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### The Framers' Federalism and the Affordable Care Act, 44 Conn. L. Rev. 1071 (2012)

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## Article

### The Framers' Federalism and the Affordable Care Act

STEVEN D. SCHWINN

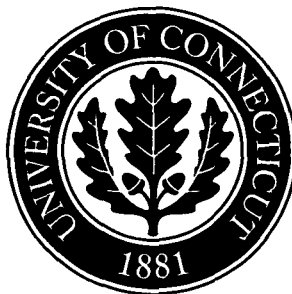
*Federalism challenges to the Affordable Care Act ("ACA") are inspired by the relatively recent resurgence in federalism concerns in the Supreme Court's jurisprudence. Thus, ACA opponents seek to leverage the Court-created distinction between encouragement and compulsion (in opposition to Medicaid expansion), and the Court-created federalism concern when Congress regulates in a way that could destroy the distinction between what is national and what is local (in opposition to universal coverage).*

*But outside the jurisprudence, the text and history of constitutional federalism tell another story. The text and history suggest that the Constitution created a powerful federal government, of the people (not the states), and that the Constitution increasingly empowered that government, at the explicit expense of the states, over time. Thus, the text and history stand directly against the federalism challenges to the ACA. And the opponents, and apparent ACA skeptics on the Court, have therefore avoided them.*

*This Article seeks to explore the text and history as applied to the ACA. It argues that a proper understanding of the text and history—through the text of the Constitution, the text of the Articles of Confederation, and the votes at the Constitutional Convention—show that neither Medicaid expansion nor universal coverage violate the Framers' federalism principles.*

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# The Framers' Federalism and the Affordable Care Act

STEVEN D. SCHWINN\*

## I. INTRODUCTION

Challengers to the Affordable Care Act ("ACA") raise two types of federalism claims in their case now before the Supreme Court. First, they argue that the Medicaid expansion violates the Tenth Amendment and related federalism principles by compelling the states to accede to it. They say that the expansion—increasing access to Medicaid to individuals up to 133% of the federal poverty line—crosses that line from encouragement to compulsion and thus upsets the delicate balance between federal and state power. Second, they argue that universal coverage unconstitutionally intrudes into an area of traditional state control. They claim that this congressional requirement that every person purchase health insurance would "completely obliterate the Constitution's distinction between national and local authority . . . ."<sup>1</sup>

These federalism claims have gained traction in the lower courts and even at the Supreme Court, where at least four of the Justices put their federalism concerns on full display at the recent oral arguments. On the one hand, this is hardly a surprise. After all, the Court has given federalism new life in its Tenth Amendment and Commerce Clause jurisprudence in the last couple decades. And the ACA—and, in particular, Medicaid expansion—tests the bounds of this jurisprudence.

But on the other hand, federalism concerns with the ACA are a complete surprise. That is because the text and history of the Constitution cut exactly the other way. The text and history show that the Constitution creates a powerful national government, of the people (not the states), at the expense of the states. In an age where text and history are such vital interpretive tools—especially for so many politically conservative jurists—we might expect the courts to blithely dismiss the ACA opponents' federalism arguments. But if so, we would be wrong.

Indeed, at a Court where enough Justices are so outspokenly steeped in

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<sup>1</sup> *United States v. Morrison*, 529 U.S. 598, 610 (2000).

the text and history, the most salient feature of the federalism arguments at the Supreme Court against the ACA is the nearly complete *lack of argument from text and history*. The ACA opponents dropped text and history arguments—including arguments based on the Tenth Amendment—almost entirely from their written and oral presentations to the Court. And the Court, including its apparent ACA skeptics, failed to engage in any serious way at all with text and history at oral argument.

In truth, this is no surprise. The text and history provide no support for federalism arguments against the ACA. Instead, these sources stand remarkably clear against the ACA opponents' federalism claims. In direct contrast to those claims, the text and history show that the Constitution created a powerful national government, of the people (and not the states), and that it only increased national power, at the direct expense of the states, over time.

This Article explores the text and some of the history of constitutional federalism and applies those sources to the ACA. The first part introduces the federalism issues in the ACA. The next three parts explore the text and structure of the Constitution; the text and structure of its reviled precursor, the Articles of Confederation; and votes at the Constitutional Convention related to federalism. The final part applies those sources to the ACA. It argues that the text and history of constitutional federalism run directly against the ACA opponents' federalism claims.

Before beginning, a quick word about methodology. This Article explores just a few of the many sources that one might consult to engage in a thoroughgoing exploration of the original understanding of constitutional federalism. In particular, this Article does not explore obvious sources like the Federalist Papers, state ratifying convention debates, public debates about federalism, early congressional enactments related to federalism, and others. It does not even explore the exchanges at the Convention.

But the Article does explore the text of the Constitution, the text of the Articles of Confederation, and the Convention votes. It explores only the primary sources, not secondary authorities (either historical or modern). These primary authorities say as much as, or more than, any other source about the Framers' meaning of federalism.

This Article does not represent a thorough originalist approach. Further it makes no claim that text, history, and original intent, meaning, or understanding are, or ought to be, the principal sources of constitutional construction.

The only modest argument is this: the text, history, and delegates' votes at the Constitutional Convention make clear that the ACA does not violate the Framers' principles of constitutional federalism.

## II. FEDERALISM IN THE AFFORDABLE CARE ACT

Federalism issues arise in two ways in the challenges to the ACA.

First, and most pointedly, challengers to the ACA argue that the Medicaid expansion violates the Tenth Amendment and related federalism principles by commandeering states to adopt and enforce national Medicaid policy.<sup>2</sup> Second, challengers argue that the universal coverage provision in the ACA invades an area of traditional state concern.<sup>3</sup> Both of these challenges, however, are at odds with the Framers' federalism, as evidenced in the text of the Constitution and its history, and the votes at the Constitutional Convention.

First, opponents of the ACA argue that the Act's expansion of the Medicaid program commandeers them in violation of the Tenth Amendment and related federalism principles. Medicaid, established in 1965, is a jointly funded, federal-state cooperative program that helps participating states provide medical care to needy persons.<sup>4</sup> In short, it is a government insurance plan for the poor. Congress enacted the Medicaid program pursuant to its spending authority under the General Welfare Clause and set certain standards for participating states.<sup>5</sup> States may participate in the Medicaid program or not, but if a state participates, it must also comply with federal requirements.<sup>6</sup>

The ACA expands Medicaid access principally by requiring participating states to cover all adults under age sixty-five with incomes up to 133% of the federal poverty line.<sup>7</sup> As the Eleventh Circuit explained, "[t]his is a significant change, because previously the Medicaid Act did not set a baseline income level for mandatory eligibility. Thus, many states currently do not provide Medicaid to childless adults and cover parents only at much lower income levels."<sup>8</sup> The Act also expands Medicaid access to children,<sup>9</sup> limits states' ability to lower eligibility levels (until a state's medical insurance exchange is operational),<sup>10</sup> and increases Medicaid payments for primary care services provided by a primary care doctor.<sup>11</sup>

Opponents of the ACA argue that the Medicaid expansion forces states to expand their own Medicaid programs in violation of federalism principles. In particular, they argue that the Medicaid expansion crosses the line that the Supreme Court has drawn in federal spending cases

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<sup>2</sup> See generally Brief of State Petitioners on Medicaid, *Florida v. U.S. Dep't of Health and Human Servs.*, No. 11-400 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> See generally 42 U.S.C. § 1396–1396w5 (2006).

<sup>5</sup> *Id.* § 1396a.

<sup>6</sup> *Id.* § 1396a(a)(10).

<sup>7</sup> 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VII) (West 2003 & Supp. 2011).

<sup>8</sup> *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1261–62 (11th Cir. 2011).

<sup>9</sup> 42 U.S.C.A. §§ 1396a(a)(10)(A)(i)(VII), and 1396a(a)(10)(C)(ii)(I).

<sup>10</sup> *Id.* § 1396a(gg)(1).

<sup>11</sup> *Id.* § 1396a(a)(13)(C).

between (acceptable) encouragement and (unconstitutional) compulsion. According to the Supreme Court, federal spending programs may *encourage* states to adopt certain policies as a condition of federal funds, but they may not *require* or *compel* states to adopt those policies. In a leading modern case, *South Dakota v. Dole*,<sup>12</sup> the Supreme Court upheld a federal requirement that states adopt a minimum drinking age (twenty-one years of age) as a condition of receiving federal highway funds.<sup>13</sup> The Court held that conditions on federal funds must not pass the point from encouragement to compulsion if they are to withstand scrutiny under the Tenth Amendment and related federalism principles.<sup>14</sup> The Court wrote: "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>15</sup> That is, when a federal spending program compels a state to participate and to adopt federal conditions, because the program leaves the state no other option, the program is unconstitutional. Opponents of the ACA say that this is a "necessary consequence" of the related principles that "Congress may not simply 'commandeer[r] the legislative processes of the States.'"<sup>16</sup>

Opponents of the ACA argue that the Medicaid expansion passes the point from encouragement to compulsion. They say that the ACA leaves the states no choice but to participate in the expanded Medicaid program, because the ACA also requires all persons, including needy persons, to obtain health insurance, and because Congress created no alternative to Medicaid for the needy.<sup>17</sup> In short, there is no alternative to fill the gap for the poor. Moreover, they argue that no state could reasonably decline to participate in Medicaid, because it would lose the massive federal funding from the largest grant-in-aid program in existence (and not just the additional incremental funding to cover the expansion itself), even as it would have to pay for its own expensive insurance option for its poor.<sup>18</sup> Because the ACA requires all persons to obtain health insurance, because Congress provided no alternative to Medicaid to the poor, and because states cannot afford to fill the gap, opponents argue that the ACA compels states to participate, thereby violating this core principle of federalism.<sup>19</sup>

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<sup>12</sup> 483 U.S. 203 (1987).

<sup>13</sup> *Id.* at 206.

<sup>14</sup> *Id.* at 211.

<sup>15</sup> *Id.*

<sup>16</sup> See generally Brief of State Petitioners on Medicaid, *supra* note 2, at 21 (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)).

<sup>17</sup> *Id.* at 32–48.

<sup>18</sup> *Id.* at 42–48.

<sup>19</sup> The Eleventh Circuit rejected this argument and upheld the Medicaid expansion. The Eleventh Circuit wrote,

Next, opponents argue that the universal coverage provision violates principles of federalism by exceeding congressional authority and invading a traditional area of state responsibility. The universal coverage provision of the ACA, or the “individual mandate,” requires all individuals, with certain exceptions, to obtain health insurance for themselves and their dependents, or pay a tax.<sup>20</sup> Under the ACA, a broad array of programs satisfy this “minimum essential coverage” requirement, including government-funded health insurance programs, employee-sponsored plans, individual plans on the open market, any grandfathered health insurance plan, and certain other approved plans.<sup>21</sup> Congress enacted the universal coverage provision under its Commerce Clause authority and its taxing power.

Opponents of the universal coverage provision argue that it trenches on areas of traditional state responsibility.<sup>22</sup> Opponents draw principally on ideas developed in *United States v. Morrison*<sup>23</sup> and *United States v. Lopez*,<sup>24</sup> two leading modern cases on congressional authority under the

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And so it is not without serious thought and some hesitation that we conclude that the Act's expansion of Medicaid is not unduly coercive . . . . There are several factors, which, for us, are determinative. First, the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program. . . . Indeed, Congress has made numerous amendments to the program since its inception in 1965. . . . In each of these previous amendments, the states were given the option to comply with the changes, or lose all or part of their funding. . . . None of these amendments has been struck down as unduly coercive.

Second, the federal government will bear nearly all of the costs associated with the expansion. . . .

Third, states have plenty of notice—nearly four years from the date the bill was signed into law—to decide whether they will continue to participate in Medicaid by adopting the expansions or not. . . .

Finally, we note that while the state plaintiffs vociferously argue that states who choose not to participate in the expansion will lose all of their Medicaid funding, nothing in the Medicaid Act states that this is a foregone conclusion. Indeed, the Medicaid Act provides [the Department of Health and Human Services] with the discretion to withhold all or merely a portion of funding from a noncompliant state.

Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1267–68 (11th Cir. 2011) (citations omitted).

<sup>20</sup> 26 U.S.C.A. § 5000A(b)(1) (West 2003 & Supp. 2011).

<sup>21</sup> *Id.* § 5000A(f)(1).

<sup>22</sup> See Brief of State Respondents on the Minimum Coverage Provision 27–33, U.S. Dep't of Health and Human Servs. v. State of Florida, No. 11-398 (2012).

<sup>23</sup> 529 U.S. 598 (2000).

<sup>24</sup> 514 U.S. 549 (1995).

Commerce Clause. Those cases established the familiar framework for analysis of congressional acts under the Commerce Clause.<sup>25</sup> They also expressed a federalism “concern” related to the protection of traditional areas of state responsibility—that “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority . . . .”<sup>26</sup>

Opponents of the ACA argue that the universal coverage provision does just that.<sup>27</sup> They say that the government’s theory here knows no bounds and would lead inexorably to a power by which Congress could interfere with all manner of policies traditionally within the states’ control.<sup>28</sup> For this reason, they argue, it violates this core principle of federalism.<sup>29</sup>

But these arguments are belied by the text and history of the Constitution. In particular, these arguments contradict the plain text and structure of the Constitution, and they run counter to the history of the Constitution, as measured by its reviled precursor, the Articles of Confederation, and the delegates’ votes in the Constitutional Convention.

### III. TEXT AND STRUCTURE OF THE CONSTITUTION

The text and structure of the Constitution show that the Constitution creates a powerful national government, constituted by the people (not the states), and that it only grows more powerful, at the expense of the states, over time. They show that the Constitution marginalizes the states in favor of the people, often ignores the states, and otherwise restricts them in various ways. They show that the Constitution even uses the states as mere instrumentalities or organizing units in order to achieve certain national ends. In short, the Constitution creates a powerful national government, completely supreme over the states. It is nothing like the weak, state-centered document that opponents of the ACA would have us believe.

We can start with the Preamble:

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<sup>25</sup> The cases look to four “considerations” to determine whether Congress exceeded its authority under the Commerce Clause. First, the Court looks to whether the activity regulated is “commercial.” *Morrison*, 529 U.S. at 610. Second, the Court looks to whether the congressional act had a “jurisdictional element” limiting its reach to those activities that have a substantial effect on interstate commerce. *Id.* at 611–12. Third, the Court considers whether legislative history or congressional findings show a connection between the regulated activity and interstate commerce. *Id.* at 612. Finally, the Court considers whether the link between the regulated activity and interstate commerce is too attenuated. *Id.* at 612.

<sup>26</sup> *Id.* at 615.

<sup>27</sup> See Brief of State Respondents, *supra* note 22, at 27–33.

<sup>28</sup> *Id.*

<sup>29</sup> Opponents argue that the government’s “rationale could ‘be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of [decisions relating to] marriage, divorce, and childrearing on the national economy is undoubtedly significant.’” *Id.* at 28 (quoting *Morrison*, 529 U.S. at 615–16) (citing *Lopez*, 514 U.S. at 565).

*We the People of the United States*, in Order to form a more perfect Union, *establish* Justice, *insure* domestic Tranquility, *provide* for the common defence, *promote* the general Welfare, and *secure* the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>30</sup>

The first and last phrases tell us that our Union is comprised of and formed by “We the People,” not the states, and that ultimate sovereignty resides in the People.<sup>31</sup> It also tells us that government is a mere proxy for the People and derives its power only by way of delegation from the People—in other words, that “We the People” have created our national government and vested it with certain powers. The language thus creates a direct relationship between the People and the government of the United States, effectively writing the states out as mediators (or anything else) in that relationship. And it identifies “We the People of the United States,” not “We the People of the states,” thus creating a politically distinct People—the national People—independent of the states or the state People (even if the actual persons are the same). In short, the plain language tells us that this new People—“We the People of the United States”—holds ultimate sovereignty in this national government, irrespective of anything having to do with the states.

Moreover, the middle clauses tell us that our national government is an active one. The Preamble effectively says that “We the People” ordain and establish this Constitution *to form, to establish, to insure, to provide, to promote, and to secure*. These are hardly the words of a passive, restrained government designed principally to get out of the way (of the market, or of anything else, for that matter). Instead, the plain language contemplates an active government that plays an active role in promoting the public good.

This active government is also reflected in the capacious powers included in Article I, Section 8. Those powers include the “Power To . . . provide for the . . . general Welfare of the United States,”<sup>32</sup> “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,”<sup>33</sup> “To borrow Money,”<sup>34</sup> “To coin Money,”<sup>35</sup> “To raise and support Armies,”<sup>36</sup> “To provide and maintain a Navy,”<sup>37</sup> and even “To

<sup>30</sup> U.S. CONST. pmbl. (emphasis added).

<sup>31</sup> See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS 119–33 (1998) (discussing the “popular sovereignty amendments”).

<sup>32</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>33</sup> *Id.* cl. 3.

<sup>34</sup> *Id.* cl. 2.

<sup>35</sup> *Id.* cl. 5.

<sup>36</sup> *Id.* cl. 12.

<sup>37</sup> *Id.* cl. 13.

provide for the calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>38</sup> among several others.<sup>39</sup> These powers are punctuated by the mighty Sweeping Clause, which authorizes Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offices thereof.”<sup>40</sup> Like the language in the Preamble, this is hardly the stuff of a passive government. These powers may be defined and limited,<sup>41</sup> but they are certainly not small.

The Amendments to the Constitution only expand these powers. Most obviously, the Reconstruction Amendments vastly expand national power to enforce civil rights. Thus Section two of the Thirteenth Amendment gives Congress the power to abolish slavery and involuntary servitude;<sup>42</sup> Section five of the Fourteenth Amendment gives Congress the power to enforce against the states the citizenship, privileges or immunities, equal protection, and due process clauses of Section one of that same Amendment;<sup>43</sup> and Section two of the Fifteenth Amendment empowers Congress to ban state racial discrimination in voting as stated in Section one of that same Amendment.<sup>44</sup> Similarly, the Nineteenth Amendment, adopted over fifty years later, gives Congress the power to ban sex discrimination in voting;<sup>45</sup> and the Twenty-Fourth Amendment, enacted nearly a century later, empowers Congress to ban poll taxes.<sup>46</sup> The Sixteenth Amendment expanded national authority in a different way: it authorizes Congress “to lay and collect taxes on incomes . . .”<sup>47</sup> These amendments show that our national constitutional history is one of expansion, not contraction,<sup>48</sup> and hardly reflects a passive government with

<sup>38</sup> *Id.* cl. 15.

<sup>39</sup> *Id.* § 8 (enumerating the remaining powers of Congress and the Government of the United States).

<sup>40</sup> *Id.* cl. 18.

<sup>41</sup> *See id.* art. I, § 9 (delineating certain limitations on Federal governmental power, such as taxation, ex post facto, titles of nobility).

<sup>42</sup> *Id.* amend. XIII, § 2.

<sup>43</sup> *Id.* amend. XIV, § 5.

<sup>44</sup> *Id.* amend. XV, §§ 1, 2.

<sup>45</sup> *Id.* amend. XIX.

<sup>46</sup> *Id.* amend. XXIV.

<sup>47</sup> *Id.* amend. XVI.

<sup>48</sup> There are only two arguable exceptions to this trend, the Eleventh Amendment and the Twenty-First Amendment, and their narrowness proves the larger rule.

The Eleventh Amendment grants states immunity in federal court from suits “in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.” *Id.* amend. XI. By its terms, this is a “states’ rights” amendment. But it is a modest amendment, merely restricting the subject-matter jurisdiction of the federal courts set out in Article three, Section two, in reaction to the Court’s decision in *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793) (holding that controversies between individual states and citizens of other states were

few powers.

Critically, each of these powers—those in the main body of the Constitution and those in its ever-expanding amendments—comes at the expense of the states. The Supremacy Clause makes this clear:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.<sup>49</sup>

Article VI goes on to say that “the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”<sup>50</sup>

Other language, too, drives home the point that the national power comes at the expense of the states. For example, Article I, Section 10, contains a list of specific restrictions on the states.<sup>51</sup> Similarly, Article IV, with its Full Faith and Credit Clause and Privileges and Immunities Clause, restricts the states by governing the relationships between the states.<sup>52</sup> Article IV, Section 1, the Full Faith and Credit Clause, even authorizes Congress to “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof,” thereby giving the national government direct control over the states.<sup>53</sup>

The Reconstruction Amendments, the Nineteenth Amendment, and the Twenty-Fourth Amendment all impose strict requirements on the states with respect to civil rights, and empower Congress to enforce those rights through legislation against the states. Two amendments illustrate national supremacy by specifically eliminating historical roles of the states. Thus

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under the jurisdiction of federal courts and that state conduct was subject to judicial review). The Supreme Court’s interpretation has given the Eleventh Amendment more muscle than its modest plain language. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacked authority under the Indian commerce clause to abrogate the states’ Eleventh Amendment immunity).

The Twenty-First Amendment repeals the Eighteenth Amendment, and gives the states the power to regulate the “transportation or importation into any State . . . for delivery or use therein of intoxicating liquors . . . .” U.S. CONST. amend. XXI, § 2.

<sup>49</sup> U.S. CONST. art. VI, cl. 2.

<sup>50</sup> *Id.* art. VI, cl. 3.

<sup>51</sup> *Id.* art. I, § 10 (including restrictions on States from entering into treaties, imposing duties on imports and exports without Congressional consent, and keeping troops).

<sup>52</sup> *Id.* art. IV, §§ 1–2.

<sup>53</sup> *See id.* § 1.

the Sixteenth Amendment empowers Congress “to lay and collect taxes . . . without apportionment among the several States,”<sup>54</sup> and the Seventeenth Amendment provides for the direct election of U.S. Senators “by the people,” not the state legislatures.<sup>55</sup>

Other provisions illustrate national supremacy by saying that the national government forms, governs, and protects the states. Article IV, Section 3, says that only Congress can admit a new state into the Union, and that Congress must approve the creation of a new state out of territory of an existing state.<sup>56</sup> Article IV, Section 4, requires the United States to “guarantee to every State in this Union a Republican Form of Government,” to protect states from invasion, and, on the application of the state legislature or the governor, to protect against domestic violence.<sup>57</sup>

Yet other provisions go far further, treating the states as appendages or instrumentalities of the national government. For example, the Constitution treats the states as mere agencies with respect to elections for national office. Article I, Section 4, directs the states to establish the “Times, Places and Manners of holding Elections for Senators and Representatives,” but allows Congress to override the states, “except as to the Places of chusing Senators.”<sup>58</sup> Article I, Section 6, says that Senators and Representatives shall be paid by the national government, not by their states.<sup>59</sup> Article II, Section 1, directs states to appoint electors for the election of the President.<sup>60</sup> Most notably, the Constitution treats states as mere organizing agents for the very process of ratification of the Constitution: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”<sup>61</sup> Ratification is by way of *the conventions*—

<sup>54</sup> *Id.* amend. XVI.

<sup>55</sup> *Id.* amend. XVII.

<sup>56</sup> *Id.* art. IV, § 3.

<sup>57</sup> *Id.* art. IV, § 4.

<sup>58</sup> *Id.* art. I, § 4.

<sup>59</sup> *Id.* art. I, § 6.

<sup>60</sup> *Id.* art. II, § 1.

<sup>61</sup> *Id.* art. VII (emphasis added). The People thus ratified the Constitution *by convention* in each state, but not *by the states themselves*. As Chief Justice John Marshall wrote in *McCulloch v. Maryland*:

The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might “be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation

comprised of We the People—not the states. The states serve as mere organizing agents—instrumentalities of the very formation of the national government.

To be sure, there are exceptions to the obviously national and supreme structure of the Constitution—exceptions that recognize independent roles for the states. For example, Article V recognizes some role for the states in the amendment procedure:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>62</sup>

But even here, Congress has authority to work around the states and directly through the People by proposing that state conventions, not states themselves, ratify amendments. Thus, Article V only respects states insofar as it permits them to propose amendments, and preserves their equal vote in the Senate. And as we have seen, this latter protection, in the wake of the Seventeenth Amendment, really respects the People, not the states. In light of the Seventeenth Amendment, this latter protection treats the states as mere convenient organizing agents within the structure of the national Constitution, and not independent sovereigns.

The Amendments also recognize some role for the states, but their emptiness or narrowness only reinforces the general rule of national

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of its Legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402–03 (1819).

<sup>62</sup> U.S. CONST. art. V.

supremacy. For example, the Tenth Amendment reserves powers to the states that are not granted to Congress.<sup>63</sup> But this only says what we know must be true of our national government of defined powers: powers not granted to the national government do not belong to the national government (instead, they belong to the states, or to the people). The plain terms of the Tenth Amendment say nothing about the scope of national power or the scope of state power; instead, the Tenth Amendment, by its plain terms, is merely a formula that tells us *where* power resides *after* we determine whether Congress possesses it. If anything, the Tenth Amendment underscores national supremacy by reminding us (along with the Supremacy Clause) that national power is supreme and (along with the Preamble) that ultimate sovereignty resides in the people. The Tenth Amendment does nothing more than acknowledge the states' residual powers; it is therefore only a minor exception to the otherwise obviously national and supreme Constitution.

The Eleventh Amendment, too, acknowledges the states by excepting them from federal court jurisdiction in suits by "citizens of another State . . . ."<sup>64</sup> And the Twenty-First Amendment acknowledges a role for the states in the regulation of alcohol.<sup>65</sup> But these provisions are notably narrow. The Eleventh Amendment is only a narrow exception to Article III jurisdiction;<sup>66</sup> and the Twenty-First Amendment is only a narrow exception to congressional authority and supremacy.<sup>67</sup> Neither the Eleventh Amendment nor the Twenty-First Amendment limits national supremacy as a general matter. Indeed, their narrowness only underscores the fact of general national supremacy.

On the whole, the plain text and structure of the Constitution are not kind to the states.<sup>68</sup> The Constitution either bypasses the states (in favor of "We the People"), emphasizes their inferiority (in favor of national supremacy), or treats them as mere instrumentalities of the national government in order to achieve national ends. Importantly, these features of the Constitution only become clearer over time, as amendment after amendment increasingly empowers Congress at the expense of the states.

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<sup>63</sup> *Id.* amend. X.

<sup>64</sup> *Id.* amend. XI.

<sup>65</sup> *Id.* amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

<sup>66</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

<sup>67</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712–13 (1984) (finding that the Twenty-First Amendment does not diminish the Supremacy Clause).

<sup>68</sup> See generally CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005) (arguing that the national Constitution is a viciously anti-state document).

The few exceptions to this trend are quite narrow, only highlighting the more general rule of national supremacy. They are, therefore, exceptions that prove the rule.

While the Constitution is silent on the precise question whether Congress may strongly encourage states to cooperate or to require them to adopt certain policies, or whether Congress may regulate areas traditionally reserved to the states, the text and structure of the Constitution overwhelmingly suggest that it can do both. The General Welfare Clause,<sup>69</sup> the Commerce Clause,<sup>70</sup> and the Necessary and Proper Clause<sup>71</sup> authorize these kinds of congressional acts. And if there were any doubts, the text and structure of the rest of the Constitution only support congressional power, and undermine any opposing claim of encroachment on state sovereignty. In short, ours is a Constitution of unquestioned national supremacy over state sovereignty; it is hard to see how to twist the text and structure to protect state sovereignty. These trends become even clearer when we compare the Constitution to its precursor, the Articles of Confederation.

#### IV. TEXT AND STRUCTURE OF THE ARTICLES OF CONFEDERATION

The differences between the Constitution and the Articles of Confederation, the Constitution's reviled precursor, bring into sharp focus the power and supremacy of the national government under the Constitution. The Constitution plainly rejects the confederative approach of the Articles, with the states' explicitly retained sovereignty and a weak confederation government. Nowhere is the difference more apparent than in Article II: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."<sup>72</sup> In addition, the Preamble read: "Whereas the Delegates of the United States of America in Congress assembled did . . . agree to certain articles of Confederation and perpetual Union *between the States . . .*"<sup>73</sup> Article III dictated that the states "severally enter into a *firm league of friendship* with each other . . ."<sup>74</sup> And Article V required states to appoint their respective delegates, authorized only states to recall them, and gave each state one vote in Congress.<sup>75</sup>

As to powers, the Articles gave quite limited ones to the United States

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<sup>69</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>70</sup> *Id.* cl. 3.

<sup>71</sup> *Id.* cl. 18.

<sup>72</sup> ARTICLES OF CONFEDERATION of 1777, art. II.

<sup>73</sup> *Id.* pmbl. (emphasis added).

<sup>74</sup> *Id.* art. III (emphasis added).

<sup>75</sup> *See id.* art. V, para. 4.

in Congress assembled. Thus Article IX gave the United States in Congress assembled certain powers over foreign affairs, power to resolve disputes between the states, and miscellaneous powers to establish weights and measures, to regulate the value of its own coin, to establish and regulate post offices, and to appoint officers, including officers of the land and naval forces.<sup>76</sup> Notably, Article IX gave the United States in Congress assembled the power to “regulat[e] the trade and manag[e] all affairs with the Indians, not members of any of the States,” with this important qualification: “that the legislative right of any State within its own limits be not infringed or violated.”<sup>77</sup>

The text and structure of the Articles stand in stark contrast to the text and structure of the Constitution. Importantly for purposes of this Article, nothing in the Constitution references state sovereignty, implies even remotely that the national government is comprised of the states, or suggests that the states are the principal political units. Indeed, as discussed more fully above, the Constitution bypasses the states, restricts them, and even uses them as instruments to national ends.<sup>78</sup>

In addition, the Constitution does not restrict powers the way the Articles did. For example, Article II provided that the United States in Congress assembled is empowered by “*expressly* delegated” powers,<sup>79</sup> but the Tenth Amendment, the closest equivalent in the Constitution, contains no such restriction on congressional authority,<sup>80</sup> indeed, the framers deliberately left the word “expressly” out.<sup>81</sup> And they deliberately added

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<sup>76</sup> *Id.* at art. IX.

<sup>77</sup> *Id.*

<sup>78</sup> See *supra* Part III.

<sup>79</sup> ARTICLES OF CONFEDERATION of 1777, art. II (emphasis added).

<sup>80</sup> See U.S. CONST. amend. X.

<sup>81</sup> 1 ANNALS OF CONG. 767–68 (1789).

Mr. Tucker proposed to amend the proposition, by prefixing to it “all powers being derived from the people.” He thought this a better place to make this assertion than the introductory clause of the Constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word “expressly,” so as to read “the powers not expressly delegated by this Constitution.”

Mr. Madison objected to this amendment, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutia. He remembered the word “expressly” had been moved in the convention of Virginia, by the opponents to the ratification, and, after full and fair discussion, was given up by them, and the system allowed to retain its present form.

Mr. Sherman coincided with Mr. Madison in opinion, observing that corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed.

the phrase “or to the people,” reinforcing the fact that *states* are not the relevant constituent units of the national government, *We the People* are.<sup>82</sup> The Articles contained no authority to tax and spend for the general welfare; they contained no general commerce clause; and they contained no necessary and proper clause.

Moreover, both Article II<sup>83</sup> and Article IX<sup>84</sup> restricted the power of the United States in Congress assembled with explicit reference to the states’ powers: congressional power under the Articles was a function of state power. Article IX was especially clear, limiting the power of the United States in Congress assembled with the proviso “that the legislative right of any state within its own limits be not infringed or violated.”<sup>85</sup> The Constitution contains no such restriction on national authority. Instead, the Constitution defines national authority in much more open and capacious terms, without reference to the powers of the states, except to say that national powers are supreme.<sup>86</sup> The closest the Constitution comes to a limitation based on states’ powers is, again, the Tenth Amendment. But the plain language of the Tenth Amendment is a far cry from the limiting language in Article II and Article IX—language that the framers had at their disposal, but elected not to use.<sup>87</sup>

To be sure, the Articles made the United States in Congress assembled supreme for some limited purposes, and, like the Constitution, they limited some powers of the states. But the language—particularly the Preamble and Articles II and IX—and the overall structure show that the Constitution deliberately creates a national government comprised of the people, not the states; that it vests that government with substantially more power and flexibility; and that its power comes at the expense of the states.

The move from the Articles of Confederation to the Constitution supports the plain interpretation of federalism principles in the text—that the Constitution created a powerful national government of the people, at

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Mr. Tucker did not view the word “expressly” in the same light with the gentleman who opposed him; he thought every power to be expressly given that could be clearly comprehended within any accurate definition of the general power.

Mr. Tucker’s motion being negatived . . . .

*Id.*

<sup>82</sup> U.S. CONST. amend. X; *id.* pmb. (emphasis added).

<sup>83</sup> ARTICLES OF CONFEDERATION of 1777, art. II.

<sup>84</sup> *Id.* art. IX.

<sup>85</sup> *Id.*

<sup>86</sup> See U.S. CONST. art VI, § 2 (“This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land . . .”).

<sup>87</sup> *Id.* pmb.; ARTICLES OF CONFEDERATION of 1777, art. II, art. IX.

the expense of the states. The delegates' votes in the Constitutional Convention support this, too.

## V. VOTES IN THE CONVENTION

The votes on federalism-related issues at the Convention of 1787 support these conclusions—that the Constitution creates a national government of the people, not the states, and that it vests that government with substantial power at the expense of the states. From the earliest convention votes, the delegates bypassed the states in favor of the people and used the states as instrumentalities toward national ends.<sup>88</sup> The votes emphasized and re-emphasized national supremacy and national power over the states, moving toward a national solution to the state-caused problems under the Articles of Confederation.<sup>89</sup> These problems are well documented, including the states' refusal to pay debts from the Revolution and to fund Congress, the states' interference with free trade, and Congress's inability to regulate.<sup>90</sup> Madison summarized his personal experience with these problems in his Preface to the Notes of Debate:

It required but little time after taking my seat in the House of Delegates in May 1784 to discover that however favorable the general disposition of the State might be towards the Confederacy the Legislature retained the aversion of its predecessors to transfers of power from the State to the Gov[ernment] of the Union; notwithstanding the urgent demands of the Federal Treasury; the glaring inadequacy of the authorized mode of supplying it, the rapid growth of anarchy in the Fed[eral] System, and the animosity kindled among the States by their conflicting regulations . . . .

The failure however of the varied propositions in the Legislature for enlarging the powers of Congress, the continued failure of the efforts of Cong[ress] to obtain from them the means of providing for the debts of the

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<sup>88</sup> See, e.g., James Madison, Notes on the Committee of the Whole House (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48–50 (Max Farrand ed., rev. ed. 1966) (discussing the delegates' arguments for the election of the Legislative branch by the people, and not the states).

<sup>89</sup> See, e.g., *id.* at 49 (discussing the need to decrease the influence of the states and increase federal power through election of the Legislative branch by the people); see also James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 19 (enumerating the problems of the Articles of Confederation caused by the states).

<sup>90</sup> *Id.* at 19, 24–26.

Revolution; and of countervailing the commercial laws of [Great Britain], a source of much irritation & ag[ainst] which the separate efforts of the States were found worse than abortive; these Considerations with the lights thrown on the whole subject, by the free & full discussion it had undergone led to a general acquiescence in the Resol[ution] passed . . . which proposed & invited a meeting of Deputies from all the States . . .<sup>91</sup>

The Resolution of the General Assembly of Virginia to which Madison refers authorizes Virginia delegates to meet with other state delegates:

[T]o take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.<sup>92</sup>

The delegates at the Convention of 1787 did this and more: they constituted a new national government of the people, not the states. Their votes on the composition of the new government, the ratification and amendment process of the new Constitution, and the powers of the new government in relation to the states worked to bypass the states in favor of the people, control the states through the power of the national government, and even to use the states as instrumentalities of national ends.

#### A. *Composition*

In a string of votes running over half the Convention, the delegates repeatedly affirmed that the new government would be comprised of the people, not the states. Their votes also affirmed that the states would have no formal agency or voice within the new government as states; instead, the states would be, at most, organizing units used by the new national government merely to facilitate the agency and voice of the people. In short, the delegates cut the states out of the new national government in

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<sup>91</sup> James Madison, Preface to Debates in the Convention of 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 543–44 (Max Farrand ed., rev. ed. 1966).

<sup>92</sup> Resolution of the General Assembly of Virginia January 21, 1786, in THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA xlvii (Gaillard Hunt & James Brown Scott eds., 1920).

nearly every way possible, bypassing them in favor of the people and using them only as instruments to empower the people in the new national government.

For example, in a series of votes on the composition of the “first branch of the national Legislature,” the House of Representatives, the delegates repeatedly and overwhelmingly voted to place that branch in the hands of the people, and not the states. Thus, early in the Convention debates, on May 31, the delegates voted 6-2-2 to elect “the first branch of the national Legislature, by the people.”<sup>93</sup> They reaffirmed this vote by an even stronger margin on June 21, when they voted 9-1-1 “[o]n the question for [the] election of the 1st branch by the *people*.”<sup>94</sup> They specifically rejected proposals to elect the House by the state legislatures three times, on May 31,<sup>95</sup> June 6,<sup>96</sup> and June 21.<sup>97</sup> And as if to punctuate the point, they voted twice, on June 11<sup>98</sup> and June 29,<sup>99</sup> in favor of a motion rejecting the one-state-one-vote model of the Articles of Confederation.

The story was similar for the Senate. Thus, in the early votes, the delegates rejected any role for the states in the Senate. On June 7, the delegates voted 10-0 against a “motion for an appointment of the Senate by the State Legislatures.”<sup>100</sup> On June 11, they rejected a proposal to give

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<sup>93</sup> James Madison, Notes on the Committee of the Whole House (May 31, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 50.

<sup>94</sup> James Madison, Notes on the Constitutional Convention (June 21, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 360.

<sup>95</sup> James Madison, Preface to Debates in the Convention of 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 91, at 52 (recording the vote “[o]n the whole question for electing by the first branch out of nominations by the State Legislatures” which failed 3-7).

<sup>96</sup> James Madison, Notes on the Committee of the Whole House (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 137–38. (“On the question for electing the 1st branch by the State Legislatures as moved by Mr. Pinkney: it was negatived.”).

<sup>97</sup> James Madison, Notes on the Constitutional Convention (June 21, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 360 (recording that the vote “[o]n the question for Genl. Pinkney motion to substitute election of the 1st branch in such mode as the Legislatures should appoint, in stead of its being elected by the people” failed 4-6-1).

<sup>98</sup> James Madison, Notes on the Committee of the Whole House (June 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 196, 200. (“Mr. King & Mr. Wilson, in order to bring the question to a point moved ‘that the right of suffrage in the first branch of the national Legislature ought not to be according to the rule established in the articles of Confederation, but according to some equitable ratio of representation.’”) The motion passed with a vote of 7-3-1. *Id.*

<sup>99</sup> James Madison, Notes on the Constitutional Convention (June 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 460 (affirming with a vote of 6-4-1 “that the right of suffrage in the first branch of the Legislature of the United States ought not to be according to that established by the articles of Confederation but according to some equitable ratio of representation”).

<sup>100</sup> James Madison, Notes on the Committee of the Whole House (June 7, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 149 (showing that a resolution proposing that the “members of the second branch of the ‘national Legislature ought to be chosen by the individual Legislatures’” passed unanimously).

each state one vote in the Senate,<sup>101</sup> and they passed a proposal “that the right of suffrage in the second branch ought to be according to the rule established for the first.”<sup>102</sup> And on July 2, they rejected a proposal by Mr. Elseworth “allowing each State one vote in the Second branch,” which was the same as in the Articles of Confederation.<sup>103</sup>

Ultimately, of course, as part of the Great Compromise, the delegates voted to allow each state legislature to select that state’s Senators.<sup>104</sup> But even so, the delegates did not design the Senate to represent the interests of the states. Instead, the Framers gave each Senator independence, so that two Senators from the same state might vote differently on any matter, and rejected the one-state-one-vote model of the Articles, suggesting that Senators represented the people of their states and not their state legislatures. Moreover, the Framers voted 9-2 to pay Senators out of the national treasury,<sup>105</sup> rejecting payment from the states,<sup>106</sup> so that Senators would not be beholden to the state legislatures. In short, the delegates did not vote for selection of Senators by state legislatures in order to give states agency and voice within the new national government. Instead, they voted for selection by state legislatures in order to advance a political compromise, and to use the state legislatures to identify and select the most

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<sup>101</sup> James Madison, Notes on the Committee of the Whole House (June 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 193 (recounting that this resolution failed with a vote of 5-6).

<sup>102</sup> James Madison, Notes on the Constitutional Convention (June 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 460 (affirming with a vote of 6-4-1 “that the right of suffrage in the first branch of the Legislature of the United States ought not to be according to that established by the articles of Confederation but according to some equitable ratio of representation”).

<sup>103</sup> James Madison, Notes on the Constitutional Convention (July 2, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 512 (rejecting by a vote of 5-5-1 “the question of allowing each State one vote in the second branch as moved by Mr. Elseworth,” i.e., the same as in the Articles of Confederation).

<sup>104</sup> James Madison, Notes on the Constitutional Convention (June 25, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 397, 408 (“On the question to agree ‘that the members of the 2d. branch be chosen by the indivl. Legislatures . . .’”).

<sup>105</sup> James Madison, Notes on the Committee of the Whole House (June 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 214, 216; *see also* James Madison, Notes on the Constitutional Convention (Aug. 14, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 283, 292 (Max Farrand ed., rev. ed. 1966).

<sup>106</sup> James Madison, Notes on the Committee of the Whole House (June 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 214, 219 (“Mr. Butler & Mr. Rutledge proposed that the members of the 2d. branch should be entitled to no salary or compensation for their services.”). This suggests that the members would be paid by their states. James Madison, Notes on the Constitutional Convention (June 22, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 371, 374 (stating that “[o]n the question for striking out ‘Natl. Treasury’ as moved by Mr. Elseworth,” payment of members would come from the states); James Madison, Notes on the Constitutional Convention (June 26, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, 421, 428 (“On the question for payment of the Senate to be left to the States as moved by Mr. Elseworth . . .”).

talented individuals. Thus, the final structure of the Senate suggests that the delegates again bypassed the states in favor of the people and, if anything, only used the states as instruments to empower the people in the new national government.

Finally, the delegates similarly bypassed the states in voting for the election and removal of the President. For example, on June 9, the delegates rejected a proposal to “refer[] the appointment of the National Executive to the State Executives” by a vote of 0-9-1.<sup>107</sup> And on June 2, the delegates overwhelmingly rejected a proposal “for making Executive removable by National Legislature at request of majority of State Legislatures.”<sup>108</sup> Ultimately, of course, the delegates voted to give the states a role in electing the President.<sup>109</sup> Article II requires states to appoint, “in such Manner as the Legislature thereof may direct,” the states’ presidential electors.<sup>110</sup> But that role, like the state legislatures’ role in appointing Senators, is merely instrumental, not substantive, in the new national government. Again, the states are mere organizing units designed merely to serve the national end.

In sum, the delegates designed the new government, including its political branches, so that its constituents were the people, not the states. The delegates left some roles for the states, to be sure, but they were principally instrumental roles in the new government, rather than substantive ones.

### B. *Ratification and Amendment*

The delegates similarly voted to bypass and disempower the states with regard to constitutional ratification and to share power between the states and the people with regard to the amendment process. As to ratification, the delegates accepted a proposal on June 12 “referring the new system to the people of the States for ratification[;] it passed [6-3-2] in the affirmative,”<sup>111</sup> and not to the states themselves. And on July 23, the delegates rejected a motion by a 3-7 vote “to refer the plan to the

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<sup>107</sup> James Madison, Notes on the Committee of the Whole House (June 9, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 175, 176.

<sup>108</sup> James Madison, Notes on the Committee of the Whole House (June 2, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 79, 87 (“On Mr. Dickenson’s motion for making Executive removable by Natl. Legislature at request of majority of State Legislatures was also rejected[—]all the States being in the negative except Delaware which gave an affirmative vote.”).

<sup>109</sup> James Madison, Notes on the Committee of the Whole House (July 19, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 58 (noting that “[o]n 2d part shall the Electors [for the executive] be chosen by State Legislatures” passed 8-2).

<sup>110</sup> U.S. CONST. art. II, § 1.

<sup>111</sup> James Madison, Notes on the Committee of the Whole House (June 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 214.

Legislatures of the States.”<sup>112</sup> Ultimately, the delegates gave the states a role in ratification,<sup>113</sup> but, like their roles in the political branches, it was merely instrumental, not substantive.

As to amendments, the delegates twice rejected proposals to put the amendment process in the hands of the states alone and to cut out any role for the people. On August 31, they rejected a motion “to strike out ‘Conventions of the’ after ‘ratifications’ . . . leaving the States to pursue their own modes of ratification.”<sup>114</sup> And on September 15, they rejected a motion “to strike out the words ‘or by Conventions in three fourths thereof’”<sup>115</sup> which would have left amendment ratification to the states alone. The Convention ultimately approved Madison’s proposal, allowing ratification “by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof,”<sup>116</sup> a solution that allowed either the state legislatures or the people in convention to ratify proposed amendments. The final language, though, includes the proviso “as the one or the other Mode of Ratification may be proposed by the Congress,”<sup>117</sup> at least putatively leaving the choice to the national government, not the states.

### C. Power at Expense of the States

The delegates also voted for expansive national power at the expense of the states. The votes reflect their frustrations with the states and their attempts to address the problems that led to the Convention in the first place. Even so, the delegates voted against certain national powers, in particular, the power to negative state laws. Some of their reasons for doing so, however, only underscored the new government’s vast power over the states.

The delegates set the tone early in the Convention. On May 30, they voted overwhelmingly in favor of a proposition “in Committee of the whole that a national Govern[men]t[] ought to be established consisting of a supreme Legislative Executive & Judiciary.”<sup>118</sup> This early proposal

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<sup>112</sup> James Madison, Notes on the Constitutional Convention (July 19, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 93.

<sup>113</sup> See U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

<sup>114</sup> James Madison, Notes on the Constitutional Convention (Aug. 31, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 475, 475, 477 (vote to strike out “Conventions of the” failed, 4-6).

<sup>115</sup> James Madison, Notes on the Constitutional Convention (Sept. 15, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 622, 630 (vote failed, 1-10).

<sup>116</sup> James Madison, Notes on the Constitutional Convention (Sept. 10, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 557, 559 (vote passed, 9-1-1).

<sup>117</sup> U.S. CONST. art. V.

<sup>118</sup> James Madison, Notes on the Committee of the Whole House (May 30, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 35 (vote passed, 6-1-1).

reflected the supremacy of the new national government over state governments and the importance of that supremacy to the new federal system.

The delegates then voted twice over the next several weeks in favor of national power in areas where the states were incompetent. These included areas where states failed under the Articles, areas where the delegates foresaw collective action problems, and areas where the delegates anticipated disputes between the states if there was no mediating national government.<sup>119</sup> Thus, on May 31, the delegates approved by a vote of 9-0-1 a proposal “for giving powers, in cases to which the States are not competent.”<sup>120</sup> And on July 17, the delegates approved a motion authorizing the new national government “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>121</sup>

But the delegates drew a line at a national power to negate state laws. In three different votes, spanning two-and-a-half months of the Convention, delegates flatly rejected proposals to grant the national government power to negate state laws.<sup>122</sup> Some delegates rejected these proposals because they posed a threat to the states. For example, Randolph responded to the proposal on July 17, stating, “[t]his is a formidable idea indeed. It involves the power of violating all the laws and constitutions of

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<sup>119</sup> James Madison, Notes on the Committee of the Whole House (May 31, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 53–54.

<sup>120</sup> *Id.*

<sup>121</sup> Journal, Notes on the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 21. “Mr. Bedford moved that the 2d. member of Resolution 6 be so altered as to read ‘and moreover to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent,’ or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation.” *Id.* at 26. “On the question for agreeing to Mr. Bedford’s motion” it passed in the affirmative, 6-4. *Id.* at 27.

<sup>122</sup> “Mr. Pinkney moved ‘that the National Legislature [should] have authority to negative all Laws which they [should] judge to be improper.’” James Madison, Notes on the Committee of the Whole House (June 8, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 164. “Mr. Madison seconded the motion.” *Id.* “On the question for extending the negative power to all cases as [proposed] by [Mr. Pinkney and Mr. Madison],” the vote failed, 3-7-1. *Id.* at 168. “On the question for agreeing to the power of negating laws of States &c,” it failed, 3-7. James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 28; *see also id.* at 27 (statement of Mr. Morris) (commenting that the extension of such power would likely be terrible to the states and would be unnecessary). “Pinkney moved to add as an additional power to be vested in the Legislature of the U.S. ‘To negative all laws passed by the several States interfering in the opinion of the Legislature with the General interests and harmony of the Union; provided that two thirds of the members of each House assent to the same.’” James Madison, Notes on the Constitutional Convention (August 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 390. The motion for commitment to committee failed, 5-6, and Pinkney withdrew his motion. *Id.* at 391–92.

the States, and of intermeddling with their police.”<sup>123</sup> Others, however, saw this power as unnecessary when the national government is already supreme. Sherman explained that “the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negated.”<sup>124</sup> Morris suggested that a negative power would only antagonize the states, and that it was unnecessary in any event, given the supreme nature of the national government. He said, “[t]he proposal of it would disgust all the States. A law that ought to be negated will be set aside in the Judiciary [department] and if that security should fail; may be repealed by a [National] law.”<sup>125</sup> Thus, it seems, even this firm line—the only firm federalism protection coming out of the Convention—was based as much on the delegates’ political concerns about unnecessarily antagonizing the states as it was based on any concern about state sovereignty. Moreover, some delegates seem to have supported this line with the full knowledge and expectation that the power to negative state laws was unnecessary and superfluous: the constitutional text already gave the national government the power to negative state laws.

In short, the votes in the convention show not only that the delegates designed a Constitution of national supremacy over the states, but also that they designed a Constitution of *complete* supremacy over the states. Thus, the delegates’ votes show that the national government would be supreme over the states in respect to its composition, in respect to the ratification and amendment processes, and in respect to its power in relation to the states. The one area in which the delegates drew a federalism line—rejecting an explicit congressional negative over state laws—seems driven as much by the delegates’ recognition that this power was unnecessary as it was driven by any concern for state sovereignty. In other words, the one federalism line coming out of the Convention only underscored national supremacy. According to the delegates’ federalism votes, the national government was to be entirely supreme over the states.

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<sup>123</sup> James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 26; *see also* James Madison, Notes on the Constitutional Convention (August 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 391 (statement of Mr. Rutledge) (commenting that the proposed motion would “damn and ought to damn the Constitution”).

<sup>124</sup> James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 27; *see also* James Madison, Notes on the Constitutional Convention (August 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 390 (stating that “Mr. Sherman thought it unnecessary; the laws of the General Government being Supreme & paramount to the State laws according to the plan, as it now stands.”).

<sup>125</sup> James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 105, at 28.

## VI. THE FRAMERS' FEDERALISM AND THE ACA

The text and history of the Constitution reflect a strong and growing national government with plenary and supreme powers within its sphere, without regard to—indeed, in direct conflict with—any notions of state sovereignty or the historical roles of the states. These sources make clear that the supreme national government is one of “We the People,” not the states, and that under the national Constitution the states are at most mere organizing units to serve distinctly national ends. The text, history, and votes in the Convention at times ignore the states, at other times expand national power at the express expense of the states, and at yet other times use the states as national appendages for national ends. The few and rare exceptions—the Tenth and Eleventh Amendments—are narrow, textually weak, and only prove the more general rule: the national government is completely supreme over the states. Even the one firm line that the delegates drew—declining to give the national government the power to negative state laws—arose as much out of the delegates’ recognition that the power was superfluous as out of the delegates’ concern for state sovereignty. In short, the text and history show that the Framers created a strong and growing national government utterly unlimited by the states.

It is hard to see how the aggressively anti-state text and history of the Constitution can support any claim that Medicaid expansion or universal coverage violates federalism principles. As to Medicaid expansion, the text and history do not support the relatively recent Court-created federalism doctrine that Congress cannot compel or commandeer the states. But even if this doctrine is consistent with the text and history, the text and history certainly do not support a claim that Congress violates federalism principles by conditioning acceptance of federal funds on the expansion of Medicaid. This is doubly true, given that Congress pays a grossly disproportionate share of the Medicaid expansion through 2020, making Medicaid expansion look more like an extremely generous federal gift to the states than a federal requirement. The opponents’ claim—that an attractive federal grant somehow compels the states in violation of constitutional federalism principles—turns the text and history on their heads. The text and history of the Constitution simply do not support this kind of federalism limit on congressional authority.

The text and history similarly fail to support a claim against universal coverage. As with the anti-commandeering doctrine, the text and history do not support the relatively recent Court-created federalism limit on Congress’s Commerce Clause authority—that Congress cannot regulate too far into an area of traditional state control so as to “obliterate the Constitution’s distinction between national and local authority.” There is simply nothing in the text or history that suggests that congressional power hits a limit in areas of traditional state responsibility. But even if they do, they plainly do not support a federalism restriction on congressional

authority over a medical insurance requirement, especially if Congress has authority in the first instance. As with Medicaid expansion, the opponents' claim—that otherwise authorized congressional regulation could violate federalism principles by intruding into an area of traditional state control—turns the text and history upside down. The text and history of the Constitution simply do not support this kind of federalism limit on congressional authority.

In sum, the text and history are aggressively anti-state. They cannot bear the weight of any federalism claim against the ACA. Thus the opponents' arguments that Medicaid expansion or universal coverage violates constitutional federalism principles must either play loose with these important sources of constitutional interpretation, or ignore them altogether. Opponents of the ACA have largely chosen the latter course.

## VII. CONCLUSION

Federalism challenges to the ACA are inspired by the relatively recent resurgence in federalism concerns in the Court's jurisprudence. Thus, ACA opponents seek to leverage the Court-created distinction between encouragement and compulsion, and the Court-created federalism concern when Congress regulates in a way that could destroy the distinction between what is national and what is local.

But outside the jurisprudence, the text and history of constitutional federalism tell another story. The text and history suggest that the Constitution created a powerful federal government, of the people (not the states), and that the Constitution increasingly empowered that government, at the explicit expense of the states, over time. Thus the text and history stand directly against the federalism challenges to the ACA. And the opponents, and apparent ACA skeptics on the Court, have therefore avoided them.

This Article sought to explore the text and history as applied to the ACA. It argued that a proper understanding of the text and history—through the text of the Constitution, the text of the Articles of Confederation, and the votes at the Constitutional Convention—show that neither Medicaid expansion nor universal coverage violate constitutional federalism principles.

