sophists.”<sup>116</sup>

The second challenge to the ACA arose from the expansion of the Medicaid program. Any state refusing to accept this expanded obligation would forfeit all Medicaid payments from the federal government, even those to which the state had hitherto subscribed. This threat, the respondents maintained, was a form of coercion and beyond the powers of the federal

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111. *Id.* at 2643.

112. *Id.* at 2649.

113. *Id.* at 2650 (emphasis in original).

114. *Id.* at 2647, 2650.

115. *Sebelius*, 132 S. Ct. at 2655.

116. *Id.* at 2656–57.

government. The minority opinion explained that the spending power was generally regarded as unlimited. Article I authorizes Congress to collect taxes “to . . . provide for the . . . general welfare,” and although James Madison maintained that the moneys collected could only be spent for one of the purposes enumerated under the powers of Congress, the Court, in the *Butler* case, opted for Alexander Hamilton’s interpretation that the power is not thus restricted.<sup>117</sup> And the Court, the minority justices conceded, has never stamped a federal expenditure as not within the rubric of “the general welfare.” Nevertheless, they warned:

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. . . . [T]he Spending Clause gives “power to the Congress 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.”<sup>118</sup> . . . While Congress may seek to induce States to accept conditional grants, Congress may not cross the “point at which pressure turns into compulsion, and ceases to be inducement.”<sup>119</sup>

The Justices cited the 5-4 *New York v. United States* decision, which declared that “Congress may not ‘simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>120</sup> The mere fact that the states, *as a matter of law*, are free to reject federal funds is insufficient to remove the coercive factor. This ignores reality. “If the anti-coercion rule does not apply in this case, then there is no such rule,” declared the dissenters.<sup>121</sup> “The Medicaid Expansion therefore exceeds Congress’ spending power and cannot be implemented.”<sup>122</sup>

The minority opinion noted that Chief Justice Roberts and Justices Breyer and Kagan also agreed that the section on Medicaid Expansion, as enacted by Congress, was unconstitutional. This meant that seven members of the Court accepted this conclusion. But the three supporters of the majority opinion joined with the other two Justices in determining that the Medicaid Expansion could be saved by severance and emendation, so as to allow states rejecting the expansion to retain their pre-existing Medicaid funds. The dissent rejected this attempt to save the provision. It amounted to re-writing the provision—a task that was legislative, not judicial. Since both pillars of the Act, the Individual Mandate and the Medicaid Expansion,

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117. *Id.* at 2599 (citing *United States v. Butler*, 297 U.S. 1, 65 (1936)).

118. *Id.* at 2659 (quoting *Butler*, 297 U.S. at 78).

119. *Id.* (quoting *Stewart Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

120. *Id.* at 2660 (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)).

121. *Sebelius*, 132 S. Ct. at 2662.

122. *Id.* at 2666.

were central to the Act, and since both were unconstitutional, the Act must, according to the dissent, be invalidated “in its entirety.”<sup>123</sup>

Scathingly dismissing the Court’s approach, the minority opinion declared:

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.<sup>124</sup>

In conclusion, the dissenting justices set forth their jurisprudential approach to the federal equation:

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. . . . Structural protections—notably, the restraints imposed by federalism and separation of powers—tend to be undervalued or even forgotten by our citizens. . . . It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution. . . . The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today’s decision should have . . . taught this truth; instead our judgment today has disregarded it.<sup>125</sup>

In the decision of the Court upholding (in the main) the Obamacare law, Chief Justice Roberts addressed and attempted to refute each of the arguments of the joint dissent.

Under the U.S. system of government, he averred, the National Government possesses only limited powers, with the States and the People retaining the remainder. Although federal power has expanded dramatically, a law can be sustained only if there is a demonstrable constitutional basis for its adoption. Citing the decision in *New York v. United States*, he stressed that under the American system, “state sovereignty is not just an end in itself: Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>126</sup> “By denying any one government complete jurisdiction over all concerns of public life, federalism protects the liberty of the individual from arbitrary power.”<sup>127</sup>

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123. *Id.* at 2677.

124. *Id.* at 2676.

125. *Id.* at 2677.

126. *Id.* at 2578 (citing *New York*, 505 U.S. 144, 181 (1992)).

127. *Sebelius*, 132 S. Ct. at 2758 (citing *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

Before proceeding to the merits Roberts adverted to the Anti-Injunction Act that requires that anyone suing the U.S. government in a tax matter must first pay the tax before the court will entertain the suit. But in the present case, the Chief Justice contended, the payment due is labeled a “penalty,” not a tax; hence, the Anti-Injunction Act does not operate to bar the Court from hearing and adjudicating the merits of the issue.<sup>128</sup>

Of the two clauses cited by the government to justify Obamacare—the Commerce Clause and the tax power—only the tax power, in Roberts’ view, furnished a valid basis. As far as the commerce power is concerned, “Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.”<sup>129</sup> “The Framers gave Congress the power to *regulate* commerce, not to *compel* it.”<sup>130</sup> The Chief Justice concluded: “The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”<sup>131</sup>

Nor could the law be upheld by means of the Necessary and Proper Clause. The government had argued that the mandate was an “integral part of a comprehensive scheme of economic regulation” and therefore embraced inactivity as much as activity to be effective. But in order to embrace anything, Roberts asserted, it was necessary to point to a granted power from which the Necessary and Proper Clause derives its authority. In the absence of the applicability of the Commerce Clause, the Necessary and Proper Clause could not be expanded to include inactivity.<sup>132</sup>

On the other hand, the alternative argument, that the required payment in the event of non-purchase of insurance can be deemed a tax, offered, according to Roberts, a suitable basis for validating the mandate. The mandate, he argued, is not a legal command to buy insurance; it simply makes non-purchase of insurance a state of affairs upon which the government imposes a tax, just as in the purchase of gasoline or any other item. True, the law describes the due payment as a penalty, rendering the Anti-Injunction requirement inapplicable; yet, the character of the exaction remains that of a tax. It is the Internal Revenue Service that collects the payment. Non-payment is not classified as a crime, and the sole obligation imposed on those who elect not to purchase insurance is payment of the prescribed fee. These features stamp the payment as a tax for purposes of constitutionality. Nor is it a direct tax that must be apportioned among the several states since it is not a capitation tax nor a tax on land. While the federal government cannot command people to obtain insurance, it can tax a person who lacks

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128. *Id.* at 2580.

129. *Id.* at 2586.

130. *Id.* at 2589.

131. *Id.* at 2591.

132. *Id.* at 2592–93.

insurance. Thus, as a federal tax, rather than as a penalty for not purchasing insurance, the Affordable Care Act can be upheld as valid and constitutional.<sup>133</sup>

In considering whether the Medicaid expansion section of the Act can be upheld, the key issue, said Roberts, was to see if the federal government's use of the spending clause of the Constitution was designed, in this instance, to encourage the states to join in the expansion program or to compel them to do so. If the latter, then the law undermines "the status of the States as independent sovereigns" in the American federal system of government.<sup>134</sup> "The two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer."<sup>135</sup> It was in recognition of this principle that the Court had struck down federal legislation that sought to commandeer a state's legislative or administrative apparatus for federal purposes, such as in the *Printz*<sup>136</sup> and *New York*<sup>137</sup> cases.

In the present case, "the financial 'inducement'" Congress has chosen by which to implement the expansion of Medicaid "is much more than 'relatively mild encouragement'—it is a gun to the head."<sup>138</sup> A state refusing to undertake the expansion of the Medicaid program stands to lose federal financing even for the earlier part of the Medicaid program that it had administered hitherto. This was coercion. Congress, said Roberts, was not free to penalize states that chose not to participate in the new program "by taking away their existing Medicaid funding."<sup>139</sup>

In sum, the government could not withdraw existing Medicaid funds for failure to join in the expansion program. By eliminating this unconstitutional feature in the Affordable Care Act, the rest of the Act is in full conformity with constitutional requirements, and the expanded program of Medicaid can go forward without hindrance. The Chief Justice dismissed the contention of the dissent that this amounted to rewriting the provision. Preserving the Act while declaring one feature unconstitutional and severing it from the rest of the law was not rewriting; it was merely fulfilling the wish of Congress to the extent possible, and fully in accordance with the Constitution.<sup>140</sup>

Justice Ginsburg, in a separate opinion, took issue with the minority opinion and also with part of the opinion of the Chief Justice.<sup>141</sup> She endorsed the Chief Justice's contention that the tax power validates the mini-

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133. *Sebelius*, 132 S. Ct. at 2600–01.

134. *Id.* at 2602.

135. *Id.*

136. *Printz v. United States*, 521 U.S. 898, 933 (1997).

137. *New York*, 505 U.S. at 174–75.

138. *Sebelius*, 132 S. Ct. at 2604.

139. *Id.* at 2607.

140. *Id.* at 2608.

141. *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

mun coverage provision, namely the individual mandate. But in her view, that provision was also validated by the Commerce Clause. Additionally, she dissented from Roberts' view on the Medicaid Expansion and held that it was fully constitutional under the spending power. In short, she considered that national power was adequate to sustain the entire Obamacare program.

Justice Ginsburg noted that the provision of health care is today "a concern of national dimension just as the provision of old-age and survivors' benefits was in the 1930s."<sup>142</sup> She cited cases from the New Deal era to demonstrate that since then, the Court has legitimated Congress' authority "to set the nation's course in the economic and social welfare realm."<sup>143</sup>

Given congressional prerogative, Ginsburg argued, the federal program should be recognized as a fit constitutional measure to redress this national problem of health care. She cited letters from James Madison and George Washington in advance of the 1787 Constitutional Convention that confirmed that the purpose of the Convention was to create a national government that would be qualified to resolve national problems, untrammelled by state interference.<sup>144</sup> "Hindering Congress' ability to [adapt to changing economic and financial realities] is shortsighted; if history is any guide," Ginsburg predicted, "today's constriction of the Commerce Clause will not endure."<sup>145</sup>

Justice Sotomayor accepted Justice Ginsburg's opinion totally, while Justices Breyer and Kagan endorsed her stand on the relevance of the Commerce Clause and the Necessary and Proper Clause. Implicitly, all four of the Justices spurned the tenets of the New Federalism.

#### *D. Summary: The New Federalism*

In reviewing the cases that establish the New Federalism doctrine formulated by the conservative majority in the Supreme Court, it becomes clear that the doctrine comprises several propositions:

1. The states are sovereign. In fact, their sovereignty preceded that of the Union, and consequently, it must be respected and preserved. The national government must accord the states due dignity.
2. As a result, a state enjoys sovereign immunity from suit, unless it consents or its immunity is validly abrogated.
3. The federal government cannot commandeer the states, or their employees, to act as agents for federal programs, unless the state consents or its immunity is validly abrogated.

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142. *Id.*

143. *Id.*

144. *Sebelius*, 132 S. Ct. at 2615.

145. *Id.* at 2625.



4. The interstate Commerce Clause cannot be used to enact national laws binding on the states unless the subject genuinely relates to commerce and has an interstate character.
5. In fields in which the Constitution is silent, the states are at liberty to legislate, whereas the federal government is precluded from acting in the absence of a defined or implied power.

The New Federalism doctrine is premised on the Originalist school of constitutional interpretation, and it is contended that the doctrine reflects the Framers' true federal design. But are these premises historically sustainable? To illuminate the historical record, several aspects of the Founding, often referenced in the current debate on the New Federalism, warrant particular attention and re-examination. These include:

- The aims of those who promoted the convening of a constitutional convention.
- The crucial modifications of the original plan that were introduced at Philadelphia and the factors that prompted their adoption.
- The process by which the enumeration and definition of congressional powers came to be included in the Constitution.
- The introduction of the Necessary and Proper Clause, and its effect on the federal character of the Constitution.
- The role of the ratification debates in delimiting the contours of the federal arrangements.
- The meaning of the Tenth Amendment and its impact on the federal balance.

Hovering over the analysis of all these issues is a fundamental, oft-neglected, primary question regarding the historical sources that are to be given pride of place as most relevant to the discussion.

## II. THE NEW FEDERALISM: ANALYSIS

### A. *The Framers' Constitution: Creating a Nation*

The aim of the Founding Fathers who drafted the Constitution in 1787 was to create a nation out of the thirteen states composing the United States.<sup>146</sup> As George Washington said in advance of the Philadelphia Convention: "I do not conceive we can exist long as a nation, without having

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146. The colonial antecedents of American federalism are traced by Alison L. LaCroix in her book, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (Harvard Univ. Press 2010). Gordon Wood critically examined the work in a major review, *Federalism from the Bottom Up*, 78 *UNIV. OF CHIC. L. REV.* 705–32, to which LaCroix responded in *Rhetoric and Reality in Early American Legal History*, *id.* at 733–58. My analysis differs in vital respects from the approach of both of these writers. It also differs essentially from that of John C. Yoo, *Federalism and Judicial Review*, in MARK R. KILLENBECK, *THE TENTH AMENDMENT*, 131–79 (Rowman & Littlefield, 2002). For a perspective closer to the one presented in this paper, see Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1993–94).

lodged somewhere a power which will pervade the whole Union in as energetic a manner, as the authority of the different state governments extends over the several States.”<sup>147</sup> James Madison, in a letter to Edmund Randolph dated April 8, 1787, wrote: “Let the national Government be armed with a positive & complete authority in all cases where uniform measures are necessary. As in trade &c. &c.”<sup>148</sup> In calling for a convention to be held in Philadelphia, the Confederation Congress described its purpose to be “establishing in these states a firm national government.” “The federal constitution,” the resolution said, should be “adequate to the exigencies of government & the preservation of the union.”<sup>149</sup> Justice Sandra O’Connor has summed it up as follows: “The Framers of our Constitution intended Congress to have sufficient power to address national problems.”<sup>150</sup>

To recall briefly: When the Constitutional Convention assembled at Philadelphia in the summer of 1787, the states were anything but united. The centrifugal forces operating among the member states were tearing the Union apart, and there was a common belief that three or more regional republics would be formed out of the general mass. The Articles of Confederation had proven themselves totally inadequate to facilitate the administration of a national body of thirteen autonomous units. Dedicated and far-sighted individuals recognized that the creation of an effective system of national government for the United States demanded the total abandonment of the underlying principles of the Articles that declared, in Article II, that each state retained its “sovereignty, freedom and independence,”<sup>151</sup> and the formulation in its place of an entirely new document of government that would bind the states into one united national polity. Those sponsoring the holding of a convention—most prominently, Madison and Hamilton—clearly sought to establish a powerful central government that would completely dominate the states. This is reflected in their writings in advance of the Convention, and specifically, in the Virginia Plan. Drafted largely by Madison, the Virginia Plan provided in Article 6 that the national legislature would be empowered 1) to enjoy the legislative rights vested in the Confederation Congress; 2) to legislate wherever the separate states are incompetent or where the harmony of the United States would be affected by separate state legislation; 3) to veto all laws of the states contravening in the opinion of the national legislature the articles of union or any treaties; and

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147. Letter from George Washington to John Jay (Aug. 15, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON 212–13 (W. W. Abbot ed., Univ. Press of Virginia, 1995).

148. Letter from James Madison to Edmund Randolph (April 8, 1787), in 9 THE PAPERS OF JAMES MADISON 370 (Robert A. Rutland & William M.E. Rachal eds., Univ. of Chicago Press, 1975).

149. CHARLES C. TANSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 46 (House Doc. 398, 69th Cong., 1st Sess.) (1926).

150. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O’Connor, J. dissenting).

151. TANSILL, *supra* note 149, at 27.

4) “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”<sup>152</sup>

Under this scheme, the central government would obviously exercise control over the states to an extraordinary degree. As Bernard Bailyn observed: “The goal of the initiators of change was the creation . . . of national power – the construction of . . . a Machtstaat, a central national power that involved armed force, the aggressive management of international relations, and, potentially at least, the regulation of vital aspects of everyday life by a government dominant over all other, lesser governments.”<sup>153</sup> It may be hard to believe that Madison, Hamilton, Randolph, et al. really thought that they could succeed in pushing such a radical plan through the Convention and expect it to be ratified by state conventions. But in fact, the original text of Article 6 of the Virginia Plan was endorsed by the Convention at least three times, with only the last paragraph, on the use of force against a delinquent state, eliminated.<sup>154</sup> As Madison said: “The use of force agst. a State would look more like a declaration of war, than an infliction of punishment.”<sup>155</sup> He dismissed the possibility of coercing a larger state.<sup>156</sup>

No effective opposition arose to this comprehensive scheme for national subordination of the states. The few isolated voices that objected soon found themselves so lost in the shuffle that they left the Conference and headed home.<sup>157</sup> One or two critics did remain, but their voices were muted in the consensus that emerged for a strong central government freed from the shackles of the states.<sup>158</sup>

#### B. *The Birth of Federalism: The Role of the Smaller and Slave States*

Creation of such a powerful central authority, however, aroused fears among the representatives of the smaller states. After the Revolution, when the Articles of Confederation were being drafted, they had demanded an equal vote in the Continental Congress for each state, regardless of size and wealth; and now, in Philadelphia, they demanded that the new regime be based on the same formula so that they would not be swallowed up by the larger states.<sup>159</sup> Their objections, it should be noted, did not relate to the

152. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20–23 (Max Farrand ed., Yale Univ. Press 1911) [hereinafter FARRAND RECORDS].

153. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 325 (Harvard Univ. Press enlarged ed. 1992).

154. 1 FARRAND RECORDS, *supra* note 152, at 225.

155. *Id.* at 54.

156. *Id.* at 327.

157. Of the three New York delegates, Robert Yates and John Lansing left the Convention on July 10. Their report to the governor of New York is recorded in 3 FARRAND RECORDS, *supra* note 152, at 244–47. Alexander Hamilton, the third delegate, remained at the Convention.

158. The major dissenter who remained at the Convention was Luther Martin of Maryland.

159. See the comment of Gunning Bedford of Delaware: “*I do not, gentlemen, trust you . . . The small states never can agree to the Virginia plan.*” *Id.* at 1:500–501 (emphasis in original).

sovereignty or independence of the states—indeed, “states’ righters” were nowhere to be seen or heard at Philadelphia. What motivated the smaller states’ delegates was the demand for equality. They even proclaimed themselves prepared to see the present division of states abolished, so long as a new division would ensure each state equal size with the other states.<sup>160</sup>

Once the principle of equality in the Senate was firmly secured, the smaller states could be enlisted in the grand design of the Federalists. In fact, their delegates became quite enthusiastic about enhancing the power of the national government in relation to the states. Thus, Gunning Bedford of Delaware moved to add to the heads of power in Article 6 an all-embracing formula that would permit Congress “to legislate in all cases for the general interests of the Union.” His proposal was promptly adopted.<sup>161</sup> As Charles Pinckney predicted, very early in the Convention: “The whole comes to this . . . Give N. Jersey an equal vote, and she will dismiss her scruples and concur in the Natil. [sic] system.”<sup>162</sup>

But the composition of the national legislature was not the only issue that engaged the smaller states; they also demanded a say in the process for selecting a Chief Executive. They therefore rejected a popular vote for choosing a President since this would nullify the advantage they had gained in securing state equality in the upper house of the national legislature. And in this quest they were aided by the slave states that were intent on preserving the advantage they had secured in the lower house by means of the three-fifths rule.<sup>163</sup> The outcome was the Electoral College, which was but a mirror image of the real Congress, with the respective increments in Congress preserved. It was a one-time congress for the exclusive purpose of selecting a President.<sup>164</sup>

Thus two groups, the small and the slave states, attained a significant role for themselves within key national institutions of government—the legislature and the executive. But whereas the small states were now national-minded and content with the broad formula of federal heads of power,<sup>165</sup>

160. See a preliminary sketch of the New Jersey Plan, *id.* at 3:613; and remarks of Brearley, *id.* at 1:177.

161. *Id.* at 2:26–27. Coming from Bedford, the proposal was quite surprising, since he had warned the larger states that if they did not concede, the smaller states “will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.” *Id.* at 1:492. His remark was severely criticized, and he apologized and said he had been misunderstood. *Id.* at 530.

162. *Id.* at 255.

163. Under the three-fifths rule, a state’s representation in the lower house would be increased by three fifths of its slave population. Slaves, of course, did not vote, but the white electorate enjoyed this increment in its representation in Congress.

164. See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 JOURNAL OF AM. HIS. 35, 35–58 (1986).

165. See the comment of Charles Warren citing George Bancroft: With the adoption of the Connecticut Compromise, the smaller states, “so I received it from the lips of Madison, and so it appears from the records – exceeded all others in zeal for granting powers to the General Government.” CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 309 (Little, Brown, 1928).

the slave states were anything but pleased. Would such plenary legislative power enable the national government to interfere with, or even seek to abolish, slavery?<sup>166</sup> Butler and Rutledge, both from South Carolina, repeatedly questioned the need for such broad grants of power as provided for in draft Article 6. Butler was quite blunt in expressing his concern: "Property in slaves should not be exposed to danger under a Govt. instituted for the protection of property."<sup>167</sup> "The security the Southn. States want is that their negroes may not be taken from them, which some gentlemen within or without doors, have a very good mind to do."<sup>168</sup> Fellow South Carolinian, General Cotesworth Pinckney, was no less blunt. He "reminded the Convention that if the Committee [of Detail] should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report."<sup>169</sup>

The smaller states had served as the spearhead of the demand for equality in one of the two houses of the legislature; but the battle for limiting congressional authority was that of the slave states alone. Their delegates insisted on having Article 6 include an enumerated, detailed list of powers that Congress would dispose of. It is also noteworthy that when the draft provisions were being prepared for assignment to the Committee of Detail for formulation in a draft constitution, Rutledge of South Carolina moved for "a specification of the powers comprised in the general terms" of Article 6.<sup>170</sup> The vote was 5-5, and thus failed.<sup>171</sup> All the smaller states, except for Connecticut, were opposed, while all of the southern states, with the exception of North Carolina, voted in favor of enumeration. The division says much about the motives of those sponsoring the delimitation of federal power. The smaller states were content to preserve the pristine formula of the Virginia Plan for heads of power, while the southern states, concerned about the security of slavery, desired a more precise definition than the Virginia version.

As it turned out, the five-man Committee of Detail<sup>172</sup> was composed of delegates, a majority of whom had voiced objections to the heads of power formula assigned to Congress. Rutledge was chairman, and he was

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166. Akhill Reed Amar succinctly summarizes the concern of the slave states regarding the threat of abolition. *AMERICA'S CONSTITUTION: A BIOGRAPHY* 113-14 (Random House 2005). Killenbeck, in his volume on *McCulloch v. Maryland*, points out that the decision aroused fears in the south that the federal government might now believe that it had judicial imprimatur to possibly limit or ban slavery altogether. At the time the decision was handed down, discussions were going on that led to the Missouri Compromise. *MCCULLOCH V. MARYLAND, SECURING A NATION*, 142, 146, 156-57 (Univ. Press of Kansas, 2006).

167. 1 FARRAND RECORDS, *supra* note 152, at 594.

168. *Id.* at 605.

169. 2 FARRAND RECORDS, *supra* note 152, at 95.

170. *Id.* at 17.

171. *Id.*

172. For records of the vote on the formation of the Committee, see 2 FARRAND RECORDS, *supra* note 152, at 85, 97, 106.

joined by James Wilson of Pennsylvania, who had argued for a precise definition of national powers so as to avoid clashes with state authorities, and John Randolph of Virginia, who held similar views. The final two were Oliver Ellsworth of Connecticut, a foremost proponent of the New Jersey Plan, and Nathaniel Gorham of Massachusetts. Little wonder that one of the first acts of the Committee was a draft enumeration of specific powers in place of the heads of power of Article 6.<sup>173</sup> Southern fears had won out where small state concern was negligible or even non-existent.<sup>174</sup>

Curiously, the events enumerated above relating to the origins of federalism in the Constitution have gone largely unnoticed in the literature. The importance of this development—the creation of a federal government of limited powers—cannot be underestimated. One writer, however, has charged that the five members of the Committee of Detail totally transformed the Convention’s resolutions to produce a much more weakened national government than was intended by the Convention plenary. John C. Hueston, in a Note that appeared in the *Yale Law Journal*,<sup>175</sup> condemns the conduct of the Committee as a usurpation of the plenary will. He writes: “This note suggests that rather than simply elaborating upon the existing resolutions, the Committee actually redefined the constitutional balance of state and federal powers by enhancing the rights of states at the expense of sweeping central powers.”<sup>176</sup> According to Hueston, scholars and Judges should recognize that the Committee’s version was “second choice” and “should redefine” the intent of the Convention accordingly.<sup>177</sup> Strangely, in making his charge, Hueston omits to link the issue to the slavery question.

In an article that I published in 2000,<sup>178</sup> I discounted Hueston’s conspiratorial interpretation of the work of the Committee of Detail, primarily for one reason: when the Committee submitted its report to the Convention, there was not even a murmur of protest about the change that had replaced heads of power with defined and enumerated powers. According to this assessment, the delegates were apparently satisfied that the change helped prevent clashes between the central and state governments. Undoubtedly, this was a factor with some delegates.<sup>179</sup> But upon closer reading of the

173. *See id.* at 142–46.

174. Obviously, Rutledge and company did not believe that the Necessary and Proper Clause would pose a threat to the preservation of slavery. In fact, Charles Warren attributes the inclusion of that Clause in the Constitution to Rutledge. *See* WARREN, *supra* note 165, at 486–87.

175. John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 *YALE L. J.* 765, 765–83 (1990).

176. *Id.* at 766.

177. *Id.* at 783.

178. *See* Shlomo Slonim, *Securing States’ Interests at the 1787 Constitutional Convention: A Reassessment*, 14 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT*, 1, 7 n.14. (2000).

179. *See*, for instance, comment of James Wilson, 1 *FARRAND RECORDS*, *supra* note 152, at 363, and of Nathaniel Gorham for “precise and explicit” definition of federal powers. 2 *FARRAND RECORDS*, *supra* note 152, at 17.

Minutes, it becomes clear, that the prime consideration for enumeration was the demand of the slave states to ensure that the federal government not be empowered to interfere with the system of slavery. Rutledge of South Carolina was chairman of the Committee of Detail, and from the earliest days of the Convention, he kept calling for an enumeration of powers.<sup>180</sup> With a committee sympathetic to his concern, he was able to ram this through and present it to the Convention as a *fait accompli*. Thus, the reason for the silence of the delegates was apparently because they recognized that this was a vital plank in the pro-slavery program and no one was prepared to oppose it, just as they did not oppose other elements in that program. The scheme for an all-powerful national government was revised to eclipse the scope and number of federal powers in order to accommodate the slave states.<sup>181</sup> It was, perhaps, the most significant concession that these states managed to wring out of the Convention.<sup>182</sup>

Given this historical background, the suggestion that federalism, like the separation of powers principle, was instituted by the Framers to preclude tyranny, is unsubstantiated. The thesis only emerged belatedly, in the struggle to secure ratification of the Constitution. And no one knew this better than James Madison.

### C. *The Court and the Revival of Dual Federalism*

In *Federalist* No. 51, Madison wrote:

In the compound republic of America, the powers 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 controul each other; at the same time that each will be controuled by itself.

It is not clear whether Madison is claiming that the federal division of government was actually designed by the Convention to safeguard liberty and rights, or whether he is simply analyzing, *ex post facto*, the situation that emerged from the large state-small state controversy and produced two

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180. 1 FARRAND RECORDS, *supra* note 152, at 53.

181. In listing the concessions that the slave states extracted from the northern states, Paul Finkelman notes that “Congress’s powers were limited and could never reach the slaveowner.” *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 381 (1989). He cites the statement of General Pinckney at the South Carolina ratifying convention: “We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.” *Id.* (internal quotation marks and citation omitted).

182. Several historians, including Jack Rakove, Michael Zuckert, and the late Lance Banning, contend that from the outset, the Convention delegates intended to replace the open-ended formula of the Virginia Plan with a defined list of powers. In my article, *Securing State Interests at the 1787 Constitutional Convention*, I cited Madison’s comments both during and after the Convention to refute this claim. Slonim, *supra* note 178, at 6 n.44.

governments exercising concurrent authority over each section of the country. Regardless of Madison's intention in this passage of the *Federalist Papers*, the members of the bench who have espoused the doctrine of New Federalism have seized upon Madison's analysis of federalism to posit their thesis that the Constitution endorses the principle of dual federalism, under which the states enjoy genuine sovereignty. The following quotations illustrate this line of argument:

1. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . . 'The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.'"<sup>183</sup>
2. "Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States . . . . We would do well to recall the constitutional basis for federalism."<sup>184</sup>
3. "[F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."<sup>185</sup>
4. "As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power."<sup>186</sup>

This diffusion-of-powers thesis is difficult to accept as an explanation for the origins of federalism for two reasons: first, because of the sources cited as the basis of the thesis, and second, because of the manner and shape in which federalism was, in fact, framed at the Constitutional Convention.

Regarding the source of the thesis, the primary, if not the sole, reference appears to be the *Federalist Papers*, and especially No. 51, authored

183. Justice Sandra O'Connor in the majority opinion in *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991) (quoting *Garcia v. San Antonio Metr. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)) (citing THE FEDERALIST Nos. 51, 45 (James Madison), No. 28 (Alexander Hamilton)).

184. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581-82, (1985) (O'Connor, J., dissenting). See also Justice O'Connor's opinion in *New York*, 505 U.S. at 182 (citing FEDERALIST No. 51 (James Madison)).

185. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. & O'Connor, J., concurring) (citing FEDERALIST No. 51 (James Madison)).

186. *United States v. Morrison*, 529 U.S. 598, 614 n. 7 (2000) (Rehnquist, J., majority). See also the views of Chief Justice John Roberts and Justice Antonin Scalia on the constitutional design of federalism, as reflected in their respective majority and dissenting opinions in the *Sebelius* case, discussed above.



by James Madison, and No. 22 or No. 28, written by Alexander Hamilton.<sup>187</sup> This reliance on the *Federalist Papers* is rather strange. The *Papers* were, after all, a propaganda tract written subsequent to the Constitutional Convention to persuade New Yorkers of the benefits of the Constitution, and most particularly, the document's superiority over the Articles of Confederation, which it was intended to replace. As Bernard Bailyn has noted, the *Federalist Papers* were written "polemically, to help win a political battle."<sup>188</sup> Even Madison frankly admitted: "It cannot be denied without forgetting what belongs to human nature, that in consulting the contemporary writings, which vindicated and recommended the Constitution, it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates."<sup>189</sup> Paul Rahe sums it up neatly: "Despite its lasting fame, *The Federalist* is less a treatise in political philosophy composed for the ages than a work of political rhetoric aimed at a particular audience."<sup>190</sup>

Ostensibly, Originalism is the *leitmotif* of the Supreme Court majority that enunciated the New Federalism doctrine,<sup>191</sup> and one might have expected that *The Records of the Federal Convention of 1787*, as so conveniently edited in 1911 by Max Farrand, would serve as the primary source referenced in the Court's opinions. Yet over the years, the courts have made so much use of the *Federalist Papers* in interpreting the Constitution that by 2010, the *Federalist Papers* had been cited by the Supreme Court in

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187. H. Jefferson Powell points to an additional line of argument that Justice O'Connor presents for disqualifying congressional acts. *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 646 (1993). Justice O'Connor cites the famous passage enunciated by Marshall in *McCulloch v. Maryland*: "Let the end be legitimate," etc., which concludes with the phrase, all means that are consistent "with the letter and spirit of the constitution" are constitutional. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). It is O'Connor's contention that federal acts that fail to dignify state sovereignty are not in accordance with the "spirit" of the Constitution as reflected in the Tenth Amendment and are therefore unconstitutional. As Powell points out, Marshall was discussing the doctrine of implied powers and his reference to "the spirit of the Constitution" would have no bearing on a statute implementing an enumerated power. *Id.* Besides, reference to the spirit of the Constitution would convert the New Federalism into a very subjective medium, lacking any clear source in the text of the Constitution. Above all, the reference to the Tenth Amendment as a basis for the spirit of the Constitution is misplaced, as noted below.

188. BAILYN, *supra* note 153, at 328–29 n.12. See also BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 103 (2003). In Chapter IV, Bailyn offers an illuminating analysis of the historical importance of the *Federalist*. Nonetheless, he acknowledges that "the *Federalist* papers were polemical essays directed to specific institutional proposals written in the heat of a fierce political battle." *Id.* at 103.

189. 3 FARRAND RECORDS, *supra* note 152, at 463 (letter to Edward Livingston dated Apr. 17, 1824).

190. PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* 573 (North Carolina Press 1992).

191. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV., 693–706 (1976); see also Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Address at the Woodrow Wilson Center for Scholars (Mar. 14, 2005), [http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).

innumerable cases.<sup>192</sup> So long as Madison's minutes were not available and there was no other source to interpret the Constitution, there was little alternative to the *Federalist Papers*. But after 1836, when the full record of Madison's minutes at the Constitutional Convention appeared, the *Papers* should logically have been regarded as, at most, a secondary source.<sup>193</sup> Even Chief Justice Marshall, in *McCulloch v. Maryland*, felt compelled to say: "[T]he opinions expressed by the authors of that work [the *Federalist*] have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained[.]"<sup>194</sup>

Constitutional interpretation, it is well recognized, is a complex subject, and there are numerous schools of thought on how to approach the matter. The literature on the topic is vast. But no one can deny that a contemporaneous account of the formulation of a provision should, at least for Originalists, be a proper starting point, and a valuable and prime source for understanding the purpose that the provision was intended to serve.

Undoubtedly, the much-quoted remarks of Madison and Hamilton in the *Federalist Papers* reflect the ability of both men to adapt themselves to new realities and convert into a virtue an arrangement that both of them had fought tooth and nail to prevent. Both had striven to institute a unitary system of government that would ride roughshod over the states. After the Constitutional Convention issued the completed document and while he was smarting from the defeat he had suffered by the Convention's rejection of his pet project of a national legislative veto over state legislation, Madison informed Jefferson that, in his estimation, the Constitution was a failure.<sup>195</sup> Hamilton, likewise, indicated that the Constitution was far re-

192. See BAILYN, TO BEGIN THE WORLD ANEW, *supra* note 188, at 127–28.

193. For a comprehensive and excellent scheme for rating the various sources for interpreting the Constitution, see Vasani Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113 (2003). In their view, Farrand's *Records* should be recognized as an "invaluable . . . source of constitutional meaning . . . of persuasive but not authoritative value." *Id.* at 1214. They dismiss the claim that the secret nature of the 1787 Convention is reason for discounting the *Records*. The *Federalist Papers*, and the writings of the Antifederalists, as also the record of the state ratifying conventions, are "good extratextual sources of constitutional meaning" but not "the incontrovertibly 'best' extratextual sources of meaning." *Id.* at 1158–59.

194. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819).

195. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 2 THE PAPERS OF THOMAS JEFFERSON 102–104 (Julian P. Boyd ed., Princeton Univ. Press 1955), <http://founders.archives.gov/documents/Jefferson/01-12-02-0095> ("I hazard an opinion . . . that the *plan should it be adopted* will neither effectually answer its *national object* nor prevent the local *mischiefs* which every where excite *disgusts* against the *state governments*." (emphasis in original)). See also Letter from James Madison to Thomas Jefferson (October 24, 1787) in 10 THE PAPERS OF JAMES MADISON 205–220 (expounding on the reasons for seeing the constitution as a failure).

moved from the instrument of government he desired.<sup>196</sup> In the aftermath of the drafting process, however, both men settled for the good in the absence of the best and trumpeted the federal system as a grand scheme for reining in tyrannous rule and protecting the rights of the people. But the *Federalist Papers* can hardly serve as evidence of what transpired in Constitution Hall in Philadelphia. For that we must turn to Farrand,<sup>197</sup> from which it emerges clearly that, as noted, federalism was not instituted to diffuse power, elegant and enticing as the political theory sounds. Nor was it introduced into the Constitution to satisfy the demands of “states’ righters,” since, as noted earlier, they carried no weight. The smaller states demanded equality, and there could be no equality unless the states were to survive as political entities endowed with a measure of sovereignty and independence; and the slave states joined the fray in their anxiety to protect slavery.

There appears to be one reference in the *Records* to something approaching the diffusion thesis, but it focuses on state authority as a factor for stability in addition to state representation in the national government. Very early in the Convention (June 2), discussion arose about the correct procedure for removing a corrupt executive. John Dickinson of Delaware proposed that he be removed by the national legislature upon the request of a majority of state legislatures.<sup>198</sup> He believed that a limited monarchy, as in England, was perhaps the best system of government. Given that the British system was inappropriate for the United States, “we must look out for something else. One source of stability is the double branch of the Legislature [with equal representation for the states in one of the two Houses.]” The division of the Country into distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the States. He considered “the accidental lucky division of this country into distinct States” a fit means of preserving the republic, and opposed those intent on abolishing this division. In other words, Dickinson was not claiming that the federal design of the Constitu-

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196. See 2 FARRAND RECORDS, *supra* note 152, at 645–46 (presenting Hamilton’s remarks on the final day of the Philadelphia Convention).

197. Farrand’s *Records* are essentially based on Madison’s minutes as he recorded them day-to-day at the Constitutional Convention. See *id.* Some have raised questions regarding the reliability of Madison’s notes, since he may have been prejudiced in recording the debates, and may even have doctored the minutes subsequently. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1, 1–39 (1986); see also Frank B. Cross, *The Practical Meaning of Originalism*, in *Selected Works of Frank B. Cross* 27–30 (2012), [http://works.bepress.com/frank\\_cross/](http://works.bepress.com/frank_cross/); and Kesavan & Paulsen, *supra* note 193, at 1191–96. But with regard to the issue of federalism, we also have the minutes of noted Antifederalist Robert Yates who was present at the Convention at least through the presentation of the Connecticut Compromise to the plenary on July 5th. Hutson, *supra* note 197, at 2. Since Yates’ notes for this period substantially corroborate Madison’s minutes throughout, there is little reason to doubt the veracity of Madison’s record, certainly with regard to the factors that led to the introduction of federalism into the Constitution.

198. 1 FARRAND RECORDS, *supra* note 152, at 85–87.

tion was created and instituted to diffuse power, but that the chance division of states would help ensure stability.

In short, federalism, according to Dickinson, was a fortuitous consequence of the need for a central government to unite thirteen colonies and exercise national authority. Federalism was not created by the delegates to the Constitutional Convention; it was a state of affairs that they had to contend with. Dickinson saw merit in this circumstance, others condemned it, but no one claimed title. Dickinson's comment represents a valuable insight into the origins of the federal system. No other delegate touched on this point.<sup>199</sup>

At various junctures in the Convention debates, the mind-set of the delegates with respect to the federal design comes to the fore. Thus, in arguing the case for the New Jersey Plan that he had presented to the plenum, Paterson said: "A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality"; otherwise, he said, "there is an end to liberty."<sup>200</sup> And Dickinson's stand on state equality in the Senate is reflected in his proposal that the members of the Senate be appointed by the state legislatures in order "that the mind & body of the State as such shd. be represented in the national Legislature."<sup>201</sup> George Mason, although a representative of a large state, recognized small state demands:

[W]hatever power may be necessary for the Natl. Govt. a certain portion must necessarily be left in the States. . . . The State Legislatures also ought to have some means of defending themselves agst. encroachments of the Natl. Govt. . . . [W]hat better means can we provide than the giving them some share in, or rather to make them a constituent part of the Natl. Establishment.<sup>202</sup>

General Pinckney of South Carolina "was for making the States as much as could be conveniently done a part of the Genl. Gov't."<sup>203</sup>

As noted earlier, the demand of the smaller states for a federal system was expressed in seeking equal representation in the national institutions of government—legislative and executive. State representation in the Electoral College was weighted in favor of the smaller states (and the slave states), the choice of delegates was left to the state legislatures, and if the College failed to choose a President, the choice out of the top five candidates was transferred to the House of Representatives voting as states. When it was suggested to limit the House choice to the top three, rather than the top five,

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199. His proposal for the removal of an executive on application by state legislatures was rejected. *Id.* at 86–87. At the same time, however, Dickinson endorsed the national legislative veto over state legislation sponsored by Pinckney and Madison as a means of preventing "discord" between the states and the national government. *Id.* at 167. Obviously, for Dickinson, preserving the states did not entail endowing them with absolute sovereignty.

200. *Id.* at 178, 183.

201. *Id.* at 158.

202. *Id.* at 155–56.

203. *Id.* at 429.

thereby restricting the chance of the smaller states occasionally landing a President, Roger Sherman of Connecticut said he “would sooner give up the plan,” and the choice out of five was retained.<sup>204</sup> Similar impulses explain why treaties and appointments, dependent on the initiative of the President, were subject to the advice and consent of the Senate, the one body representing the states where the smaller states had disproportionate influence. In sum, contrary to the New Federalism thesis enunciated above, federalism was not a product of the genius of the Framers to balance national and state authority and thereby preserve liberty. It was imposed on them by the smaller states and the slave states in combination and was accepted only to avoid a breakup of the Constitutional Convention. Federalism emerged as an accident of history, and not as a brainstorm of profound political thinkers intent on securing republican government.

Federalism for the smaller states meant that they would have a direct share in running the national government. They had no desire to cripple the national government, because now it was their government. In contrast to Madison’s legislative veto over state legislation, which the Convention rejected, the smaller states had gained a form of veto over national legislation by virtue of the changes they extracted from the Constitutional Convention. With their sovereignty and independence assured, they had turned the federal government around so that the scheme for a unitary government resting on a popular vote in both legislative houses that favored the larger states was abandoned in favor of a government more accommodating to their wishes. Their keen satisfaction with the outcome of the Philadelphia Convention is revealed by the speed and near unanimous vote by which their ratifications of the Constitution were secured. Furthermore, none of the smaller states attached a demand for amendments to its ratification, as did some of the larger states subsequently. As Charles Warren has said: “Having won their contention as to equality of votes in the Senate, they were now willing to join hands with their opponents in making the Congress an adequate body.”<sup>205</sup>

In light of this analysis of the source of federalism in the American Constitution, the thesis espoused by Wechsler, Choper, Amar, and Kramer, on the “political safeguards” of federalism, deserves closer scrutiny and greater appreciation.<sup>206</sup> Their thesis is reflected in the conclusion of the *Garcia* decision that overruled *National League of Cities* and declared that

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204. 2 FARRAND RECORDS, *supra* note 152, at 514.

205. Warren, *supra* note 165, at 316.

206. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (Harvard Univ. Press 1961); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (Univ. of Chicago Press 1980); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); and Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J., 1425 (1987). See also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96

“the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.”<sup>207</sup> It echoes the words of Chief Justice Marshall in *McCulloch v. Maryland*, when he said: “The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power [of taxation].”<sup>208</sup>

From the postulate of the New Federalism, that the Constitutional Convention designed the federal system of government as one of two means of precluding tyranny, it follows that the Convention not only recognized state sovereignty but also was committed to protecting that sovereignty. And when the Court acts to forestall federal encroachment on state authority, it is simply ensuring that the sovereignty accorded the states is duly respected. Again, in light of the Convention minutes, it is difficult to uphold this line of thought, particularly when it enjoins the application of general federal laws to state instrumentalities.

It can hardly be denied that abridgement of state sovereignty was a major purpose of the Philadelphia Convention. As the Court said in the *Garcia* opinion: “The States unquestionably do ‘retain a significant measure of sovereign authority.’ They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”<sup>209</sup> An effective national government could not emerge unless state sovereignty was subordinated to the national authority. The Supremacy Clause resoundingly confirms this proposition. As Akhil Reed Amar wrote: “The supremacy clause clinches the case.”<sup>210</sup> Gouverneur Morris expressed Federalist sentiment in rather graphic terms. “State attachments, and State importance have been the bane of this Country. We cannot annihilate; but we may perhaps take out the teeth of the serpents.”<sup>211</sup> Subsequently, Gouverneur Morris described the aims of the Convention as follows: “Shortly after the Convention met, there was a serious discussion on the importance of arranging a national system

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COLUM L. REV. 121 (1996) (highlighting “the crucial role reserved for the states in the newly established constitutional order.”).

207. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 556 (1985)

208. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 435.

209. *Garcia*, 469 U.S. at 549.

210. Amar, *Of Sovereignty and Federalism*, *supra* note 206, at 1458. One writer has aptly written: “Dual federalism . . . suggests that federalism is a principle of coequal sovereignty – one sovereign nation and fifty sovereign states. The fact that this formula has no obvious congruence with Article 6 of the Constitution – the supremacy clause – poses no apparent difficulty to its supporters.” ROBERT W. HOFFERT, *A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS* xi–xii (Univ. Press of Colorado 1992). For a critical analysis of dual federalism from the standpoint of political theory, see Sotorios A. Barber, *Defending Dual Federalism: A Self-Defeating Act* (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1902970](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902970) (delivered at 2011 American Political Science Association annual meeting in Seattle).

211. 1 FARRAND RECORDS, *supra* note 152, at 530.

of sufficient strength to operate, in despite of State opposition, and yet not strong enough to break down State authority.”<sup>212</sup>

Moreover, the claim that the states were sovereign at the birth of the United States was categorically denied by the majority of delegates to the Convention. Their pre-Constitution status was famously described by Rufus King of Massachusetts:

The States were not “sovereigns” in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or faculties of defense or offence, for they could not of themselves raise troops, or equip vessels, for war. . . . If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects – they formed a Nation in others.<sup>213</sup>

Madison likewise denied that the states had ever enjoyed complete sovereignty. Under the Confederacy, the states’ laws were akin to bylaws, he said, and all agree that “under the proposed Govt. the {powers of the States} will be much farther reduced.”<sup>214</sup> In Yates’ notes for that date, Madison’s comments are only slightly sharper. “Some contend that states are sovereign, when in fact they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty. These were always vested in Congress.”<sup>215</sup>

212. 3 FARRAND RECORDS, *supra* note 152, at 421. In a letter from Gouverneur Morris to W. H. Wells on Feb. 24, 1815, Morris also noted a short speech that he delivered to the Convention on that occasion: “Mr. President; if the rod of Aaron do not swallow the rods of the Magicians, the rods of the Magicians will swallow the rod of Aaron.” *Id.*

213. 1 FARRAND RECORDS, *supra* note 152, at 323–24. Rufus King’s statement was later cited by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936).

214. 1 FARRAND RECORDS, *supra* note 152, at 464.

215. *Id.* at 471. In 1821, Madison took strong exception to Yates’ notes that were published that year, and suggested that they reflected the “warped” views of the New York delegates who were opposed to “the contemplated change in the federal system.” See two letters by Madison on the Yates notes, 3 FARRAND RECORDS, *supra* note 152, at 446–48. However, when one looks at Madison’s own notes for the same date, June 29, they closely parallel the Yates version, and so both have been cited in the text. See 1 FARRAND RECORDS, *supra* note 152, at 461–470. Quite simply, as already indicated, the Madison of 1821 differed greatly from the Madison who promoted and dominated the 1787 Constitutional Convention. Madison’s minutes were only published posthumously, in 1836. He had rejected every suggestion that he publish his minutes during his lifetime, and he gave various reasons for his stand. Many contend that he simply did not want people to know how nationalist he had been at Philadelphia. See, e.g., the DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 85–89 (Cambridge Univ. Press 1989).

In sum, whatever sovereignty meant under the Articles of Confederation, the creation of the national government determined that state sovereignty would be severely curtailed under the Constitution. Besides specific prohibitions on the states in Article I, Section 10 of the Constitution, national legislation in spheres assigned to Congress would extend throughout the nation and would override any contrary manifestation of state will or sovereignty. As Akhil Amar observed, “the word ‘sovereignty’ never appears in the Constitution, not even in the Tenth Amendment.”<sup>216</sup> Thus, to assess the scope of state sovereignty is to beg the question—it is whatever the legislation of the national government has not legitimately preempted and applied nationwide.

And this brings us to the argument that Congress is not empowered to commandeer the states, or their personnel, to fulfill and execute federal programs. It will be recalled that under Article 6 of the Virginia Plan, Congress was to possess extensive authority vis-à-vis the states.<sup>217</sup> In addition to inheriting all the powers of the Confederation Congress, it was to be empowered to legislate where the individual states were incompetent or where national harmony would be affected by separate legislation. It could veto all state legislation that conflicted with the Constitution and use force against a recalcitrant state. As noted earlier, the original text of this article—minus the authority to use force against delinquent states—was endorsed by the Convention at least three times. The clause empowering the national legislature to exercise all the powers vested in the Confederation Congress, including the right to legislate for the states to implement federal directives, was retained throughout all the deliberations on the draft resolutions preparatory to their consolidation into a draft constitution. In other words, even when the Convention abandoned the notion of applying force against a delinquent state, the scope of legislative authority of the Confederation directed to the states, was preserved.<sup>218</sup> The fact that it was now accepted that legislation would primarily be directed to individuals did not affect retention of the legislative power directed to the states, as such.

When the Proceedings of the Convention were conveyed to the Committee of Detail for resolution on July 23, it included the stipulation, “[t]hat the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation.”<sup>219</sup> The express formula preserving authority to legislate for the states was only eliminated when all the heads of power were replaced with a list of powers by the Committee of Detail. The question that arises is whether, by this act, the Convention meant to abandon the power to legislate for the states. In the Constitution there is no specific formula that asserts that Congress may legislate only for

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216. Amar, *Of Sovereignty and Federalism*, *supra* note 206, at 1456.

217. See discussion of the Virginia Plan, *supra*.

218. See 1 FARRAND RECORDS, *supra* note 152, at 225.

219. 2 FARRAND RECORDS, *supra* note 152, at 131.



individuals, and not for the states. Nor does the general declaration that “[t]he Congress shall have power” etc., warrant such a conclusion. So long as Congress possesses the authority to legislate on a particular topic, its rule would thus legitimately extend throughout the nation. There would seem to be no constitutional grounds for excluding any part or province from such federal reach.

Interestingly, in the Convention debates there does appear a specific reference—unnoticed in the literature—regarding the concept of also commandeering the states. In the course of discussing the New Jersey and Virginia Plans, William Davie of North Carolina remarked: “We were partly federal, partly national in our Union. And he did not see why the Govt. might {not} in some respects operate on the States, in others on the people.”<sup>220</sup> No one contradicted him, and there is no reason to believe that the Convention had abandoned the right to enlist state action as well as popular action, when required.

Further evidence that Congress was to retain the power to command the states even while it was empowered to command individuals, would seem to arise from the issue of requisitions. Those states proposing the adoption of amendments invariably proposed that before Congress imposed taxes on individuals, the states be enabled to pay requisitions. Thus, the draft amendment of New York reads as follows: “That Congress do not lay direct Taxes . . . until Congress shall first have made a Requisition upon the States to assess levy and pay their respective proportions of such Requisition.”<sup>221</sup> The formulation in this New York draft and in all the other similar draft amendments clearly implies that Congress retains the right and power to impose requisitions on the states, even though direct taxes were to apply to individuals. The right to requisition is, of course, classic commandeering. There is no suggestion that the draft provision is *empowering* Congress to make requisitions; it presumes that Congress possesses the power and is *requiring* requisitions. The implication is clear that Congress has preserved the power to requisition and commandeer the states as before.

As noted earlier,<sup>222</sup> in his dissent in *New York v. United States*, Justice Stevens likewise argued that there was no basis, either in the history of the Constitutional Convention or in the final constitutional provisions, for the “incorrect and unsound” conclusion that “the Federal Government may not also impose its will upon the several States as it did under the Articles.” In his view, the Constitution had “enhanced, rather than diminished, the power of the Federal Government.” It was “incorrect and unsound,” he said, “to

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220. 1 FARRAND RECORDS, *supra* note 152, at 488.

221. TANSILL, *supra* note 149, at 1039.

222. *See supra*.

assert that Congress could not command a state to implement legislation enacted by Congress.”<sup>223</sup>

A contrary viewpoint would appear to have been expressed by Oliver Ellsworth at the Connecticut Ratifying Convention. Ellsworth had been a delegate to the Philadelphia Convention and, moreover, had served there as one of the five members of the Committee of Detail that formulated and defined the powers of Congress.<sup>224</sup> Subsequently, he served for a period as Chief Justice of the U.S. Supreme Court.<sup>225</sup> In addressing the Connecticut Convention, he said: “The only question is, shall it be a coercion of law, or a coercion of arms? . . . I am for coercion by law – that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. No coercion is applicable to such bodies, but that of an armed force.”<sup>226</sup>

It would appear that Ellsworth’s remarks were premised on the assumption that only the use of armed force could compel a state to fulfill an edict of the federal government. It is unclear whether he is arguing that the Constitution precludes the possibility of a federal directive to state authorities. He postulates that only two alternatives exist: coercion of the individual or coercion of the state. The former is to be preferred, he says, since to coerce a state would have the “necessary consequence” of “a war of the states, one against another,” and this the Constitution abjured.<sup>227</sup> If force was uncalled for, as would apply under the judicial system of the United States, there would appear to be no reason why an Act of Congress could not apply to a state.

#### *D. State Sovereignty between the Tenth Amendment and the Necessary and Proper Clause*

To protect state interests and sovereignty, Supreme Court Justices have placed key emphasis on the Tenth Amendment and have imparted a disposi-

223. 505 U.S. 144, 210, 211 (1992). See also the criticism of the Court majority by (retired) Justice Stevens in his article, *Should We Have a New Constitutional Convention?* 15 N. Y. REV. OF BOOKS 9, 20–22 (2012), <http://www.nybooks.com/articles/archives/2012/oct/11/should-we-have-new-constitutional-convention/>.

224. See 2 FARRAND RECORDS, *supra* note 152, at 97, 106.

225. See SULLIVAN & GUNTHER, *supra* note 53, at app. B-1.

226. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 553 (Merrill Jensen ed., 1976); see also 3 FARRAND RECORDS, *supra* note 152, at 241; reprinted in 1 THE DEBATE ON THE CONSTITUTION 883 (Bernard Bailyn ed., The Library of America 1993).

227. Madison, in his October 24 letter to Jefferson after the Philadelphia Convention, also expressed the same thought. A “compulsive” system of government, he wrote, could only be introduced against individuals, not states, for if armed force were to be applied against states it would produce “a scene resembling much more a civil war, than the administration of a regular government.” Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), 10 THE PAPERS OF JAMES MADISON 207 (Robert A. Rutland, et al. eds., The Univ. of Chicago Press 1977), <http://founders.archives.gov/documents/Madison/01-10-02-0151>; see 1 FARRAND RECORDS, *supra* note 152, at 54.

tive effect to that Amendment where none had previously been held to exist. As Mark Killenbeck observed, for those Justices promoting the New Federalism, the Tenth Amendment “is lionized as an embodiment of a newly robust conception of state sovereignty that seems on occasion to hold an almost mystical meaning.”<sup>228</sup> Or, to quote Linda Greenhouse of the *New York Times*: “The Tenth Amendment was the constitutional frog that turned into a prince. A kiss by the Supreme Court had lifted the amendment from decades of scorn and neglect.”<sup>229</sup>

Thus, in *Alden v. Maine*,<sup>230</sup> Justice Kennedy, for the majority, wrote: “Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment.<sup>231</sup> . . . The federal system . . . preserves the sovereign status of the States. . . . It reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”<sup>232</sup> Kennedy went on to say: “When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system.”<sup>233</sup>

Earlier, in *New York v. United States*, Justice O’Connor, in the majority opinion she authored, stated: “The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”<sup>234</sup> In conclusion, Justice O’Connor referred to the Tenth Amendment to confirm that the Constitution explicitly reserved to the States “a residuary and inviolable sovereignty.”<sup>235</sup> In his 1985 dissent in *Garcia*, Justice Lewis F. Powell accused the Court of unjustified disregard of the Tenth Amendment in that case, declaring: “Today’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”<sup>236</sup>

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228. Mark R. Killenbeck, *No Harm in Such a Declaration?*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY*, *supra* note 97, at 7. For further valuable discussion along these lines, see Leuchtenberg, *supra* note 97, at 41–105; and Jack N. Rakove, *American Federalism: Was There an Original Understanding?*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY*, *supra* note 97, at 107–29.

229. Leuchtenburg, *supra* note 97, at 73.

230. 527 U.S. 706 (1999).

231. *Id.* at 713.

232. *Id.* at 714.

233. *Id.* at 758. According to Kennedy, “the States entered the federal system with their sovereignty intact.” *Id.* at 713 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

234. 505 U.S. 144, 157 (1992).

235. *Id.* at 188.

236. 469 U.S. 528, 560 (1985).

These references illustrate how the Court majority has employed, or sought to employ, the Tenth Amendment to restrict national power. The members of Congress who framed this Amendment would be astonished to learn how a simple confirmation of residual state powers, to the degree that state autonomy applies, can be exploited to deny Congress national authority even under a legitimate federal power. Madison explicitly said that the very structure of the Constitution confirms the reserved powers of the states, and the Tenth Amendment in no way adds to, or modifies, that basic fact. Neither he, nor the majority in both houses of Congress who drafted the Amendment, intended to diminish federal power one iota. As much as this amendment was designed to assuage state fears about a federal monolith that might abolish the states and produce a consolidated United States, it was equally designed to confirm the sum total of federal power instituted under the Constitution, including an unmitigated doctrine of implied powers. Madison's purpose in rushing to promote the adoption of the Bill of Rights, including the Tenth Amendment, was to rescue the Constitution from even the slightest impairment.

But if the Tenth Amendment has been somewhat glorified by the Court majority, the Necessary and Proper Clause, it would appear, has suffered a reverse fate; it has been somewhat denigrated. Ever since the New Deal, the interstate Commerce Clause had served as a handle for countless federal programs, thanks to the Necessary and Proper Clause. Recent attempts to utilize that clause were dismissed as encroachments on state sovereignty. This was particularly the case where the legislation bore on a subject of criminal activity, as in the *Lopez* and *Morrison* decisions. Criminal law, the majority held, was peculiarly a state fiefdom, and federal intrusion into that field held the potential of complete federalization of criminal law as a national, rather than state, perquisite. The minority Justices, in each case, would have validated the legislation on the basis of the Commerce Clause operating in conjunction with the Necessary and Proper Clause. As Justice Souter said in the *Morrison* case: "The [Violence Against Women] Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, extended to all activity that, when aggregated, has a substantial effect on interstate commerce."<sup>237</sup>

A perspective that magnifies the status of the Tenth Amendment while reducing the scope of the Necessary and Proper Clause would appear not to accord with the original intentions of the drafters of these two provisions. In a word, as noted earlier, it raises the question of how much the New Federalism doctrine really coheres with an Originalist approach to constitutional interpretation.

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237. 529 U.S. 598, 637 (2000).

Originalist interpretation, it is well recognized, is a subject of considerable debate, not only as to whether it is the ideal form of constitutional interpretation, but as to what original interpretation actually comprises.<sup>238</sup> The literature on the relative merits of Originalism is vast.<sup>239</sup> However, in the present case, whatever Originalism has come to mean—whether original intent, original meaning, or original understanding<sup>240</sup>—does not bear on the subject at hand. The central issue in this article is: what factors led to the decision to replace the strongly nationalist scheme proposed by the Founding Fathers with a federal system of government, and what are the implications of this development? At least, where the intention of the draftsmen is abundantly clear, it should carry some weight in constitutional interpretation.

True, James Madison, after embracing the Antifederalist ideology of his erstwhile opponents in the ratification contest, thought otherwise, but his argument is open to serious questioning. His emphasis on the conditions and interpretations stipulated by some of the states when ratifying the Constitution appears misplaced. Why, for example, would the arguments of Antifederalists in the state ratifying conventions serve as a satisfactory guide to interpreting the meaning of any of the provisions of the Constitution? Various writers have sought to label the Antifederalists as junior partners in the drafting of the Constitution and to ascribe the meaning of certain provisions

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238. Lawrence B. Solum has written extensively and with keen insight on the subject of originalism. See LAWRENCE B. SOLUM & ROBERT W. BENNETT, *CONSTITUTIONAL ORIGINALISM: A DEBATE* (Cornell Univ. Press 2011). See also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (Univ. Press of Kansas 1999); RAUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (Univ. of Oklahoma Press 1987); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (Macmillan 1988); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (Free Press 1990); JACK N. RAKOVE, *ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (Knopf 1996); Frank B. Cross, *The Practical Meaning of Originalism*, from *SELECTED WORKS OF FRANK B. CROSS*; SOTORIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (Oxford Univ. Press 2007).

239. For a basic of discussions of constitutional interpretation, see Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1988); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204 (1980); Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); Phillip B. Kurland, *The Constitution: The Framers' Intent, the Present, and the Future*, 32 ST. LOUIS U. L. J. 17 (1987); Gary L. McDowell, *The Politics of Original Intention*, in *THE CONSTITUTION, THE COURTS, AND THE QUEST FOR JUSTICE* 1–24 (Robert A. Goldwin & William A. Schambra eds., American Enterprise Inst. 1989); Henry G. Manne, *Reconciling Different Views About Constitutional Interpretation*, *id.* at 55–69; Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L. J. 2037 (2006); Michael J. Perry, “*Interpreting*” *the Constitution*, in *THE CONSTITUTION, THE COURTS, AND THE QUEST FOR JUSTICE* 70–92 (Robert A. Goldwin & William A. Schambra eds., American Enterprise Inst. 1989); Harry M. Clor, *Constitutional Interpretation and Regime Principles*, *id.* at 115–35; and Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

240. For this three-way classification, see Kesavan & Paulsen, *supra* note 193, at 1134–48.

of the Constitution to them.<sup>241</sup> Other commentators have vigorously rejected the attempt to credit the Antifederalists with any effective role in the formulation of the Constitution. As one authority has said: “Americans are fortunate that the antifederalists were the failed, defeated, would-be founders of what would have been a very different kind of nation.”<sup>242</sup> Another writer has articulated it quite summarily: “Anti-Federalists are sometimes called ‘Other Founders,’ but they did not draft the Constitution, nor influence its drafting, and they opposed the fixed written document when they got to see it.”<sup>243</sup>

On various occasions, Madison contended that the Constitution as it emerged from Philadelphia was merely a proposal, and its meaning must be ascertained from the state ratifying conventions. In 1796, addressing the House of Representatives, he said:

As the instrument came from them [the Framers] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.<sup>244</sup>

But all of this was propounded when Madison, by then no longer a Federalist, vigorously opposed the Federalist financial policies pursued by his former ally, Secretary of the Treasury Alexander Hamilton, who enjoyed the confidence of President Washington. To ascertain the meaning of a legal document, the contemporaneous comments of its drafters are regularly and justifiably given greater weight than later second thoughts and debates that do not alter the text. At Philadelphia, the delegates had been free to adopt, modify, or reject the drafts before them. The state conventions, on the other hand, were presented with the Constitution as a *fait accompli*, and bidden to accept or reject that document as is. They had no opportunity to revise anything, and their remarks, even assuming that they paralleled those of delegates in other states, were nothing more than commentary. They did not affect the meaning imparted to the adoption of the document by its authors at its birth. They effected no changes in the text of the Constitution; they only succeeded in extracting a promise for the addition of Constitutional amendments—which became the Bill of Rights. But,

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241. See, e.g., SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828* (Univ. of North Carolina Press 1999) (and the works cited therein in the Introduction and Epilogue).

242. Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, From the Antifederalists?*, 79 *TEXAS L. REV.* 849, 854 (2001).

243. CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 133 (Cambridge Univ. Press 2005).

244. 3 *FARRAND RECORDS*, *supra* note 152, at 374.

as noted earlier, in proposing the Bill of Rights, Madison declared categorically that the Tenth Amendment added nothing new and that it only reaffirmed the relationship that was instituted between federal and state powers under the Constitution. As summed up by Bernard Bailyn: “How the Anti-federalists’ views explain the Constitution that was adopted over their objections has not been made clear.”<sup>245</sup>

There are also weighty considerations that Madison apparently overlooked in arguing that only the debates in the state ratifying conventions determine the meaning of the provisions of the Constitution. It is illuminating, in this context, to examine Madison’s initial statement, made in the House of Representatives on February 2, 1791, and recorded in his *Papers*. In opposing the administration’s bill on the establishment of the Bank of the United States, he stated:

The powers not given were retained; and . . . those given were not to be extended by remote implications. . . . The explanations in the state conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated. (Here he read sundry passages from the debates of the Pennsylvania, Virginia, and North-Carolina conventions, shewing the grounds on which the constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged by its opponents.)<sup>246</sup>

To which states and debates was Madison referring? In accordance with Article VII, the Constitution came into force on June 21, 1788, when New Hampshire became the ninth state to ratify. Of those nine states, six (Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, and Maryland) had ratified without any proposals for amendments. The suggestion for amendments arose only at the Massachusetts Convention, which “recommended” a series of amendments. Throughout the ratification campaign, no state was allowed to make its ratification subject to conditions. New York tried countless times to introduce a variety of conditions but was refused each time.<sup>247</sup> Madison made it absolutely clear that ratification had to

245. BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 128 (Vintage 2003).

246. James Madison, *The Bank Bill*, [2 Feb.] 1791, in 13 *THE PAPERS OF JAMES MADISON* 380 (Charles F. Hobson & Robert A. Rutland eds., Univ. Press of Virginia 1981), <http://founders.archives.gov/documents/Madison/01-13-02-0282>.

247. See Letter from Alexander Hamilton to James Madison (July 19, 1788), in 11 *THE PAPERS OF ALEXANDER HAMILTON* 188 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Virginia 1977), <http://founders.archives.gov/documents/Madison/01-11-02-0130>; Letter from James Madison to Alexander Hamilton (July 20, 1788), in 11 *id.* at 189, <http://founders.archives.gov/documents/Madison/01-11-02-0131>. In an address to the Virginia Ratifying Convention on June 24, 1788, Madison explained why Virginia could not demand amendments to the Constitution as a condition for ratification. Suppose eight states had already ratified, “the difficulty attending it will be immense. Every state, which had decided it, must take up the subject again.” Each

be unqualified. Each of the remaining seven states came up with “recommended” amendments. The key amendment that they sought was a reserved powers amendment. Five of the seven recommended that the word “expressly” be stipulated in this amendment, so that the federal government would be limited to those powers “expressly” enumerated in the Constitution. Virginia and North Carolina made no such stipulation, Madison having categorically rejected any such proposal, just as he would later reject it in Congress during the debate over the draft reserved powers amendment. Both Houses of Congress adopted the Madisonian version, and this is the formula that was ratified by the number of states required for its entry into force as the Tenth Amendment.

Madison’s reference to the debates in the states of Pennsylvania, Virginia and North Carolina, is particularly puzzling. Pennsylvania ratified without any proposal for amendments. Virginia and North Carolina ratified *after* the Constitution had gone into effect with ratification by nine states. How, then, can it be said that the Constitution was adopted subject to the conditions enunciated in their ratifying conventions? Granted, Virginia’s ratification was crucial to the future of the Union, but the Constitution was already in force, so what does belated accession by one or two states determine with regard to constitutional interpretation? And who was qualified to commit the United States to anything? In drawing up his draft Bill of Rights for approval by two-thirds of Congress, Madison disregarded eighty or ninety percent of the state proposals, and especially those designed to modify federal power, that the proponents had stamped as vital. The ones that he did incorporate were only those, including the Tenth, that would in no way affect the Constitution.

What is one to make of this whole saga? Six states, a clear majority of the nine required for entry into force of the Constitution, ratified without any amendments. The appeals for amendments by the other seven states were only suggestions, and they certainly could not bind the initial six. Five of the seven states proposed the term “expressly,” something that was deliberately excluded in the proposed list of amendments presented by the two other states, as Madison insisted. Hence, eight states abjured requiring inclusion of the term “expressly” in the text of the Tenth Amendment. Madison denied any suggestion that the Tenth Amendment was a repeat of Article II of the Articles of Confederation. In sum, the Tenth Amendment, as Madison emphasized in the congressional debate, merely confirmed the existing state of affairs under the Constitution and did not modify any of the powers of Congress in any way. Thus, it preserved the full scope of the

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state would be free to propose its own new amendments and the process would be endless. James Madison, *Ratification Without Conditional Amendments*, in 11 *THE PAPERS OF JAMES MADISON* 172–77 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Virginia 1977), <http://founders.archives.gov/documents/Madison/01-11-02-0110>. See also Letter from James Madison to Edmund Randolph (Apr. 10, 1788), *in id.* at 19.



Necessary and Proper Clause which, as Chief Justice Marshall said in *McCulloch v. Maryland*, was clearly designed to expand, not contract, congressional powers. An implied powers doctrine was thus a fundamental part of the Constitution.

No clear expression of opinion regarding the provisions of the Constitution emerges from all, or even the majority, of the state conventions, and in vain does one search for a common interpretation of any particular provision. We know what the Antifederalists wanted, and we know that they voted against ratification, even with Madison's promises. We do not know how many delegates to the ratifying conventions would have voted for ratification even absent any promises. So how relevant are the supposed "commitments?" As Kesavan and Paulsen have argued: "[H]ow can one rely on particular utterances in the Virginia ratifying convention, unknown to those in all preceding ratifying conventions?"<sup>248</sup> And as far as the Tenth Amendment is concerned, the only thing that was common to those recommending a reserved powers clause was the demand for inclusion of the term "expressly," and this was repudiated by Madison himself.<sup>249</sup>

The Constitutional Convention created a nation in 1787, albeit that it made vital concessions to the smaller and slave states. The nationalizing factor was current throughout the Constitutional Convention, and as a result, the final text, even with concessions, reflected the desire of the delegates for a powerful central government within a federal framework. The Necessary and Proper Clause added flexibility to federal power, and the Tenth Amendment, correctly read, confirmed that flexibility, while the Supremacy Clause ensured that no contrary state legislation could cancel legitimate national legislation.

#### CONCLUSION

According to Max Farrand, "every provision of the federal constitution can be accounted for in American experience between 1776 and 1787."<sup>250</sup> In this regard, he said, "the federal constitution was nothing but the applica-

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248. Kesavan & Paulsen, *supra* note 193, at 1164.

249. Calvin H. Johnson contends: "The program that gives the original meaning to the Constitution is also the proponents' program, rather than the opposition's. The Anti-Federalists did not write the Constitution, they opposed what they saw, and they lost in the only purpose that organized them – defeating ratification of the Constitution. Their goals explain the Constitution only by silhouetting it." JOHNSON, *supra* note 243, at 5. Robert W. Hoffert has portrayed the implications of the adoption of the Constitution for local government in the following terms: "Principles of decentralization, localism, and reduction in the size and dimensions of the national government are frequently attributed to the 1787 Constitution in spite of the fact that there is no single event in the entire history of the United States more purposefully contrary to these goals. The Constitution of 1787 delivered a deadly blow to decentralization, overwhelmed localism, and expanded the size, complexity, and power of the national government beyond any political, economic, or social event of the twentieth century." HOFFERT, *supra* note 210, at 2.

250. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 204 (Yale Univ. Press 1913).

tion of experience to remedy a series of definite defects in the government under the articles of confederation.”<sup>251</sup> Various features of the new constitution reflect the lessons learned. One was the new form of federalism under which the national government would not be beholden to the states for its existence. The states, while continuing to survive and thrive, would no longer be capable of paralyzing the national government by simply failing to support it. Capping the powers conveyed to Congress was the Necessary and Proper Clause, providing a doctrine of implied powers, to ensure that the national government would have the means to implement policies within the broader range of its powers. This facilitated considerable expansion of federal power nationwide.

Both federalism and the separation of powers are fundamental elements of the American system of government inaugurated in 1787–88. Under the federal arrangements instituted by the Constitution, both levels of government, the national and the state, have essential roles to play to ensure the successful functioning of the system of government. And just as cooperation between the three separate branches of government is required for the effective operation of the federal government, coordination between the center and the states is needed if the American people are to gain maximum benefit from the divided system of government. The essence of federalism was not only acknowledgment of the independent status of the states, but the principle that they would be integrated into the operation of the national government. Whereas under the separation of powers there is no mixture of representation between one branch and another (except for the Vice-President presiding over the Senate), under federalism, particular groups of states were not only represented like all other states in the national legislature, they had inordinate representation there. This extraordinary measure of influence was also carried over into the selection process for a President. Thus, federalism represented a form of partnership in the decision-making bodies of the national government that provided for security of state interests.

But there is an important difference between federalism and the separation of powers. Whereas on the federal level the three branches of government are equal and independent of one another, in the national-state nexus the Constitution stipulates that where the national government has authority, it also has supremacy. Ensuring that the national government would exercise paramountcy over the states was a critical feature of the Federalist Revolution instituted by the Philadelphia Convention. Nor was this supremacy affected by the adoption of the Tenth Amendment, which simply confirmed the federal equation instituted under the Constitution.

The separation of powers is also distinguished from the federal principle by its ideological genealogy. Both ancient and modern theorists, Aris-

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251. *Id.* at 205.

Montesquieu, proclaimed the separation of powers as a vital principle of sound government. As Madison said in Federalist No. 47, “the accumulation of all powers, legislative, executive and judiciary in the same hands” could justly be pronounced “the very definition of tyranny.”<sup>252</sup> Separating the three functions of government was designed to secure liberty. In contrast, federalism in the American system of government had no such distinguished lineage to portray. Preservation of the states was regarded as a necessary convenience; it was not a product of any profound theory of political science. In creating a nation, the Founding Fathers aimed to cure the United States of the destructive force of separate states, each going its own way. While content to preserve the independence and sovereignty of the states, they clearly were intent on subordinating the states to the national authority. Federalism was shaped, not by design, but because of the parochial demands of two groups of states, the smaller states and the slave states, that sought protection for their insular interests. Thus, diffusion of power, while clearly underlying the separation of powers arrangements on the national level, was not the guiding principle for the Framers in settling nation-state relations. It came about essentially as an accident of history.

Given the historical and documentary background, it is also clear that federalism was not designed to frustrate resolution of national problems. The role of the states in the operation of the national government, it was felt, would serve as sufficient guarantee for protection of states’ interests. While the Constitution confirmed that the federal government would reign supreme, the federal factor would ensure that in ultimate terms, the common interest would serve both state and nation.

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252. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke, ed., Wesleyan Univ. Press 1961).