



# RESTORING THE RULE OF LAW WITH STATES LEADING THE WAY

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EXECUTIVE SUMMARY

The Constitution is increasingly eroded with each passing year. That is a tragedy given the volume of blood spilled by patriots to win our country's freedom and repeatedly defend it over the last 240 years. Moreover, the declining relevance of our Nation's governing legal document is dangerous. Thomas Hobbes's observation more than 350 years ago remains applicable today: the only thing that separates a nation from anarchy is its collective willingness to know and obey the law.

But today, most Americans have no idea what our Constitution says. According to a recent poll, one-third of Americans cannot name the three branches of government; one-third cannot name any branch; and one-third thinks that the President has the "final say" about the government's powers.<sup>1</sup> Obviously, the American people cannot hold their government accountable if they do not know what the source of that accountability says.

The Constitution is not just abstract and immaterial to average Americans; it also is increasingly ignored by government officials. Members of Congress used to routinely quote the Constitution while debating whether a particular policy proposal could be squared with Congress's enumerated powers. Such debates rarely happen today. In fact, when asked to identify the source of constitutional authority for Obamacare's individual mandate, the Speaker of the House revealed all too much when she replied with anger and incredulity: "*Are you serious?*"<sup>2</sup> And, while the Supreme Court continues to identify new rights protected by the Constitution's centuries-old text, it is telling that the justices frequently depart from what the document actually says and rely instead on words or concepts that are found nowhere in the document. That is why one scholar observed that "in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds."<sup>3</sup>

Abandoning, ignoring, and eroding the strictures of the Constitution cheapens the entire institution of law. One of the cornerstones of this country was that ours would be a Nation of laws and not of men. The Constitution is the highest such law and the font of all other laws. As long as all Americans uphold the Constitution's authority, the document will continue to provide the ultimate defense of our liberties. But once the Constitution loses its hold on American life, we also lose confidence in the ability of law to protect us. Without the rule of law, the things we treasure can be taken away by an election, by whims of individual leaders, by impulsive social-media campaigns, or by collective apathy.

The Constitution provides a better way—if only we were willing to follow it. The Constitution imposes real limits on Congress and forces its members to do their jobs rather than pass the buck. The Constitution forces the President to work with Congress to accomplish his priorities rather than usurping its powers by

circumventing the legislative process with executive orders and administrative fiats. And the Constitution forces the Supreme Court to confront the limits on its powers to transform the country. Although the Constitution provides no assurance that any branch of government will make policy choices you like, the Constitution offers *legitimacy* to those choices and legitimate pathways to override those choices. The people who make those choices would have to stand for election, they would have to work with others who stand for election, and crucially, they would have to play by rules that we all agree to beforehand rather than making them up as they go along.

Of course, the Constitution already does all of this. And thus it bears emphasis at the outset that *the Constitution itself is not broken*. What *is* broken is our Nation's willingness to obey the Constitution and to hold our leaders accountable to it. As explained in the following pages, all three branches of the federal government have wandered far from the roles that the Constitution sets out for them. For various reasons, "We the People" have allowed all three branches of government to get away with it. And with each power grab the next somehow seems less objectionable. When measured by how far we have strayed from the Constitution we originally agreed to, the government's flagrant and repeated violations of the rule of law amount to a wholesale abdication of the Constitution's design.

That constitutional problem calls for a constitutional solution, just as it did at our Nation's founding. Indeed, a constitutional crisis gave birth to the Constitution we have today. The Articles of Confederation, which we adopted after the Revolutionary War, proved insufficient to protect and defend our fledgling country. So the States assembled to devise what we now know as our Constitution. At that assembly, various States stepped up to offer their leadership visions for what the new Constitution should say. Virginia's delegates offered the "Virginia Plan," New Jersey's delegates offered the "New Jersey Plan," and Connecticut's delegates brokered a compromise called "Connecticut Plan." Without those States' plans, there would be no Constitution and probably no United States of America at all.

Now it is Texas's turn. The Texas Plan is not so much a vision to alter the Constitution as it is a call to restore the rule of our current one. The problem is that we have forgotten what our Constitution means, and with that amnesia, we also have forgotten what it means to be governed by laws instead of men. The solution is to restore the rule of law by ensuring that our government abides by the Constitution's limits. Our courts are supposed to play that role, but today, we have judges who actively subvert the Constitution's original design rather than uphold it. Yet even though we can no longer rely on our Nation's leaders to enforce the Constitution that "We the People" agreed to, the Constitution provides another way forward. Acting through the States, the people can amend their Constitution to force their leaders in all three branches of government to recognize renewed limits on federal power. Without the consent of any politicians in Washington, D.C., "We

the People” can reign in the federal government and restore the balance of power between the States and the United States. The Texas Plan accomplishes this by offering nine constitutional amendments:

- I. Prohibit Congress from regulating activity that occurs wholly within one State.
- II. Require Congress to balance its budget.
- III. Prohibit administrative agencies—and the unelected bureaucrats that staff them—from creating federal law.
- IV. Prohibit administrative agencies—and the unelected bureaucrats that staff them—from preempting state law.
- V. Allow a two-thirds majority of the States to override a U.S. Supreme Court decision.
- VI. Require a seven-justice super-majority vote for U.S. Supreme Court decisions that invalidate a democratically enacted law.
- VII. Restore the balance of power between the federal and state governments by limiting the former to the powers expressly delegated to it in the Constitution.
- VIII. Give state officials the power to sue in federal court when federal officials overstep their bounds.
- IX. Allow a two-thirds majority of the States to override a federal law or regulation.

## BACKGROUND

Our Nation was built on one principle above all others—the Rule of Law. As James Madison explained in the *Federalist*: “If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>4</sup> As the Founders envisioned it, *the rule of law* offered the solution to that great difficulty: the law could check the ambitions of men who were far from angels, and the law could moderate the excesses of governments that were far from benevolent.

The miracle of our Nation’s birth is that the Founders were willing to sacrifice their personal ambitions and egos to the rule of law. The Founders could have picked a monarch and made themselves courtiers. But they knew first-hand what happened when a king, who was a law unto himself, had license to do whatever he wanted. They knew first-hand how much blood was spilled to liberate our country from the yoke of a lawless ruler. And they knew, in John Adams’s words, that “good government is an empire of laws.”<sup>5</sup> They responded by laying down a law—our Constitution—that protected the rights of the governed and limited the powers of government. That law is external to the will of any one person or group of people; it was laid down before our lifetimes and will endure long after we are gone. And as long as both the people and the government agree to be governed by the Constitution rather than the caprice of individual rulers, then ours will “be a government of laws, and not of men.”<sup>6</sup>

It is difficult to overstate the significance of the Founders’ insights and accomplishments in framing our Constitution. Our Constitution was a singular victory for popular sovereignty, in which “We the People” came together to ordain and establish a government that was accountable to law and democracy. That is why Arthur L. Goodhart, who held the Oxford Chair of Jurisprudence between 1931 and 1951, described our Constitution as “the most important single legal document in the history of the world.”<sup>7</sup>

Today, however, the Constitution and the rule of law are under unprecedented attack in our Nation’s capital. The President touts his unilateral power to change the law when he does not like the results of the democratic process. Congress is full of members who care more about the trappings of power than actually performing their constitutional roles. And the Supreme Court is dominated by individuals who substitute their personal policy preferences for the Constitution and laws of the United States.

There have been many casualties in Washington, D.C.’s war on the rule of law. But perhaps no one has lost as much as the States. Under the Founders’ original design for our Nation, “the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty.”<sup>8</sup> The same

Constitution that created our government of laws, and not of men, was intended to preserve the States as coequal and sovereign governments because they were closest—and hence the most accountable—to the people. The States were supposed to be energetic and powerful, and in the spirit of the Constitution’s checks-and-balances, State leaders were supposed to have the power and opportunity to check any attempt by federal officials to overstep their bounds. And Madison argued that was essential to the constitutional plan because strong States would provide “a double security . . . to the rights of the people. The different governments [*viz.*, state and federal] will control each other, at the same time that each will be controlled by itself.”<sup>9</sup>

Indeed, the entire structure of the Constitution was premised on the idea that the States would be *stronger* than the national government. As Madison explained, “[t]he State government will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.”<sup>10</sup>

It was not as if Madison made those observations unthinkingly. The Constitution’s chief critics—who were collectively known as the “Anti-Federalists”—penned a series of essays under pseudonyms like “Federal Farmer,” “Brutus,” “Cato,” “Agrippa,” “An Old Whig,” and “Centinel.” And the Anti-Federalists principal complaint with the Constitution was premised on their fear that it would turn the States into “useless and burdensome” relics.<sup>11</sup> Madison passionately rebutted those concerns by insisting that the States would remain the most powerful and important organs of American government.

If only we had heeded Madison’s solutions to the Anti-Federalists’ concerns, our Nation would not be mired in this constitutional conundrum today. But over the last 227 years, in fits and starts, through baby steps and giant leaps, our government lost its way; it left the Constitution in its rearview; and it pushed States into the roadside ditch.

Consider a few examples:

- In the 1930s, the federal government started making law through an alphabet soup of administrative agencies—even though such agencies have no basis whatsoever in the Constitution. As every school kid learns, the Constitution specifies how a bill becomes a law: it has to pass both houses of a democratically elected Congress by a majority vote and be presented to a democratically elected President for his signature. Today, though, nameless and faceless bureaucrats can bypass that process and make federal “law”—and even preempt the

States' lawmaking efforts—without so much as telling a single person who ever stood for election at any level of government.

- In the mid-1930s, the Supreme Court began to routinely enforce the views of five unelected judges rather than the text of the Constitution. Eighty years later, that “living” document has evolved into a Frankenstein that somehow affords a constitutional right to make sexually explicit “animal crush” videos but denies a constitutional right for a woman in Connecticut to protect her home from being forcibly taken from her by private developers. And the same handful of Supreme Court justices who embrace those results can veto enormous swaths of state law—ranging from the broadest laws of statewide significance down to and including every criminal judgment rendered by a State court in an individual case.
- And today, the President thinks he can remake entire sectors of the world's biggest and most dynamic economy and use administrative agencies to displace state law. By one estimate, the President has unilaterally amended Obamacare in 32 separate ways, remaking the Nation's healthcare markets in the process. The President has asserted unilateral authority to regulate virtually every building in the entire United States (all the way down to the corner food mart and drycleaner) in an effort to curb “greenhouse gases.” The President has taken executive actions to infringe the Second Amendment rights of millions of lawful gun owners, even though the entire point of the Bill of Rights was to protect Americans from invasions of their liberties. And but for a lawsuit brought by Texas, the President would have unilaterally ordered the single largest overhaul of the immigration system in our Nation's history.

James Madison, Alexander Hamilton, John Jay and the other Framers of our Constitution would shudder at those results. As shocked as they would be, however, those results are mere symptoms of the disease. What really plagues this Nation is that we have forgotten what it means to be governed by the rule of law, and we have succumbed to the rule of men.

The cure to that illness obviously will not come from Washington, D.C. Lawmakers in Washington cannot be relied upon to do something as mundane as pass an annual budget, much less can they balance one, and much less still can they solve systemic problems like this one. That means the States must step up and lead; and thanks to the Founders' prescience, the Constitution itself provides the States' path forward.

Article V of the United States Constitution gives the States the power to amend the Constitution. The Texas Plan consists of nine such amendments. Part I

of this paper explains the Texas Plan for fixing Congress; Part II addresses the President; Part III addresses the federal judiciary; and Part IV explains how the Texas Plan will reclaim the States' rights from a federal government bent on abrogating them. Finally, Part V explains the process for implementing the Texas Plan.

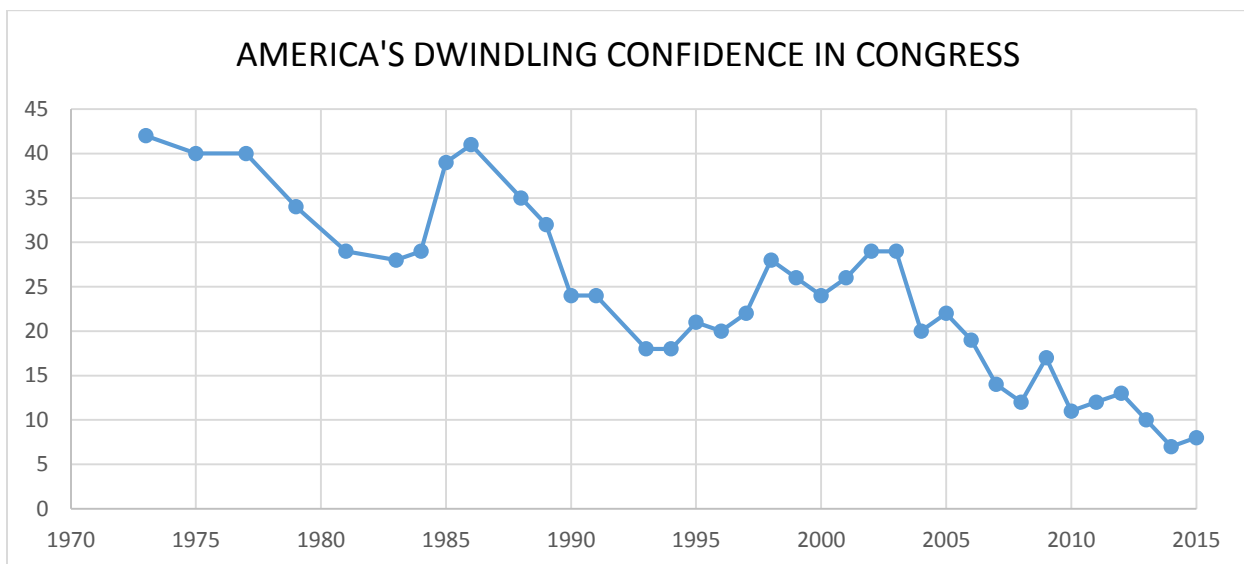


## DISCUSSION

## I. THE CONGRESS

A. *The Problem*

If there is only one thing on which virtually all Americans can agree, it is that our Congress is broken. In an era where cable news and social media thrive on stoking disagreement and hyper-partisanship, it sometimes seems that Americans could not agree on which day of the week it is. That makes our near-unanimous distrust of Congress all the more remarkable. Consider, for example, Gallup's annual polling data on Americans' lack of confidence in Congress.<sup>12</sup>



Over the last forty years, our collective faith in Congress has dwindled almost to zero.

Political scientists have spirited debates about the cause for that trend line, but we should not be surprised that Americans distrust an institution that long ago abdicated its constitutionally prescribed role. In a constitutional republic like the United States, the legitimacy of our government depends on its faithfulness to the rule of law. But the river of laws coming from our Congress has violently jumped its constitutional banks.

Here is how Congress is supposed to work. The first section of the first article of our Constitution creates a bicameral Congress and defines the scope of its powers: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>13</sup> In that one short sentence, the Framers provided two directives to the Nation’s legislature.

First, Congress is vested with only those powers “herein granted”—that is, those powers granted by the Constitution itself. Congress has zero inherent, implied, or unenumerated legislative powers; its powers are either expressly enumerated in the Constitution or they do not exist. The Framers’ phraseology was no accident. By contrast to the way it frames Congress, the Constitution vests “*The executive power*” in the President,<sup>14</sup> and it vests “*The judicial power*” in the federal courts.<sup>15</sup> As explained in Parts II and III below, the Constitution sharply limits the powers of the President and the courts in other ways. For present purposes, however, the Constitution’s limitation of Congress to only those powers “herein granted” underscores how fundamentally the Constitution depends on limiting the legislative branch.

Second, Congress’s vesting clause is remarkable for what it does *not* say. On the sixth day of the constitutional convention in Philadelphia, May 31, 1787, the draft Constitution would have vested Congress with the power “[t]o legislate in all cases, to which the separate States are incompetent, [or] in which the harmony of the united States may be interrupted by the exercise of individual legislation.”<sup>16</sup> Moreover, that first draft of Congress’s vesting clause would have given our national legislature the power to veto any state law that members of Congress did not like.<sup>17</sup> Over the course of many weeks, numerous spirited debates, and hard-fought compromises, the Framers gradually pared that down to the vesting clause Congress has today—one that limits the legislature to only its enumerated powers.

And Madison forcefully rebutted the criticism that even the more modest and pared-down version gave Congress too much power.<sup>18</sup> Madison argued that far from obviating or eliminating the individual States, the Constitution would *preserve* them. Indeed, Madison argued, the entirety of the federal government would be subservient to the States and dependent on the States for its continued existence.<sup>19</sup> Moreover, the Framers’ decision to limit Congress only to certain enumerated powers would ensure both (1) that Congress remained small (and hence unthreatening to the people’s liberties) and (2) that the States would remain the people’s primary representatives. Madison explained:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>20</sup>

In other words, the federal government would have only those powers expressly conferred upon it in the Constitution—primarily matters that were extraordinary

and that implicated foreign affairs—while the several States would retain the general power to legislate in matters that affected the day-to-day lives of their citizens.

Alexander Hamilton buttressed Madison’s arguments in the *Federalist*. There Hamilton responded to the concern that the proposed Constitution “would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes.”<sup>21</sup> Hamilton dismissed that concern as a fanciful conspiracy theory: “I confess I am at a loss to discover what temptation the persons intrusted with the administration of the [federal] government could ever feel to divest the States of the authorities of that description.”<sup>22</sup>

While Hamilton’s disbelief in the inevitability of an all-powerful federal government seems naïve today, it was anything but in the Eighteenth Century. Back then, the States were the only game in town. For example, the official records of Virginia’s General Assembly reveal that, before 1789, the Commonwealth was responsible for regulating agriculture, livestock, farming, banks, bridges, canals, business charters, citizenship, commerce, criminal justice, property lines and land grants, divorces, name changes, elections, ferries, roads, fishing, manufacturing, mining, paper money, taxation, tobacco, war claims and pensions, wills, schools, and universities.<sup>23</sup> And Hamilton promised that the States would retain almost all of that authority—and with it, a distinct power advantage over the new federal government. His explanation is worth quoting at length:

There is one transcendant advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light, — I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.<sup>24</sup>

Today, far from providing “the great cement of society,” States are in many cases irrelevant when it comes to “regulating all those personal interests and

familiar concerns to which the sensibility of individuals is more immediately awake.”<sup>25</sup> Indeed, over the last two centuries, the federal Congress has steadily expanded its reach into every nook and cranny of every American’s life—and kicked the States to the curb in the process. It is not that Hamilton was wrong when he assured voters at the Founding that States would retain vital influence; rather, the Nation was wrong to abandon the safeguards for States that Hamilton and the Founders weaved through the Constitution.

While States used to have regulatory power over livestock, armed federal agents now conduct pre-dawn raids to enforce federal prohibitions on unpasteurized milk.<sup>26</sup> While States used to have regulatory power over fishing, federal law now regulates down to the tenth of the inch the minimum size of fish that anglers can keep.<sup>27</sup> While States used to have regulatory power over canals, the federal government now wants to make ponds and ditches on private property part of the “waters of the United States.”<sup>28</sup> While States have regulated healthcare at least since Pennsylvania chartered Benjamin Franklin’s hospital in 1751,<sup>29</sup> healthcare now has been overwhelmed by the federal Obamacare law, which increased “the number of federally mandated categories of illness and injury for which hospitals may claim reimbursement . . . from 18,000 to 140,000. There are [now] nine codes relating to injuries caused by parrots, and three relating to burns from flaming water-skis.”<sup>30</sup> And while the Constitution reserved to the States the power to prosecute all but three specific crimes,<sup>31</sup> federal law now imposes thousands of criminal penalties for every imaginable offense—ranging from feeding killer whales<sup>32</sup> and failing to fix an overflowing toilet,<sup>33</sup> to letting a dog off its leash at the beach<sup>34</sup> and importing flowers without federally mandated paperwork.<sup>35</sup>

Of course, the foregoing illustrations could be viewed as equally absurd if they had been accomplished at the State level. But one of the ingenuities of our Constitutional structure—if and when we faithfully adhere to it—is that it is harder for States to impose such extreme regulatory regimes. That is partly because States, state governments, and state leaders are closer and more responsive to their constituents.<sup>36</sup> And it is partly because the Framers “hardwired into our Constitution’s structure” a requirement that States compete against each other to keep their constituents (both people and businesses) happy.<sup>37</sup> To be sure, some States (like California) impose more draconian regulatory regimes than others (like Texas). But when they do so, they face the risk that their constituents will leave—just as 5 million Californians left that State in the last decade and emigrated to Texas more often than any other State.<sup>38</sup> The U.S. Congress obviously does not face the same competitive discipline that the States do, which makes the Constitution and the discipline of the rule of law all the more important. The bottom line is that American hospitals would not have three reimbursement codes for flaming water-skis, and beach-going dog owners would not have to fear federal prosecution, if only we could keep Congress in its constitutional lane.

Given the scope and magnitude of Congress’s transgressions, there are no simple solutions for restoring the rule of law. But two constitutional amendments would fix much of the mess. They are discussed in the following sections.

*B. The Constitutional Solution: Commerce Clause*

*The Texas Plan would prohibit the federal government from regulating any activity that is confined within a single State.*

The Commerce Clause is the single biggest culprit in Congress’s decades-long project of self-empowerment. That constitutional provision gives Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>39</sup> From that straightforward sentence, Congress has successfully asserted the power to regulate every conceivable activity in America—even those that never could qualify as “commerce” under any interpretation of that term.<sup>40</sup>

It is difficult to overstate how far we have strayed in that regard. When the Commerce Clause was added to the Constitution, “commerce” was understood to mean the “trade” or “exchange” of goods—as distinguished from manufacturing, agriculture, or other means of producing the goods that would eventually be traded or exchanged, and as distinguished from consuming goods, discarding goods, or doing any other thing with the goods.<sup>41</sup> That is, nothing in the Commerce Clause even hints that Congress should have the power to regulate virtually every conceivable “economic or gainful activity,” which is what the modern Supreme Court thinks the clause means.<sup>42</sup> To the contrary, the Framers’ whole point in enumerating one very specific kind of economic activity—that is, the trade of goods—was to *prohibit* Congress from regulating every other economic activity that is not the trade of goods. That is why Madison argued so forcefully that Congress’s powers are “few and defined,” and that every power not given to Congress is denied to it.<sup>43</sup>

Consider the plain meaning of the word “commerce” in the eighteenth century. The leading dictionary in print at the time of the Founding, Samuel Johnson’s *Dictionary of the English Language*, defined “commerce” to mean “1. Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick.” And that is precisely how the Framers used it in other parts of the Constitution. For example, the Framers used the word “commerce” to prohibit States from discriminating between ships that enter their ports from other States: “No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”<sup>44</sup> There—as in the Commerce Clause—the Framers used the word “commerce” to mean only the trade and trafficking of goods.<sup>45</sup>

So too at the Constitutional Convention. Randy Barnett, one of the Nation's foremost scholars on the Commerce Clause, studied every use of the word "commerce" at the Constitutional Convention in the summer 1787 and in every State's ratification debates. The Framers invoked the word hundreds of times during those debates. And Professor Barnett could not find a single example of a single person—whether proponent or opponent of the Constitution—who used the word "commerce" to mean "all economic activity" or "all gainful activity."<sup>46</sup> Rather, he "found that the term was uniformly used" in the more limited sense "to refer to trade or exchange."<sup>47</sup>

Likewise in the *Federalist*. In that collection of essays, the Framers admitted that the Commerce Clause was a new power conferred on Congress (and taken from the States). But Madison noted the Commerce Clause almost as an afterthought because it was so narrow. After all, it only gave Congress the power to regulate the trade of goods, so it was hard for Madison to imagine how anyone could worry about it:

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; *but that seems to be an addition which few oppose, and from which no apprehensions are entertained.*<sup>48</sup>

Moreover, Madison explained that the Commerce Clause does *not* give Congress the power to regulate all "commerce." To the contrary, it expressly limits Congress to regulating only the commerce conducted "with foreign nations, and among the several states, and with the Indian tribes." The Framers' point was that Congress must have the power to promote foreign commerce and to prevent States from interfering with foreign commerce. Madison explained:

The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.<sup>49</sup>

That is, the Framers really wanted Congress to regulate commerce with foreign nations; they gave Congress the power to regulate inter-State commerce only as a means to that end.

So if it is so clear, how did we veer so far off course? The short answer is that the limitations inherent in the Commerce Clause became politically inconvenient. And all three branches of the federal government—Congress, the President, and the Supreme Court—abandoned the rule of law for the more-expedient rule of man.

Here is the story in a nutshell. For the first 140 years of our Nation’s history, the Commerce Clause retained its original meaning. For example, in 1895, the Supreme Court of the United States held that the Sherman Antitrust Act could not be applied to the American Sugar Refining Company.<sup>50</sup> The Court based that conclusion on the fact that American Sugar *manufactured* sugar and did not *trade* sugar; because Congress only could regulate “commerce” (that is, “trade”), it had no constitutional authority to regulate a sugar-refining monopoly. The Court explained: “Commerce succeeds to manufacture, and is not a part of it. [Congress’s] power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly . . . . The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce.”<sup>51</sup> And that (correct) interpretation of the Commerce Clause prevailed until 1935, when the Court (again, correctly) invalidated a key portion of the National Industrial Recovery Act because it exceeded Congress’s powers.<sup>52</sup>

But then came the politics—and with the politics, the rule of man began to trump the rule of law established in our Constitution. In the mid-1930s, President Franklin D. Roosevelt wielded unprecedented executive branch power to expand and transform the federal government into a bureaucratic behemoth that would regulate virtually every facet of American life. He viewed the Constitution, as written, as an obstacle to his political mission. So the President threatened to “pack” the Court—that is, to expand the Court’s membership by appointing new justices who would uphold FDR’s progressive agenda, regardless of what the Constitution said.<sup>53</sup>

The President’s Court-packing plan was a grave threat to the rule of law. It represented one of the singular moments in American history when the President determined that the law was his obstacle, and he threatened the custodians of justice—our Nation’s courts—as a means to impose his will. Ironically, when he proposed the court-packing plan in a “fireside chat,” FDR said that *the Constitution* itself somehow demanded it.<sup>54</sup> Of course, he did not mean that the Constitution specified a particular size of the Court, nor did he mean that the Constitution gave him and the New Deal Congress the power to do what they wanted to do. Rather, FDR explained, the Constitution’s “main objective[.]” was “to establish an enduring Nation.” And in FDR’s view, if the President and Congress determined that a

particular law was necessary “to protect us against catastrophe by meeting squarely our modern social and economic conditions,” then the Court was duty-bound to defer to that determination—no matter what it thought the Constitution said.<sup>55</sup>

Thus, FDR initiated a high-stakes game of “chicken” in which the Supreme Court was forced to choose between enforcing the written Constitution and saving its own skin from a President bent on transforming and packing the Court. Ultimately, the Court blinked. In a 1937 decision called *West Coast Hotel v. Parrish*, the Court changed its interpretation of the Constitution, upheld a minimum-wage law that it previously determined was unconstitutional, and placated the popular President in the process.<sup>56</sup> Today, *West Coast Hotel* is known as the “switch in time to save nine” because by giving in to FDR’s demands, the Court mooted the President’s desire to pack the Court.

While the Court saved its nine-justice membership, it could not also save the Constitution. What came after 1937 was a nearly unbroken line of judicial decisions that expanded, expanded, and expanded some more the Commerce Clause. Today, the Court’s interpretations of the Clause are vacuous and divorced from its text and meaning. The Court has for all practical purposes rewritten the constitution to specifically empower Congress to regulate “channels” of interstate commerce (like navigation channels and roads), “instrumentalities” of interstate commerce (like ships, trains, and cars), and anything that has a “substantial effect” on interstate commerce (like virtually every activity in modern human existence).<sup>57</sup> Thus began what is now an almost-century-long process of the Supreme Court rewriting and amending the Constitution with its own fabricated language as opposed to simply applying the Constitution as it was written.

Although “channels,” “instrumentalities,” and “substantial effects” appear nowhere in the Constitution, the first two of those categories are at least arguably consistent with the bargain that “We the People” struck in forming the Nation.<sup>58</sup> But the third category—“substantial effects”—has no basis in the Constitution, so the Texas Plan would eliminate it. Congress still could regulate things like the airwaves, interstate highways, borders, and the things that cross over and through them. And Congress still could regulate trade with foreign nations, trade across State lines, and trade with Indian tribes. But it would be prohibited from regulating some of the things the Commerce Clause has erroneously been used to regulate—such as a farmer who wanted to produce and consume his own wheat without buying or selling anything to or from anyone out of state.<sup>59</sup> And it would be prohibited from regulating some of the entirely noncommercial conduct that Congress currently regulates—such as the noncommercial “harassment” of a tiny spider that is born, lives, reproduces, and dies without ever leaving its cave, much less entering the channels of commerce or crossing state lines.<sup>60</sup> That would go a long way to restoring the balance between State and federal power.<sup>61</sup>



C. *The Constitutional Solution: Spending Clause*

*The Texas Plan would require Congress to balance its budget.*

The second-biggest source of Congress’s decades-long project of self-empowerment is the Spending Clause. That Clause gives Congress the power “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>62</sup> The Framers intended for that text to *limit* Congress’s spending. But over the years, Congress has gradually and successfully turned the Spending Clause into an *affirmative grant* of power to do whatever it wants with federal tax dollars.

Again, the actual authors of the Constitution would be shocked by that result. When framing the words that we now know as the Spending Clause, the authors spent virtually no time thinking about spending. Rather, they focused almost exclusively on whether and to what extent Congress should have power to raise money through taxes, duties, impost, and excises. After all, as the Founders knew all too well, “[a] right to tax is a right to destroy.”<sup>63</sup> On the other hand, one of the key deficiencies in the Articles of Confederation was that the federal government did not have the power to raise its own money; it instead had to rely on the States to pay “requisitions” to the federal government, and many States failed to do so.<sup>64</sup> Madison listed the federal government’s inability to raise its own revenues as the first and principal “vice” of the Articles of Confederation, and he argued it was “fatal to the object of the [pre-Constitutional] System.”<sup>65</sup>

By contrast, the Founders spent relatively little time and spilled relatively little ink discussing Congress’s power to spend money. One reason for the Founders’ relative muteness on the topic was that the Constitution did not create any new spending powers. Under the Articles of Confederation, the federal government had the power to provide for the States’ “common defense, the security of their liberties, and their mutual and general welfare.”<sup>66</sup> The Framers appeared satisfied with that specification of Congress’s spending power, so they copied it almost verbatim into the Constitution’s Spending Clause.

When the Founders did talk about Congress’s power to spend money “for the common Defence and general Welfare of the United States,” they repeatedly emphasized that the purpose of the text was to impose meaningful limits on Congress’s spending. For example, in *Federalist* 41, Madison argued that any concern over Congress’s spending powers proved just how far the Constitution’s critics had to stretch to find objections to the document.<sup>67</sup> And Madison forcefully argued that, far from giving Congress “an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare,” the Spending Clause allowed Congress to spend money *only* on the things expressly enumerated in the Constitution (like the military,<sup>68</sup> the courts,<sup>69</sup> and the establishment of post roads<sup>70</sup>). He explained that the Spending Clause authorizes

spending money to promote the general welfare, and that general authorization is then qualified by the specific enumerations of Congress's powers.<sup>71</sup>

Madison's view prevailed for the first 140 years of our Nation's existence. For example, the first federal bailout was requested during the very first Congress. The owner of the American Glass Manufacturing Company asked Congress for an \$8,000 loan.<sup>72</sup> Roger Sherman (a Congressman from Connecticut and a representative at the Constitutional Convention), along with Representative William Smith from South Carolina successfully scuttled the deal because Congress did not have an enumerated power to spend money on such loans.<sup>73</sup> Moreover, they explained that such "assistance would be applied for with more propriety to the State Government."<sup>74</sup>

Likewise, the fourth Congress determined that it did not have constitutional authority to spend money to rebuild the city of Savannah after it burned to the ground. One member of the House noted "[t]here had never occurred so calamitous an event of the kind in the United States, or which had so strong a claim upon the General Government for relief."<sup>75</sup> Representative John Milledge explained that "[n]ot a public building, not a place of public worship, or of public justice" was spared the "wide waste of ruin and desolation."<sup>76</sup> Numerous members of Congress nonetheless opposed the bail-out because it was not authorized by any of Congress's enumerated powers.<sup>77</sup> Representative Nathaniel Bacon's opposition is illustrative:

The sufferings of the people of Savannah were doubtless very great; no one could help feeling for them. *But he wished gentlemen to put their finger upon that part of the Constitution which gave that House power to afford them relief.* Many other towns had suffered very considerably by fire. . . . If the United States were to become underwriters to the whole Union, where must the line be drawn when the assistance might be claimed? . . . Insurance offices were the proper securities against fire.<sup>78</sup>

On the back of such arguments from numerous members, the House voted down any federal aid to Savannah by a vote of 55-24.<sup>79</sup>

President Monroe took a slightly different view of the Spending Clause, but he agreed that it imposed a restriction on Congress's powers. In 1822, President Monroe vetoed a bill to preserve and repair the Cumberland Road. In explaining his decision, he first argued that the Spending Clause did *not* limit Congress to spending money on only those objects that are expressly enumerated in the Constitution.<sup>80</sup> Rather, in Monroe's view, the Clause restricted Congress to spending money on "purposes of common defence, and of general, not local, national, not State, benefit."<sup>81</sup> And he vetoed the Cumberland Road project because it fell on the local side of that line.

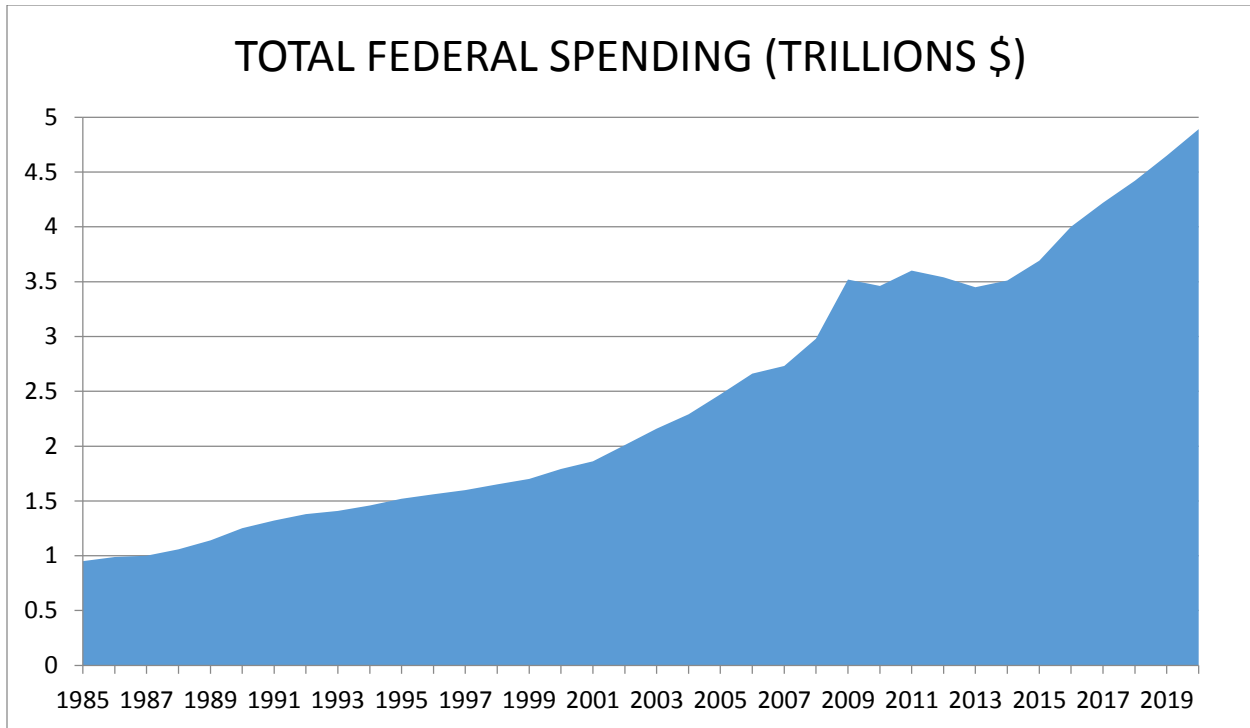
As with the Commerce Clause, Congress and the Supreme Court faithfully recognized that the Constitution's text imposed meaningful restrictions up until FDR's New Deal. In 1936, the Supreme Court held that the Secretary of Agriculture could not use the Agricultural Adjustment Act of 1933 to levy taxes and then pay the revenues to farmers to stop farming (and thus raise the prices of their agriculture products).<sup>82</sup> The Court explained:

Until recently no suggestion of the existence of any such power in the federal government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion [*i.e.*, the Spending Clause] or elsewhere in the Constitution, the authority whereby every provision and every fair, implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.<sup>83</sup>

The year after that decision, however, brought the “switch in time to save nine”<sup>84</sup> and with it, a near-total abandonment of the Spending Clause as a limit on Congress's powers.<sup>85</sup>

Today, Congress and the Supreme Court conceive of the Spending Clause an *affirmative grant* of power to Congress. While the fourth Congress determined that it lacked constitutional authority to rebuild Savannah, the 110th Congress had no doubt that it could spend \$750 billion to bail out banks during the subprime lending crisis.<sup>86</sup> The federal government today apparently believes it knows better about bailouts than the people who wrote the Constitution. Not only that, the Supreme Court has underscored the “clear” and remarkable “breadth” of the Spending Clause.<sup>87</sup> That creates a sort of Alice-in-Wonderland effect when juxtaposed next to every source of the Constitution's original meaning. Madison, Monroe, and countless individuals who framed the Constitution and applied it before the New Deal understood the Spending Clause as a limit on Congress—and a sharp limit at that. Fast forward to today, however, and the Clause now provides a broad empowerment for Congress to do things it otherwise could not do.

Congress has used its newfound power to spend money like a drunken sailor. In the fiscal year 2015, our federal government spent \$3.69 *trillion*.<sup>88</sup> That is a staggering sum. So where does it all go? About half of it pays for Medicare, Medicaid, Social Security and related entitlement programs; 18% pays for national defense; 11% pays for social welfare programs; and 7% pays the interest on the Nation's outstanding debts.<sup>89</sup> Each year, Congress's spending continues to skyrocket out of control.



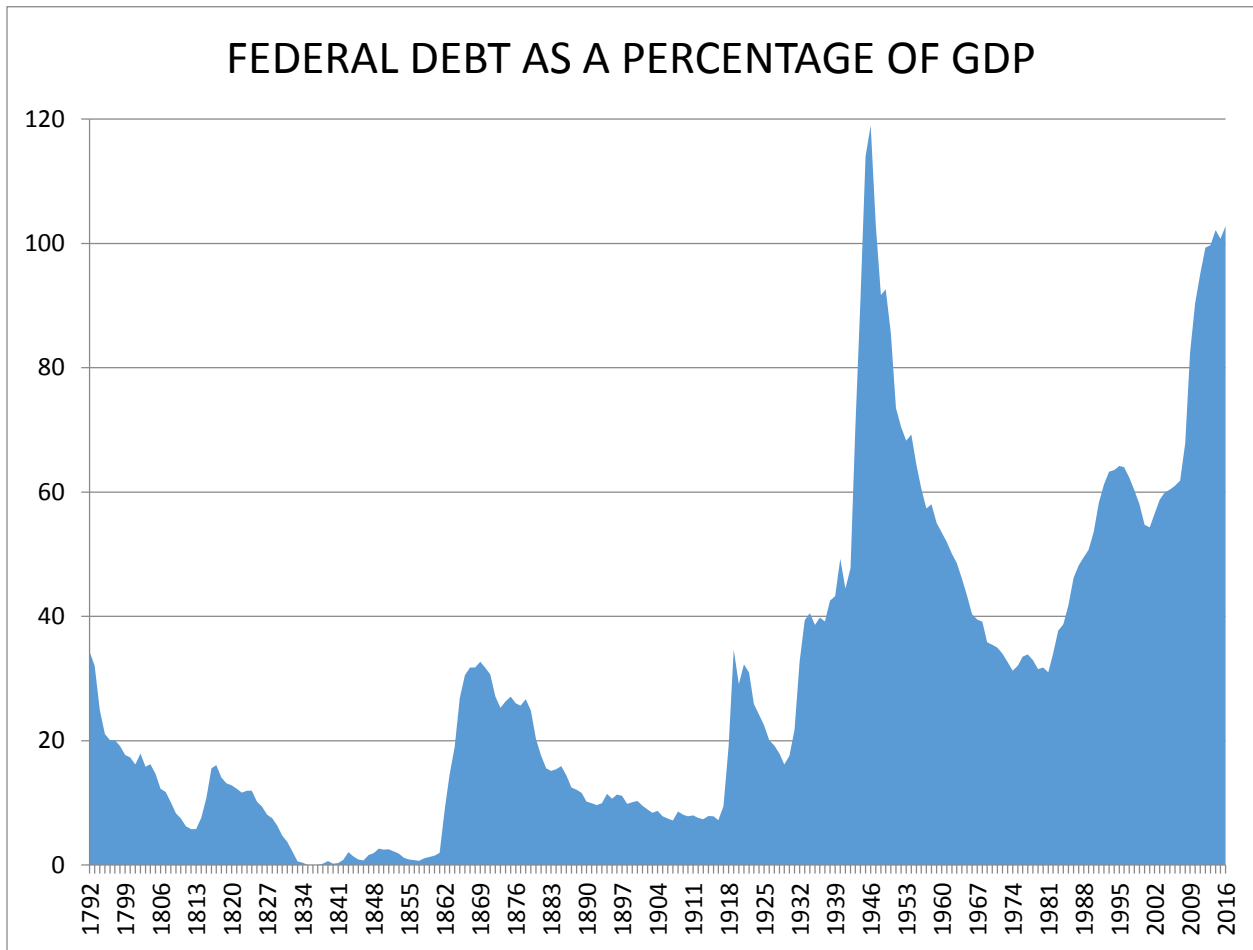
On the other side of Congress’s ledger, it collected \$3.25 trillion in revenue. That revenue number is remarkable for two reasons. First, the amount of money that Congress takes from Americans in taxes is equal to almost 18% of our Nation’s income (most commonly measured as gross domestic product, or “GDP”). Added together with state and local taxes, the government’s burden on the American people rises to 34% of GDP. Second, notwithstanding the crushing tax burdens that government imposes on “We the People,” it is *still* not close to enough to pay for Congress’s punch-drunk spending. At the end of 2015, Congress came up \$440 billion short. To put that number in contrast, Congress’s \$440 billion deficit is more than the entire GDP of the world’s 28th largest economy (Austria).<sup>90</sup>

If Congress overspent by \$440 billion in one year, our federal lawmakers still should be embarrassed by their failure to understand what every school kid with a piggybank understands—namely, that you cannot spend more than you have. But the reality is dramatically worse than that because Congress overspends by hundreds of billions of dollars *every* year. Each new deficit pushes the Nation’s overall debt load higher and higher. And as the debts go up, the interest that Congress owes on that debt also goes up. That—combined with Congress’s general inability to cut politically popular programs—continues to push spending (and hence future debts) even higher. And so the cycle continues, year in and year out.

As a result of that cycle, the outstanding federal debt today stands at \$19 trillion. That is more than \$58,000 for every citizen in the Nation, and it is more than \$157,000 for every taxpayer. Moreover, our \$19 trillion federal debt is six times more than Congress collected in revenue last year. That means that if

Congress canceled every single federal program on its books and instead devoted every penny it collected to repaying the debts it racked up over previous decades, it *still* would take Congress more than six years to pay everyone back.

What’s worse, our Nation’s debt continues to rise as a percentage of our GDP. Think of the debt-to-GDP ratio like an individual’s debt-to-income ratio. Both represent the debtor’s potential to make good on its liabilities.



As the foregoing chart illustrates, our current Congress earned the ignominious distinction of pushing our debt-to-GDP ratio over 100% for only the second time in our Nation’s history. (The first was a fleeting uptick during World War II.) That means if every single individual and business in the entire Nation devoted every single penny earned in the country last year to repaying the federal debt, we *still* would come up short.

Sometimes the lunacy of the status quo is difficult to understand in the abstract. So consider this illustration offered by a prominent think tank.<sup>91</sup> The median family income in the U.S. is \$52,000. If that median family spent money like the federal government does, it would spend \$61,000 per year—resulting in an

annual credit card bill of \$9,000. That is bad enough on its own. But if that median family also had preexisting debts like our federal government does, that family would add its \$9,000 credit card bill to an outstanding debt of \$311,000. It is virtually impossible to imagine how that median family ever could climb out of that debt hole. So too with the United States.

All of this threatens the rule of law in two ways. First, Congress uses carefree and runaway spending to bankroll federal overreach. All of Washington's bureaucracies and entitlement programs cost money. And as long as Congress faces no meaningful restraints on its spending, it will continue to expand its existing programs and build new ones. Second, many commentators have dismissed concerns about Congress's systematic inability to balance the budget on the rationale that lenders will continue to lend us money with no questions asked. Whatever merit that contention might have had in the past, it is dubious today. In 2011, the United States had its sovereign debt downgraded by the credit-rating agencies for the first time in the history of our country. That is unsurprising, just as it would be unsurprising for a bank to charge a high interest rate to the family with \$52,000 of income and \$311,000 of outstanding debt. But it also should serve as a wakeup call.

The Texas Plan would impose meaningful fiscal discipline on Congress. It would amend the Constitution to require the President to submit a balanced budget to Congress, and it would require Congress to enact a balanced budget every year. The only exception would be for a national emergency, like a war or national-security crisis. If Congress failed to meet its balanced-budget obligations, the Texas Plan would automatically freeze all federal spending (except for payments on outstanding debt) at 90% of the preceding year's levels.<sup>92</sup>

The Texas Plan also would specify *how* Congress must balance its budget—namely, by cutting spending. After all, the federal government already takes 18% of the Nation's GDP in the form of taxes; there is no justification for taking even more of today's earnings to pay for yesterday's excesses. Therefore, the Texas Plan would prohibit Congress from taxing its way to a balanced budget. In particular, the Texas Plan would freeze the federal government's income as a proportion of GDP at today's 18% level.<sup>93</sup>

## II. THE PRESIDENT

### A. *The Problem*

One thing that has united Presidential administrations of all varieties and stripes is their unwavering and bipartisan faith in the so-called “administrative state.”<sup>94</sup> The administrative state is the alphabet soup of agencies, bureaus, boards, and commissions—like the EPA, FTC, FHA, DOE, DOL, BATFE, HUD, EEOC, NLRB, HHS, IRS, SEC, FEMA, FAA, FDA, and myriad others—that makes the overwhelming majority of federal law. Sometimes that law takes the form of administrative rules and regulations; sometimes it takes the form of administrative adjudications; sometimes it takes the form of executive orders or executive actions. In all of its forms, however, the modern-day administrative state cannot be reconciled with the Constitution’s lawmaking procedures, and its unchallenged control over the federal government constitutes a grave affront to the rule of law.

Again, the Founders would be shocked. At the time of the Founding, the Framers primarily debated three facets of the President’s powers. First, the Framers wanted to ensure that the power to execute the law was separated from the power to make it. The great political philosopher John Locke explained it this way in 1689:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

\* \* \*

And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government: therefore in well ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good.<sup>95</sup>

Fifty years later, Montesquieu echoed the point: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”<sup>96</sup>

The separation-of-powers principle expounded by Locke and Montesquieu had deep roots in America even before the constitutional convention. For example, the Virginia Declaration of Rights required “[t]hat the legislative and executive powers of the state should be separate.”<sup>97</sup> And James Madison observed that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than” “the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>98</sup> That is because “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>99</sup> In John Adams’s words, an entity exercising all three powers “would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favor.”<sup>100</sup>

To prevent a tyrannical accumulation of power, the Framers went to great lengths to separate *lawmaking* from *law-execution*. As every school kid knows, a law is made by passing it through both houses of Congress in identical form and presenting it to the President. That process is called “bicameralism and presentment.”<sup>101</sup> Regardless of what the President does with the bill, the Congress is supreme over the lawmaking process: the President can sign the bill that Congress passed, or he can veto it, but if he chooses the latter, Congress can override him.<sup>102</sup> The President’s power, by contrast, is limited to law-execution: The Constitution vests in him “[t]he executive power,” and it charges him with “tak[ing] Care that the Laws be faithfully executed.”<sup>103</sup>

Second, having separated the President’s power from that of Congress, the Framers turned their attention to the scope and breadth of the President’s powers. This was the topic that consumed most of the Framers’ debates—much to the chagrin of James Madison, who later complained about the “tedious and reiterated discussions.”<sup>104</sup> An Old Whig captured the gist of the critics’ concerns:

To be the fountain of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to put a negative upon all laws, unless two thirds of both houses shall persist in enacting it, and put their names down upon calling the yeas and nays for that purpose, is in reality to be a KING as much *a King as the King of Great Britain*, and a King too of the worst kind;—an elective King.<sup>105</sup>



In the same vein, the Framers discussed at length whether the executive power should be vested in one President or in an executive council. For example, Edmund Randolph decried the idea of a single President because “[h]e regarded it as the foetus of monarchy.”<sup>106</sup> Given the Framers’ experience with an abusive monarch, perhaps Randolph’s concerns were understandable. At the end of the day, however, the Framers decided that Randolph’s concerns were outweighed by the need to create a strong and accountable executive counterweight to Congress. This is how James Wilson explained the rationale to the Pennsylvania ratifying convention:

[T]he *executive authority is one*. By this means we obtain very important advantages. We may discover from history, from reason, and from experience, the security which this furnishes. The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. We secure *vigor*. We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.<sup>107</sup>

The Framers’ third concern about the executive power was whether to limit the number of terms the President could serve.<sup>108</sup> The Anti-Federalist Cato worried that allowing the President to serve multiple four-year terms would “tempt[] his ambition” and make him “*fanc[y] that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country*.”<sup>109</sup> And Thomas Jefferson worried that the perpetual eligibility of the President for reelection “will be productive of cruel distress to our country in your day and mine.”<sup>110</sup>

In the end, however, the Framers determined that any President’s aspirations “to permanent grandeur” would be best checked by “a due dependence on the people” and not by limiting his tenure in office.<sup>111</sup> As Alexander Hamilton explained, limiting the President’s tenure to fewer than four years would make him timid. That is because “[i]t is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it.”<sup>112</sup> Moreover, if the President faced an election every year or every two years, “his confidence, and with it his firmness, would decline.”<sup>113</sup> Thus, the Framers determined that a renewable four-year term struck the right balance: “As, on the one hand, a duration of four years

will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition; so, on the other, it is not enough to justify any alarm for the public liberty.”<sup>114</sup>

The great irony is that the Framers largely succeeded in restraining the President. But all three of their concerns reared their ugly heads in the administrative state. While the President himself remains separated from Congress, administrative agencies routinely and powerfully combine executive, legislative, and judicial power. For example, the Environmental Protection Agency writes its own rules (lawmaking), brings enforcement actions for violations of those rules (law-execution), and adjudicates defendants’ liabilities (law-interpretation and law-enforcement). If the combination of those three powers “may justly be pronounced the very definition of tyranny,”<sup>115</sup> then modern-day administrative agencies meet the definition easily. That is why the noted constitutional historian Philip Hamburger concludes that “administrative law runs contrary to the very origin and nature of Anglo-American constitutional law.”<sup>116</sup>

While we continue to have a singular and unitary President, the administrative state replicates the multi-member executive council that Madison and Wilson so deeply hated. Madison and Wilson both feared that diffusing the executive power across a multi-member council would allow everyone in the executive branch to “hide either his negligence or inattention,” to avoid responsibility, and to shift blame and responsibility.<sup>117</sup> But the executive council that Madison and Wilson so loathed was tiny and harmless compared to the massive federal bureaucracy that reigns in Washington today.

And while we have successfully term-limited the President, we have not term-limited our bureaucrats. It is virtually impossible to fire a federal employee. And the perpetual nature of bureaucracies creates an inherent ambition and temptation to expand them. Moreover, that ambition is particularly pernicious in the context of the administrative state because bureaucrats never stand for election. Thus, in short, the Constitution has largely policed the powers and role of the President—but it has done nothing to police the administrative state, which today inflicts the same harms that the Framers tried so hard to prevent.

Finally, the courts have done little to remedy those harms. Under the Constitution’s original design, the courts were supposed to play a key role in policing the separation of powers.<sup>118</sup> And in the early days, the courts did not shrink from that responsibility.<sup>119</sup> In modern times, however, the courts not only bless the accumulation of executive, legislative, and judicial power within administrative agencies, the courts consider themselves somehow bound to *defer* to the administrative entities that undermine the entirety of our constitutional scheme.<sup>120</sup> The status quo thus has reached the height of absurdity.

*B. The Solution: Non-Delegation*

*The Texas Plan would prevent administrative agencies—and the unelected bureaucrats that staff them—from creating federal law.*

So how did we get where we are today? Again, the answer lies in the rule of law. Or, more precisely, our collective decision to abandon it.

For the first 140 years of our Nation’s history, things worked largely as the Framers envisioned they would and should. Congress passed laws using bicameralism and presentment, and because members of Congress had to stand for periodic elections, the people and democracy imposed accountability on that lawmaking process. The President more or less faithfully executed the laws without writing his own. And the courts stood ready to police the line between lawmaking (Congress’s job) and law-execution (the President’s job).

The courts policed that line through a series of cases that collectively are called the “non-delegation doctrine.” The basis for the non-delegation doctrine is the same as the basis for the entire separation-of-powers doctrine—that is, each branch has to do its job and refrain from doing the jobs of other branches. As the Supreme Court summarized it in 1892: “That congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”<sup>121</sup>

For example, in 1886, Congress passed “An Act defining ‘butter.’”<sup>122</sup> The statute did all manner of things to regulate butter, including taxing it. To enforce the law and collect the tax, the Commissioner of the IRS promulgated a regulation that required butter wholesalers to keep books on their purchases and sales. A Boston butter dealer named George Easton failed to follow the IRS’s regulations, however, and the United States prosecuted him criminally.<sup>123</sup> The United States pointed out that section 18 of the butter statute imposed criminal liability on those who failed to do anything “required by law,” and the United States argued that compliance with its bookkeeping regulations is “required by law.” The Supreme Court of the United States rejected that argument, however, because it had “very dangerous” implications for the non-delegation doctrine.<sup>124</sup> The Court held that if Congress—in its sovereign lawmaking power—wanted to make bookkeeping offenses criminal, then Congress itself had to do so and could not delegate the decision to the IRS.<sup>125</sup>

As with so many areas of law, however, our constitutional framework began to unravel in the New Deal era. Administrative rules to enforce butter and tea regulations were quaint by comparison to the massive delegations that the New Deal Congress gave to FDR. For example, the National Industrial Recovery Act of 1933 (“NIRA”) delegated to the President the unilateral power to write “codes”—

that is, *laws*—governing “fair competition,” unions, workplace conditions, and prices.<sup>126</sup>

One of the laws that the President fabricated was the “hot oil” rule. In an attempt to raise oil prices, NIRA allowed States to set quotas that capped the volume of oil that could be sold, and it allowed the President to prohibit the interstate transmission of any oil in excess of the States’ quotas.<sup>127</sup> The President then adopted a “Code of Fair Competition for the Petroleum Industry,”<sup>128</sup> which created production and sale quotas for oil refiners. The Supreme Court, however, held that the entire exercise constituted an unconstitutional delegation of Congress’s lawmaking powers to the President.<sup>129</sup> In reaching that conclusion, the Court emphasized that the Constitution requires Congress to make the tough policy decisions; it cannot simply punt those to the President:

The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy.<sup>130</sup>

Another of the laws that President Roosevelt wrote was the “Live Poultry Code.”<sup>131</sup> It prohibited anyone from working in a chicken slaughterhouse in New York City for more than 40 hours per week, it set a minimum wage of 50 cents per hour, it required slaughterhouse operators to hire a minimum number of employees, and it gave all employees collective-bargaining rights.<sup>132</sup> And it did all of that without any input from Congress; the President wrote the Live Poultry Code using only his subordinates within the executive branch.

The Supreme Court wasted little time in striking down the Live Poultry Code as a violation of the non-delegation doctrine. The Court explained that it is *Congress’s* duty to write laws; Congress cannot avoid that duty by giving its power to the President:

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the [*Hot Oil*] *Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But

we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.<sup>133</sup>

And the Court determined that the Live Poultry Code easily failed that test. NIRA contained no standards whatsoever for the President to execute; it contained only a delegation for the President to write a “code” containing those standards. “[T]he code-making authority thus conferred is an unconstitutional delegation of legislative power.”<sup>134</sup>

But then came FDR’s promise to “pack” the Court, and the “switch in time to save nine.” As with the Commerce Clause and the Spending Clause,<sup>135</sup> the sheer political pressure of a powerful President, unhinged from constitutional moorings engaged in an open war on the Court, probably would have been sufficient to convince the Court to abandon the non-delegation doctrine. But in the context of the non-delegation doctrine, the President’s political efforts were buttressed by co-conspirators from the administrative estate.

No voice was louder or more powerful than that of James Landis. Landis had unimpeachable legal credentials: he was a member of the Federal Trade Commission, the chairman of the Securities and Exchange Commission, and most importantly, the dean of Harvard Law School. So when Landis spoke, people (including in particular lawyers) listened. And as an alumnus of two different administrative agencies, Landis could speak authoritatively about both the need for and the legality of the administrative state.

What Landis said was equal parts refreshingly honest and bone-chillingly radical. Landis openly admitted that administrative agencies like the FTC and SEC were unconstitutional. But in Landis’s view, the agencies were not the problem; the problem was the Constitution, which had outlived its usefulness in a modern world that needed tea experts and emergency rules on hot oil: “In terms of political theory, the administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems.”<sup>136</sup> And he urged everyone (including the Supreme Court) to openly reject the Constitution and its separation of powers insofar as it was inconvenient or impractical for the then-pressing problems of the day: “The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government.”<sup>137</sup> Whereas Madison and the Framers called it the very definition of tyranny to unite the legislative, executive, and judicial powers in a single entity, Landis celebrated that agencies like the SEC have “not merely legislative power or simply executive power, but whatever power might be required

to achieve the desired results.”<sup>138</sup> And he applauded Congress for openly violating the Constitution’s separation of powers by “vest[ing] the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government.”<sup>139</sup>

To the Framers—and probably to most Americans today—it would be unthinkable to comply with law only when you find it convenient. The whole point of the rule of law is that we comply with it even when we do not want to; otherwise, it is the will of man and not the rule of law that reigns supreme. In all events, however, Landis’s view spread like wildfire. And it, combined with political pressure from FDR, convinced the Supreme Court to abandon the non-delegation doctrine and to openly embrace the idea that federal “law” can be made by administrative agencies.<sup>140</sup>

Today, Landis’s view of the administrative state—namely, that it is a good and practical solution to the exigencies of modern governance, even though it is flatly inconsistent with the Constitution—prevails throughout Washington, D.C. In fact, Landis’s view is the gospel that is accepted by everyone who unthinkingly accepts the legitimacy of the administrative state.

And it is difficult to overstate how unthinkingly we accept it. Take for example the Clean Air Act of 1970. That statute—which was passed through bicameralism and presentment—charges the EPA with creating among other things “standards of performance” for power plants.<sup>141</sup> The members of Congress who voted for the Clean Air Act 45 years ago doubtlessly went home to their constituents and proudly touted their vote for clean air and for the environment. But the statute itself says virtually *nothing* about what those “standards of performance” should be, much less does the statute say anything about how those “standards of performance” will clean the air. Those tasks instead fall to the EPA—whose officers and employees never have stood for election and never will. Those unelected bureaucrats in turn have interpreted three vacuous words—“standards of performance”—to give EPA authority to issue a 1,600 page “clean power plan.” The “clean power plan” is an environmental “code”—that is, *a law*—that has much broader implications than the FDR’s Live Poultry Code or his hot-oil orders. The “clean power plan” may require States like Texas to shut down some power plants, and it will cost consumers and businesses billions of dollars every year.<sup>142</sup> But thanks to James Landis and the “switch in time to save nine,” we take for granted that administrative agencies like EPA can promulgate a law that binds us, even though no elected official ever voted for one word of it.

In fact, it is even more absurd than that. Given the scope of the “clean power plan” and its radical effects on the American economy, some members of Congress introduced a joint resolution to *force* their fellow members to vote on it.<sup>143</sup> And when given the chance to vote on the bureaucrats’ plan, the electorally accountable

members of Congress voted to reject it.<sup>144</sup> Then, in a *coup de grâce* for the rule of law, the President vetoed the joint resolution—thus ensuring that EPA’s rule would remain the law even after being rejected by both houses of Congress.<sup>145</sup> That turns the Constitution’s procedure for lawmaking on its head and elevates the rule of bureaucrats over the rule of law.

The Texas Plan would revert the lawmaking process to the one enshrined in the Constitution. Under current law, administrative actions like the Clean Power Plan have legal force unless they are rejected by Congress or the courts. By contrast, under the Texas Plan, administrative actions like the EPA’s would have no binding legal force unless they are *approved* by Congress. The Texas Plan thus prevents Congress from delegating its lawmaking powers to administrative agencies and from deputizing bureaucrats as law-writers. By elevating the Constitution’s lawmaking procedures over the administrative convenience of theorists like Landis, the Texas Plan vindicates the rule of law.

In doing so, the Texas Plan would address two problems with the status quo. First, one of the reasons that agencies like the EPA have authority to regulate clean air is that Congress does not want to make the tough choices associated with those regulations. The elected members can trumpet their support for “the environment,” while EPA then does the unpopular work of shutting down power plants and destabilizing our Nation’s power grid. In addition to violating the Constitution’s provisions for making laws,<sup>146</sup> such administrative delegations run contrary to the republican principles of our Constitution.<sup>147</sup> Indeed, the Framers spent an enormous amount of time debating how to ensure that the House, the Senate, and the President would be sufficiently but not unduly connected to the will of the people.<sup>148</sup> All of that was a fool’s errand if the political branches can just punt to unaccountable bureaucrats.

Second, the whole point of the Constitution was to stop Congress from making careless decisions. As a generation of people who survived tyranny and its excesses, the Framers wanted a system that ensured laws would be “cautiously formed and steadily pursued.”<sup>149</sup> Thus, the Framers would not agree that it is an unmitigated good to pass a bill in the spirit of simply “getting something done”; to the Framers, no law was often better. And that result is dramatically hindered when the members of Congress can get political credit for doing something while taking little or no blame for the consequences.

Critics doubtlessly will complain—in words that could have been quoted from James Landis—that the Framers could not have foreseen how complicated our modern economy is and how pressing our need is for “expert” bureaucrats. The obvious flaw in that complaint is that the Founders did in fact foresee that American life would change and that those changes might require alterations to the Constitution. That is precisely why they included mechanisms to amend the Constitution.<sup>150</sup> What the Framers—and the plain language of the Constitution—

did not intend was the hijacking and antidemocratic restructuring of the tripartite government established in the Constitution. The process that wrought the current administrative state is the precise process the Founders sought to avoid in constructing the Constitution. If a new or different approach from the original Constitution is so desperately needed, so be it. But that is a call for the people, and the people should be asked to bless it through a constitutional amendment. The decision to restructure the government should not be made by unaccountable law professors like Landis and blessed by unaccountable members of the judiciary.

Relatedly, critics will complain that the Texas Plan jettisons the experts who staff modern-day administrative agencies. The Texas Plan does no such thing. Instead it funnels that expertise through a system of democratic accountability. All that changes under the Texas Plan is that the agencies' handiwork does not become federal law unless it goes through bicameralism and presentment. That is, the agencies have to submit their expert ideas to Congress, Congress has to pass them in identical form through both houses, and then they have to be presented to the president for his signature. Only *then* do they become federal law.

Critics also will complain that the non-delegation doctrine is “unworkable.” It is true that the modern Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>151</sup> And the Supreme Court bases that reluctance in large part on the difficulty in drawing lines between permissible and impermissible delegations of lawmaking power.<sup>152</sup>

But there are lots of constitutional principles that are *difficult*. That does not mean that courts should simply jettison them and openly embrace defiance of the Constitution's text. For example, courts seem to have no problem determining what constitutes a “reasonable” search or seizure—even though each case involves sensitive line-drawing. The courts seem to have no problem determining what constitutes “due process” or “equal protection of the laws”—even though each case involves sensitive line-drawing. Indeed, all or almost all of the Constitution's provisions are difficult to apply. And courts routinely rebuff any assertion that there is no role for courts to play because the question is too difficult. As the Chief Justice recently explained in a related context: “Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the [Constitution]. This is what courts do. The [sensitivity of the inquiry] poses no bar to judicial review of this case.”<sup>153</sup>

If there were any doubt about whether courts have the chops to administer the Texas Plan's non-delegation doctrine, it is eliminated by the operation of the non-delegation doctrine at the State level. Several States have non-delegation doctrines, which their courts faithfully apply to police the separation of powers. By one count, there are 19 such States—Arizona, Florida, Illinois, Kentucky,



Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Texas, Virginia, and West Virginia.<sup>154</sup>

To take just one high-profile example of the non-delegation doctrine in operation, in 2012, the New York City Board of Health adopted a rule banning large sodas in the city. The rule—the full name of which was the “Sugary Drinks Portion Cap Rule”—made it unlawful for a restaurant or convenience store to “sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces” or to “sell, offer or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces.”<sup>155</sup> The Board of Health pointed out that the City’s Charter gave it broad authority to adopt the rule as part of its efforts to regulate “all matters affecting the health of the City.”<sup>156</sup> And much like FDR during the new deal, the Board of Health told the courts that pesky constitutional doctrines must yield to pressing public-health emergencies, like the “obesity epidemic.”<sup>157</sup> But New York’s courts emphatically disagreed and held that the large-soda ban was an unconstitutional violation of the non-delegation doctrine:

[I]t is clear that the Board of Health wrote the Portion Cap Rule without benefit of legislative guidance, and did not simply fill in details guided by independent legislation. Because there was no legislative articulation of health policy goals associated with consumption of sugary beverages upon which to ground the Portion Cap Rule, . . . the adoption of the Rule involved the choosing of ends, or policy-making.<sup>158</sup>

The lawmaking process envisioned by the Founders and enshrined in the Constitution still works. The Texas Plan restores that vision by requiring elected officials to be the lawmakers, not unaccountable bureaucrats.

### *C. The Solution: Non-Preemption*

*The Texas Plan would prevent administrative agencies—and the unelected bureaucrats that staff them—from preempting state law.*

Preemption exacerbates the problems associated with the administrative state. “Preemption” refers to the idea that when federal law and state law conflict, the former trumps—that is, preempts—the latter. The general proposition that federal law would be supreme to state law attracted no recorded opposition at the constitutional convention. But the Framers would be shocked to learn that state law *also* has to yield to the policy positions of unelected bureaucrats working at federal administrative agencies.

At the constitutional convention, the original draft of the Supremacy Clause would have given Congress a veto over any and all state laws. James Madison reports it this way: “Resolved . . . that the national Legislature ought to be empowered . . . to negative all laws passed by the several States, contravening in

the opinion of the National Legislature the articles of Union.”<sup>159</sup> In explaining the need for that federal power, Madison explained:

Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs.<sup>160</sup>

But Madison lost that debate. The constitutional convention instead sided with Elbridge Gerry, a delegate from Massachusetts who had previously served in the First and Second Continental Congresses as well as the Confederation Congress. Gerry argued that “[t]he Natl. Legislature with such a power may enslave the States. Such an idea as this will never be acceded to.”<sup>161</sup> Likewise, Gunning Bedford, a delegate to the constitutional convention from Delaware, opposed it because he thought large States like Pennsylvania and Virginia would use their greater numbers in Congress to oppress and veto laws from smaller States like Delaware: “It seems as if Pa. & Va. by the conduct of their deputies wished to provide a system in which they would have an enormous & monstrous influence.”<sup>162</sup> In the end, the proposal to give Congress a running veto over all state laws failed.<sup>163</sup>

The Framers settled instead on a more modest preemption of state law. The Supremacy Clause as they adopted it reads: “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>164</sup> But even that more-modest version of the Supremacy Clause concerned many because it prohibited States—and people acting through their States—from checking Congress’s exercises of federal power. An Old Whig argued:

The Congress are therefore vested with the supreme legislative power, without controul. In giving such immense, such unlimited powers, was there no necessity of a bill of rights to secure to the people their liberties? Is it not evident that we are left wholly dependent on the wisdom and virtue of the men who shall from time to time be the members of Congress? [A]nd who shall be able to say seven years hence, the members of Congress will be wise and good men, or of the contrary character.<sup>165</sup>

The Framers responded to those concerns in two ways. First, Hamilton dismissed criticisms of the Supremacy Clause as “virulent invective and petulant declamation” because the only supreme law are those passed by “*the national legislature*.”<sup>166</sup> Madison echoed that point by emphasizing that the Supremacy Clause would protect “the new Congress.”<sup>167</sup>

And second, because the Supremacy Clause applied only to acts of Congress, the States would be protected by their representatives in Congress. This was another recurring theme in the Framers' views of the relationship between States and the federal government—namely, that the members of Congress would be constantly thinking about ways to advance the States' prerogatives, not to undermine them. As Madison put it in the *Federalist*, “A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States.”<sup>168</sup> Madison went on:

The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.<sup>169</sup>

The constitutional scholar Herbert Wechsler later termed this idea the “political safeguards of federalism” because the States' political representatives in Congress would ensure that federal law did not trample on States' rights.<sup>170</sup>

But what about administrative agencies, the proverbial alphabet soup of agencies, commissions, and boards that are directly accountable only to the President? Or worse, what about the so-called “independent” administrative agencies that are accountable to no elected official, not even the President?<sup>171</sup> Given how much attention the Framers paid to protecting state law and ensuring that it was not unduly preempted by Congress, it would be strange for them to allow mere bureaucracies to preempt state law. And it would be particularly odd for the Framers to allow bureaucratic preemption given that the Supremacy Clause itself makes no mention of administrative agencies.

In fact, as noted above,<sup>172</sup> administrative agencies are mentioned nowhere in the Constitution. Indeed, administrative agencies as we now understand them did not even exist when the Constitution was written. The closest analogue would be executive decrees by the president or a king—and Founding-era documents very clearly refute the idea that the Framers would have afforded supreme law-like effect to executive proclamations.<sup>173</sup> As Blackstone explained:

By the statute 31 Hen. VIII c.8 it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fundamental to the liberties of this kingdom, had it not been luckily repealed . . . about five years after.<sup>174</sup>

The notable constitutional scholar and Supreme Court Justice Joseph Story made the same point more directly: Actions of the Federal Government “which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies,” are not “the supreme law of the land. They will be merely acts of usurpation, and will deserve to be treated as such.”<sup>175</sup>

Notwithstanding all of the Framers’ attention to the topic and careful delineation of *Congress’s* power to preempt state law, courts today nevertheless allow *administrative agencies* to exercise that power too. For example, in 1984, the Department of Transportation promulgated a regulation with a name that only a bureaucrat could love: “FMVSS208.” The FMVSS208 regulation gave carmakers a choice whether to install airbags in their passenger vehicles. Honda chose not to install airbags in their 1987 Accords, in accordance with the FMVSS208 rule. When a woman named Alexis Geier was injured while driving a 1987 Accord, she sued Honda under state law.<sup>176</sup>

The Supreme Court confessed that Congress did *not* preempt Ms. Geier’s suit.<sup>177</sup> In that sense, the political safeguards of federalism worked. The States’ elected lawmakers defended the States’ prerogatives and ensured that their statute did not displace state law. That result suggests Madison was right that “[a] local spirit will infallibly prevail [on] the members of Congress,”<sup>178</sup> who will avoid preempting state law where possible.

But the *Geier* case did not end there. After determining that Congress’s statute did not preempt state law, the Court then asked whether *the Department of Transportation’s rule* (FMVSS208) preempted state law. And on that question, the Court determined that state law was an “obstacle” to the administrative agency’s “purposes and objectives.”<sup>179</sup> In particular, the Court determined, DOT wanted to give carmakers a choice whether to install airbags, whereas Geier’s state-law tort suit wanted to deprive carmakers of that choice. Faced with that tension—between the state laws enacted by a sovereign State and the policy preferences of unelected bureaucrats at DOT—the Supreme Court of the United States determined that the latter must trump.

The Framers would be shocked by that result. Indeed, in many ways, it is worse than the version of the Supremacy Clause that the Framers rejected. If Congress had a running opportunity to preempt any and all state laws, at least the relevant decision-makers would be electorally accountable lawmakers. But under *Geier*, an administrative agency can preempt the laws of a sovereign State using only “agency musings, [which] do not satisfy the [Constitution’s] requirements for enactment of federal law.”<sup>180</sup>

The Texas Plan would prevent that result. It would amend the Supremacy Clause to make plain that the only things that preempt state law are the statutes that members of Congress actually vote on, pass, and present to the President for

his signature. Limiting preemption to *real* federal laws—as opposed to the policy preferences of federal bureaucrats—comports with the original meaning of the Constitution. And it also treats States and state law with the dignity that the Framers always intended to afford them.<sup>181</sup>

### III. THE JUDICIARY

#### A. *The Problem*

As explained in the foregoing pages, the courts have aided and abetted the constitutional violations by Congress and the President. The Constitution appoints the judiciary as the guardian of the boundary lines between the political branches. As Alexander Hamilton put it, “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>182</sup> And as explained above, the courts have failed in that most basic task.

But the courts’ failures run much deeper than simply failing to police the other branches. Most fundamentally, the courts have failed to behave like *courts*.

Here is how things were supposed to work. The Constitution vests “[t]he judicial power of the United States” in one Supreme Court and any inferior courts that Congress might establish.<sup>183</sup> Federal judges enjoy life tenure and salary protection; that is, they can hold their offices as long as they want (limited only by impeachment for bad behavior), and Congress cannot reduce their compensation.<sup>184</sup> Moreover, the Constitution gives federal judges jurisdiction over “*all cases*, in law and equity, arising under this Constitution, [and] the laws of the United States,” among others.<sup>185</sup>

The Framers insisted that even with such wide jurisdiction, life tenure, and salary protection, the courts still would constitute the “weakest” and “least dangerous” branch.<sup>186</sup> That is so, the Framers argued, because the courts “will be least in a capacity to annoy or injure” “the political rights of the Constitution.”<sup>187</sup> Hamilton explained:

The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>188</sup>

Hamilton’s idea—echoed by others who supported the Constitution—was that judges are just honest umpires who call balls and strikes. The Framers were not willing to countenance the idea that judges *also* would want to play in the game, or that judges would change the rules to ensure that their preferred team wins.

Hamilton's conception of a judge as an umpire who uses neither force nor will but merely judgment remains popular today. For example, when John Roberts was nominated as Chief Justice of the United States, he told the Senate Judiciary Committee that a judge's job is merely to call "balls and strikes."<sup>189</sup> Roberts explained: "Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ballgame to see the umpire."<sup>190</sup>

Despite that popular conception, the reality is that judges now have moved beyond calling balls and strikes and have turned to actively making law, rewriting statutes, and even amending the Constitution itself. What's more, many predicted this result at the Founding. One of the most vocal Anti-Federalists, writing under the pseudonym "Federal Farmer," argued that "we are more in danger of sowing the seeds of arbitrary government in [the judicial] department than in any other."<sup>191</sup> That is so, Federal Farmer argued, because even the wisest judge will make a mistake, and because courts' decisions are final, that mistake will be difficult or impossible to fix:

[J]udicial power is of such a nature, that when we have ascertained and fixed its limits, with all the caution and precision we can, it will yet be formidable, somewhat arbitrary and despotic—that is, after all our cares, we must leave a vast deal to the discretion and interpretation—to the wisdom, integrity, and politics of the judges—These men, such is the state even of the best laws, may do wrong, perhaps, in a thousand cases, sometimes with, and sometimes without design, yet it may be impracticable to convict them of misconduct. These considerations shew, how cautious a free people ought to be in forming [the judicial branch].<sup>192</sup>

The Anti-Federalist "Brutus" went even further in two respects. First, he correctly predicted that the courts would fail to police the Constitution's limits on Congress and the President. In fact, Brutus correctly warned, the courts would actively support the expansion of federal power by interpreting every provision of the Constitution to give Congress an increased role in regulating Americans' lives. In Brutus's words, the federal courts will interpret the Constitution to "give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts."<sup>193</sup> And Brutus was correct that, as explained in the foregoing parts of this paper, each new expansion of federal power would come at the expense of the States:

[I]n proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become

so trifling and unimportant, as not to be worth having. I am much mistaken, if this system will not operate to effect this with as much celerity, as those who have the administration of it will think prudent to suffer it.<sup>194</sup>

Second, in addition to predicting that federal courts would expand the power of the other federal branches, Brutus also predicted that the federal courts would abuse their own power. In particular, Brutus worried that the Constitution sowed the seeds for judicial tyranny in the sense that it empowered unelected judges to impose their will on the people. He pointed out that the Constitution itself imposed no limit on courts because judges “are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”<sup>195</sup> Brutus noted that “the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.”<sup>196</sup>

Hamilton tried to allay Brutus’s concerns of a runaway federal judiciary by pointing out that judges could be impeached just like other federal officers.<sup>197</sup> In Hamilton’s view, “[t]his is alone a complete security.”<sup>198</sup> But Hamilton’s assurances were hollow in both theory and fact. As to the theory, Brutus correctly pointed out that impeachment is available only when a judge commits a high crime and misdemeanor; it is not available whenever (as Brutus worried) a judge abuses his role as a judge and foists his policy views on the Nation:

Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges commit[t]ed the error from wicked and corrupt motives.<sup>199</sup>

And that showing, Brutus predicted, would be difficult or impossible. Indeed, Brutus’s predictions were not just theoretically persuasive. They also were factually accurate: In the history of the U.S. Supreme Court, only one justice ever has faced impeachment charges (Samuel Chase in 1804), and he was acquitted.<sup>200</sup>

Notwithstanding the fact that the Court’s members were unaccountable to anyone (through elections, impeachments, or any other mechanism), the Court was for the most part able to control its ambitions for the first 170 years of our Nation’s history. Of course, the Court made mistakes. But for the first 170 years, Hamilton was essentially correct that “[p]articular misconstructions and contraventions . . . may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.”<sup>201</sup>



For example, in 1819, the Supreme Court held that Congress could establish a national bank—even though it had no enumerated power to do so.<sup>202</sup> That decision would have raised the eyebrows of many Framers who so forcefully argued that the principal virtue of the Constitution was that it limited Congress to certain enumerated powers. Indeed, Madison and Jefferson both argued (unsuccessfully) that the national bank was unconstitutional.<sup>203</sup> But whether the Supreme Court’s decision was right or wrong, back in the Nineteenth Century, the Supreme Court did *not* have the final word on what the Constitution means.

That is why President Andrew Jackson could openly disagree with the Supreme Court’s opinion regarding the constitutionality of the bank. When the bank came up for reauthorization in 1832, he vetoed it because the bank was “unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people.”<sup>204</sup> And President Jackson expressly rejected the view that the Supreme Court has the final word on the meaning of the Constitution: “It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent.”<sup>205</sup> Because it established that each branch of government must make its own assessment of the Constitution’s meaning—rather than simply bowing to the Supreme Court’s opinion—“Andrew Jackson’s rejection of the bank recharter was probably the most consequential veto in the history of the Republic.”<sup>206</sup>

President Lincoln reached the same conclusion in disregarding one of the most ignominious decisions ever rendered by the Supreme Court. In *Dred Scott v. Sandford*,<sup>207</sup> the Supreme Court held that a freed slave is not a “person,” and hence can be owned like any other form of “property.” That decision was horribly wrong. In ignoring that decision, President Lincoln emphasized that nothing in our Constitution gives the Supreme Court the final say on the Constitution’s meaning. The President said in his first inaugural address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>208</sup>

As with so many other things, Lincoln was right about this one. The Constitution says: “[T]his Constitution, and the laws of the United States made in pursuance thereof; and all treaties . . . shall be the supreme law of the land . . . .”<sup>209</sup> Nothing in the Constitution says that *the Supreme Court’s interpretations* of the Constitution are worth any more than the paper they are printed on.

Fast forward to today, and the Nation looks very different. Gone are the days that non-judicial officials can make their own independent judgments—like Lincoln did—regarding what the Constitution means. And gone are the days that non-judicial officials can make their own *policy* judgments without being countermanded and vetoed by the federal courts. In modern America, the policy preferences of five robed unelected septuagenarians will trump even the most politically popular legislation on virtually any topic—from voting rights to abortion to religion to speech to criminal procedure to guns to healthcare to the environment. That result goes far beyond the Court’s traditional power to “say what the law is” and to render a judgment in a particular case<sup>210</sup>; rather it turns the members of the Court into proverbial philosopher kings who can countermand the will of the people when they in their purported wisdom want to.<sup>211</sup> Although Brutus would not be surprised by that result, everyone present at our Nation’s founding would be horrified by it.

*B. The Solution: Allow States to Overrule*

*The Texas Plan would allow a two-thirds majority of the States to override a U.S. Supreme Court decision.*

The modern doctrine of judicial supremacy is problematic for three reasons. Each requires a solution that makes the judiciary accountable to the people.

First, the Supreme Court’s mistakes are drastically costlier than mistakes by the other branches of government. When Congress or the President does something wrong, it almost always can be corrected by a future Congress or President. Moreover, Congress and the President are electorally accountable to the people, which means that we can replace them when they step out of line. Not so with the Supreme Court. The people have no direct control over who sits on the Court, and when the Court foists an erroneous interpretation of the Constitution on the Nation, it is virtually impossible to fix. In fact, in the history of our country, the Supreme Court’s interpretation of the Constitution has been overturned only once—and that was way back in 1795.<sup>212</sup> That is why Justice Robert Jackson could so confidently say, “[w]e are not final because we are infallible, but we are infallible only because we are final.”<sup>213</sup>

Second, judicial supremacy is problematic because it imperils the separation of powers, and with it, the liberty of every American. When courts stop enforcing the rule of law and start writing the rules themselves, they effectively override the legislative power. And as Montesquieu observed, down that road lies peril:

[T]here is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>214</sup>

Likewise, Justice Felix Frankfurter was right that “[t]here can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.”<sup>215</sup>

Third, judicial supremacy is problematic because the Framers clearly did not intend for the Supreme Court to discover new rights in the Constitution, to treat the document as a “living” organism that evolves according to the personalities and preferences of the Court’s majority, or to otherwise change the Constitution’s meaning. There are myriad documents from the Founding to that effect, but three examples will prove the point. First, as Madison explained in 1788:

In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. *This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper.*<sup>216</sup>

Second, Charles Pinckney (who signed the Constitution on behalf of South Carolina) explained:

On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country.<sup>217</sup>

Finally, Thomas Jefferson echoed the same point:

[N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the Executive to decide for them. . . . [T]he opinion which give to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.<sup>218</sup>

Yet today, the Supreme Court has asserted the exact authority that Madison, Pinckney, and Jefferson worried about—namely, the ability to use unelected justices to alter the Constitution’s meaning.

Consider the Eighth Amendment. That constitutional provision says: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted.”<sup>219</sup> We inherited it from England, which adopted a ban on excessive fines and cruel and unusual punishments as part of the English Bill of Rights of 1689.<sup>220</sup> And at the time of the Founding, that provision embodied a proportionality principle. The idea was that more-serious crimes should be punished more harshly than less-serious ones. In Montesquieu’s words, “[i]t is a great abuse amongst us to condemn to the same punishment a person that only robs on the highway and another who robs and murders. Surely, for the public security, some difference should be made in the punishment.”<sup>221</sup>

The Framers adopted a series of laws that illustrated the proportionality principle. For example, in Virginia, Thomas Jefferson authored “A Bill for Proportioning Crimes and Punishments” in 1788.<sup>222</sup> Some of the punishments deemed appropriate at the time for various crimes included whipping, pillorying, and hanging.<sup>223</sup> Those punishments obviously seem outdated by today’s standards. That is presumably why no legislature in any state or part of the country imposes them today. But the fact that that Eighteenth Century penalties offend modern sensibilities does not make them more *unconstitutional* today than they were 230 years ago.

Without regard to the Eighth Amendments’ historical underpinnings—in fact, in flagrant disregard of them—the Supreme Court has taken the view that the Eighth Amendment must evolve to keep up with the times. In the Court’s words, the Eighth Amendment will prohibit a punishment as unconstitutional if, in the justices’ personal opinions, it violates the “evolving standards of decency that mark the progress of a maturing society.”<sup>224</sup> No member of the Court ever has explained what qualifies an unelected jurist to make such determinations, nor has any member of the Court explained why the inquiry is a legitimate one. The whole point of the rule of law is that we agree to the ground rules ahead of time, and then, in John Roberts’s words, the courts neutrally call balls and strikes. It runs contrary to the rule of law to allow unelected judges to change the rules as they go along and determine that, in their view, the “evolving standards of decency” require it.

Lest there be any doubt that they are making it up on the fly, the Supreme Court sometimes determines that the “evolving standards of decency” renders a punishment unconstitutional when a majority of States prohibit it.<sup>225</sup> But sometimes that nose-counting exercise does not reach the result the justices prefer, in which case they rely on the rate of change among States.<sup>226</sup> And when the rate of change runs contrary to the justices’ policy preferences, they turn instead to international law and the views of people in France.<sup>227</sup> When that fails, and when both the overwhelming majority of States and the rate of change support a punishment the Court opposes, it instead will use its “independent judgment” to declare that entire punishments are categorically off-limits nationwide.<sup>228</sup> As Justice Antonin Scalia has bemoaned, these opinions make “a mockery . . . of Hamilton’s expectation” that “[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment.”<sup>229</sup>

Things have gotten so bad that the Court is now willing to declare that *the Constitution itself* is unconstitutional. In 2008, the Court held that the State of Louisiana could not impose the death penalty on Patrick O’Neal Kennedy for brutally raping and sodomizing his eight-year-old stepdaughter. The justices reasoned that their personal assessments of the “evolving standards of decency” prohibited executing someone who did not kill his victim. This despite the fact that the Constitution itself permits the death penalty for crimes not involving murder. In fact, treason is the only crime defined in the text of the Constitution, and the Constitution expressly confers on Congress the power to declare the punishment for it.<sup>230</sup> Under that authority, a congressional enactment authorizing the death sentence for treason has been in continuous effect since 1790.<sup>231</sup> Indeed, at the time of the Founding, Blackstone pointed out that the capital punishment for treason was particularly gruesome: rather than simply being “hanged by the neck till dead,” the traitor was either “drawn or dragged to the place of execution,” or “in high treason affecting the king’s person or government, embowelling alive, beheading, and quartering,” or “burning alive.”<sup>232</sup> In 2015, two members of the Court went even further and said that *all* capital punishments are unconstitutional for *all* crimes,<sup>233</sup> even though the Constitution itself specifically mentions “capital” crimes and allows the State to “deprive[.]” criminals “of life.”<sup>234</sup>

Reasonable people can and do disagree about the propriety of capital punishment in Twenty-first Century America. But reasonable people cannot disagree about what the Constitution says and what it always has meant. If we are a Nation of laws, and not of men, then our highest law must prevail over the personal policy preferences of unelected jurists who do not like it.

The Court’s efforts to change the Constitution are not limited to the Eighth Amendment. Private property is another great example. There is no right more essential to the Constitution than the right to own property. As John Locke explained:

The *Supream Power cannot take* from any man any part of his property without his own consent: for the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should *have property*, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it; too gross an absurdity for any man to own.<sup>235</sup>

And Locke explained that when the government abdicates its most basic responsibility to protect the property of its people, it loses its claim to legitimacy: “whenever the legislators endeavour to take away, and destroy the property of the people . . ., they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence.”<sup>236</sup> No truth

commanded greater influence on the Framers, who weaved Locke’s conception of the sanctity of private property throughout myriad documents at the Founding.<sup>237</sup> Without regard to any of them, however, a majority of the Supreme Court held that the city of New London, Connecticut could take Suzette Kelo’s home, bulldoze it, and turn her land into an empty patch of grass because that is what a pharmaceutical company wanted.<sup>238</sup>

Or take the First Amendment. That constitutional provision says, in relevant part, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>239</sup> As its words indicate, the First Amendment was supposed to protect *speech* and *words*, including but not limited to those published by the press. The purpose of the amendment was to ensure that people had the freedom to use speech and words to keep their government in check. As David Hume explained prior to the Founding:

It is apprehended, that arbitrary power would steal in upon us, were we not careful to prevent its progress, and were there not an easy method of conveying the alarm from one end of the kingdom to the other. The spirit of the people must frequently be roused, in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition. Nothing so effectual to this purpose as the liberty of the press, by which all the learning, wit, and genius of the nation may be employed on the side of freedom, and every one be animated to its defence. As long, therefore, as the republican part of our government can maintain itself against the monarchical, it will naturally be careful to keep the press open, as of importance to its own preservation.<sup>240</sup>

That freedom, Oliver Wendell Holmes said, will ensure the “free trade in ideas— that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”<sup>241</sup>

The Supreme Court has contorted those ideas beyond all recognition. Without explaining what it has to do with the freedom of speech, the press, or the pursuit of truth, the Court has held that the First Amendment protects lying,<sup>242</sup> videos of women crushing kittens while wearing stiletto heels,<sup>243</sup> nude dancing,<sup>244</sup> and the right to purchase violent video games.<sup>245</sup> As Justice Scalia remarked in a different context, “[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”<sup>246</sup>

When confronted with the possibility that willful judges would impose their views on the people under the guise of interpreting the Constitution, some of the

Framers suggested that the risk was inherent in having judges at all. Here is how Alexander Hamilton put it:

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.<sup>247</sup>

But on this, at least, Hamilton was wrong. The problem is not judges or even willful judges. The problem is allowing willful judges to rule our Nation with no oversight or accountability.

The Texas Plan supplies that accountability. It would allow States to convene assemblies for the purpose of overturning the Supreme Court's misinterpretations of the Constitution. In particular, the States could convene an assembly on the vote of 26 States. The States could pick their delegates to those assemblies, and the assemblies could meet as often as the States deem necessary. At the assembly, a two-thirds super-majority of state delegates would be required to overturn a Supreme Court decision. But once the super-majority requirement is met, the assemblies could overturn the Court's decisions in whole or in part. They could overturn the Court's decisions retroactively or prospectively. They could vitiate the precedential effect of the Court's decisions and remand cases to the Supreme Court for further proceedings. In short, the assemblies would restore the people—rather than five unelected jurists—to the role of the truly supreme arbiter of the Constitution.

To those who complain that this part of the Texas Plan is extreme, again, the Constitution supplies the reply. From the beginning, the people acting through their respective States were supposed to have control over the Constitution. Article V allows the state legislatures to propose a constitutional amendment, and it can be ratified by a three-fourths vote of the state legislatures or state ratifying conventions.<sup>248</sup> The Framers were deliberate in vesting *the people* (and their closest representatives, namely, the state legislatures) with the power to amend the Constitution.<sup>249</sup> The people have been robbed of that authority if the Supreme Court can change what the Constitution means with the stroke of a pen. The Texas Plan restores the people's control over their Constitution by giving the States the power to fix errant Supreme Court decisions.

C. *The Solution: Require Super-Majority Votes*

*The Texas Plan would require a seven-justice super-majority vote for U.S. Supreme Court decisions that invalidate a democratically enacted law.*

The Framers thought long and hard about how to change the terms of the original Constitution. On the one hand, they knew that constitutional amendments would be necessary. After all, their ill-fated experiment with the Articles of Confederation proved that they could not foresee all contingencies. They also knew that building into the Constitution a mechanism for amending it would lower the stakes of the Framers' decision-making and facilitate compromises; if those compromises proved ill-advised, the people could undo them later.<sup>250</sup> Thus, George Mason explained, "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."<sup>251</sup> The requirement of three-fourths of the States to support an amendment was a dramatic reform from the Articles of Confederation, which had required unanimous consent for amendments.<sup>252</sup>

On the other hand, the Founders did not want it to be *too* easy to change the Constitution's terms. If it was too easy to change the document, the Framers worried, it would create "instability in the government."<sup>253</sup> The Founders therefore intentionally included "such obstacles, and delays, as must prove a sufficient bar against light, or frequent innovations" to the Constitution.<sup>254</sup> The Framers envisioned a tea kettle of sorts; once a problem heated up and persisted for some time, then but only then it would blow the whistle of a constitutional amendment.

What the Framers did not anticipate, however, was that the Supreme Court would vent the steam before the water ever could boil. Amending the Constitution is an arduous task that requires years of work and nationwide grassroots support. Since the Great Depression, we have managed to do it only six times. One reason there are so few amendments is because it is infinitely easier to gin up a lawsuit and ask the Supreme Court just to declare whatever right or amendment the plaintiff wants. Why try to get millions of votes from people across the country when you can get the same result with just five from the Supreme Court?

Compare these two real-world examples of nearly identical changes to the Constitution. The Seventeenth Amendment transferred power to choose United States Senators from "the Legislature" of each State to "the people thereof."<sup>255</sup> To get that amendment passed, reformers had to navigate the vagaries of the Article V amendment process, and their success "resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States."<sup>256</sup>



By contrast, the State of Arizona accomplished virtually the same change—transferring power to conduct redistricting from “the Legislature” of each State to “the people”<sup>257</sup>—without spending a single dollar on a single step in the Article V process and without winning a single vote from a single elected official in any jurisdiction in the Nation. Rather than doing the hard work of amending the Constitution, Arizona simply asked the Supreme Court to bend the language of the Constitution to equate “the Legislature” (the Constitution’s words) and “the people” (Arizona’s words). And by a 5-to-4 vote, the Supreme Court obliged.<sup>258</sup> The upshot was that the reformers who worked so hard to ratify the Seventeenth Amendment could have saved themselves a lot of effort by forgoing the Constitution’s amendment process and instead just asking the Court to do the dirty work for them. As the Chief Justice explained it:

What chumps! Didn’t [the framers of the Seventeenth Amendment] realize that all they had to do was interpret the constitutional term ‘the Legislature’ to mean ‘the people’? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests congressional redistricting authority in “the Legislature” of each State. An Arizona ballot initiative transferred that authority from ‘the Legislature’ to an ‘Independent Redistricting Commission.’ The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising ‘the Legislature’ to mean ‘the people.’<sup>259</sup>

Even for those who support the notion that the Supreme Court gets to use the Constitution to countermand virtually any decision by any democratically elected lawmaker, and even for those who support the results the Court reaches, the status quo makes little sense. It takes a clear super-majority of States to ratify an amendment through the Article V process—so why does it only take a bare majority of Supreme Court justices to accomplish the same thing? It cheapens the rule of law—and encourages circumvention of the Constitution’s amendment process—to allow five justices to overrule constitutional precedents and invalidate democratically enacted legislation.

The Texas Plan fixes that anomaly by imposing the same super-majority requirement for Supreme Court decisions (three-fourths) that Article V already imposes for constitutional amendments. Not only is a super-majority already required by Article V, a super-majority also is a familiar requirement for courts. Every criminal jurisdiction in the United States requires a super-majority (if not complete unanimity) of jurors for criminal convictions. The purpose of those requirements is to mitigate the risk that a bare majority would get the answer wrong. If that concern is valid in individual criminal cases, and everyone agrees it is, the same is certainly true for the highest legal question our system ever could ask—namely, whether a particular thing is or is not unconstitutional.

And lest anyone worry that this portion of the Texas Plan is unworkable or radical, super-majority requirements for judicial invalidations of statutes already exist in two States. Nebraska has a seven-member Supreme Court, and in 1920, it amended its Constitution to say: “[a] majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.”<sup>260</sup> And since 1976, North Dakota’s Constitution has imposed an even stronger super-majority requirement: it requires four out of five justices to strike down legislation.<sup>261</sup> The sky has fallen in neither State.

This facet of the Texas Plan accords with existing U.S. Supreme Court doctrine. The Supreme Court “recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”<sup>262</sup> This presumption of constitutionality leads to a host of related doctrines, including the so-called “canon of constitutional avoidance,”<sup>263</sup> and forces the Court to do jurisprudential summersaults to avoid striking a statute down as unconstitutional. Given the lengths to which the Court is willing to go to save a statute from unconstitutionality,<sup>264</sup> it is a modest step to require more than a bare five-justice majority to agree that the statute *really is* unconstitutional. As the Supreme Court of Nebraska explained their parallel requirement:

[A] legislative act is always presumed to be within constitutional limitations unless the contrary is clearly apparent—a rule consistently followed by this court. However, the people, ever alert, and jealous of their vested rights, in 1920 adopted as an amendment to the Constitution of our state, as an additional safeguard, the [Constitution’s super-majority] provision.<sup>265</sup>

We should be equally jealous of our vested rights and thus equally welcoming of the Texas Plan’s super-majority requirement.

Finally, some might wonder whether this part of the Texas Plan could be accomplished by a statute in lieu of a constitutional amendment. That is, could Congress simply pass a statute prohibiting the Supreme Court from invalidating a democratically enacted law with less than a seven-justice super-majority vote? On the one hand, Congress undoubtedly has the power to make “exceptions” to and “regulations” of the Supreme Court’s appellate jurisdiction.<sup>266</sup> That would suggest Congress has the power to tell the Court when and under what circumstances it can exercise appellate jurisdiction to strike down a law.

On the other hand, as far back as 1871, the Supreme Court reserved to itself the power to declare unconstitutional any congressional effort to regulate the Court’s powers to determine that a law is unconstitutional.<sup>267</sup> Members of the

modern Court have suggested that such congressional efforts are unconstitutional where they interfere with the Court's conception of its own "essential functions."<sup>268</sup> Given the Court's jealousy of its power to "say what the law is,"<sup>269</sup> and given how far the Court has gone to arrogate to itself additional powers over the decades, there is a substantial risk that the Court would invalidate a statute imposing a super-majority requirement on its power to declare a statute unconstitutional. Thus, the safer route is a constitutional amendment.

## IV. THE STATES

A. *The Problem*

Nowhere did the Constitution’s supporters (“the Federalists”) and its critics (“the Anti-Federalists”) disagree more sharply or fundamentally than on the role of the States in the new Union. Here—as with the clashes between the Federalists and Anti-Federalists discussed above—the terms of the debate at the Founding merit careful attention. That is because the Anti-Federalists raised valid concerns about federal overreach, and the Federalists responded with ingenious constitutional solutions to keep the federal government in check. Today’s problems stem largely from our national amnesia regarding the Constitution’s solutions to the Anti-Federalists’ concerns.

In the summer of 1787, when the Framers met in Philadelphia, the Articles of Confederation were crumbling. The young country had crushing war debts, its creditors were clamoring to be repaid, and the federal treasury was bare because the States were refusing to make voluntary payments into it. Foreign commerce was crippled because the States had conflicting and burdensome tax schemes that impeded the flow of goods, and the federal government had no power to do anything about it. The country’s national security was imperiled on every border, and the federal government lacked the means and authority to provide national defense. George Washington summed it up this way:

It now rests with the Confederated Powers, by the line of conduct they mean to adopt, to make this Country great, happy, and respectable; or to sink it into littleness; worse perhaps, into Anarchy and Confusion; for certain I am, that unless adequate Powers are given to Congress for the general purposes of the Federal Union that we shall soon moulder into dust and become contemptable in the Eyes of Europe, if we are not made the sport of their Politicks; to suppose that the general concern of this Country can be directed by thirteen heads, or one head without competent powers, is a solecism, the bad effects of which every Man who has had the practical knowledge to judge from, that I have, is fully convinced of; tho’ none perhaps has felt them in so forcible, and distressing a degree.<sup>270</sup>

The Federalists’ solution to those problems was a strong, centralized, national government. That solution had three principal parts. First, the proposed Constitution gave Congress the ability to levy taxes.<sup>271</sup> That was crucial, the Federalists said, to paying the Nation’s debts. Second, the proposed Constitution gave the government both enumerated powers and implicit ones. It accomplished the latter through the “Necessary and Proper Clause,” which gives Congress the power “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 Officer thereof.”<sup>272</sup> That was crucial, the Federalists said, to ensure that the federal government would have the power to meet unforeseen circumstances and to defend the Nation. Third, the proposed Constitution preempted State laws that were inconsistent with it. It did so through the “Supremacy Clause,” which says: “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, anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>273</sup> That was crucial, the Federalists said, to ensure that the States did not adopt conflicting laws, taxes, and other schemes that would thwart federal law.

The Anti-Federalists disagreed because they started from a different premise. While the Federalists were focused *outward* to protect the Nation’s survival, the Anti-Federalists were focused *inward*. The Anti-Federalists cared chiefly about private property, civil justice, public order, and the ability of ordinary people to live ordinary lives without undue interference in their day-to-day liberties. And the Anti-Federalists thought that the States—not a centralized federal government—were the best guarantors of those values because they were closest to the people and the most capable of protecting local values.<sup>274</sup> What will it profit a nation to survive, the Anti-Federalists asked, if we lose our domestic liberties in the exchange?

The Federalists won the debate at the Founding, and their champions (chiefly, Madison, Hamilton, and Washington) were the Framers of our Constitution. The federal government, with its newly consolidated and centralized powers, was able to pay its debts, restart the engines of foreign commerce, and provide for the national defense. The country they founded quickly emerged as the envy of the world, and so it remains today.

And to be clear, the Federalists’ Constitution was not a *purely* nationalist one. The Federalists disagreed with the charge that they were giving short shrift to States’ concerns and States’ rights. And they insisted that States would remain powerful and sovereign entities. At the same time, however, the Federalists were steadfast in their belief that the foremost challenge facing America was its survival; that national survival required States to cede some of their authority to a central government; and that the States’ concerns were a secondary concern to the continued existence of our country.<sup>275</sup>

Almost 240 years later, however, Madison’s concerns about the balance of federal-State power have receded far into our collective rearview. It no longer makes sense to worry that States will somehow usurp federal prerogatives, sap the federal treasury, dissolve the union from within, or weaken us on the international stage. And no one worries anymore that our mighty federal government is somehow powerless to defend itself against encroachments by the States.

In reality, the opposite is true. Today's federal government is so big, and as explained in the foregoing parts, its three branches have expanded their powers so far beyond what the Constitution contemplated, that it risks swallowing the States whole. As it turns out, that is precisely what the Anti-Federalists predicted 240 years ago. Given the Anti-Federalists' prescience, their views and concerns about the balance of federal-State powers demonstrate why the Founders constructed a Constitution that included protections for States and their citizens.

Two themes run throughout the Anti-Federalists' criticisms. First, as a predictive matter, they foresaw that the federal government would swallow States. And second, as a normative matter, they argued that was a bad thing because it would make the people less free.

No one made these points more powerfully than the Anti-Federalist who wrote under the pseudonym "Brutus." His principal point was the predictive one—that is, that the natural consequence of the new Constitution would be to create an all-powerful federal government that would swallow the States. That, he argued, was a natural consequence of human ambition:

[I]t it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all.<sup>276</sup>

But the problem was not just a matter of human nature and ambition. Brutus pointed out that the proposed Constitution included two particular provisions that would enable Congress and the other branches of the federal government to swallow the States whole: the Necessary and Proper Clause and the Supremacy Clause. His ability to foretell the operation of the Necessary and Proper Clause was particularly remarkable. Even though that Clause was not supposed to give Congress any new powers—it was merely intended to allow Congress to take "necessary and proper" steps to execute its enumerated powers—Brutus knew that would not hold true. He correctly predicted that Congress, the President, and the Courts would use that Clause to expand Congress's powers beyond the limits enumerated in the Constitution:

The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution, it has been shewn, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it — though I believe this is not the fact, yet, admitting it to be, it implies that the

constitution is not to receive an explanation strictly, according to its letter; but more power is implied than is expressed.<sup>277</sup>

Of course, if Congress has implied powers, then there was no way for the people to be sure where Congress's power would stop. Implied powers cannot be described or quantified up front; in a sense, you only know they are there when Congress exercises them. And in that sense, Brutus argued, implied powers run squarely contrary to the rule of law: they allow Congress to make up the rules as they go along and exigencies (whether genuine or feigned) demand them.

The threats posed by Congress's implied powers under the Necessary and Proper Clause were exacerbated by the Supremacy Clause. Brutus argued that the combination of those two provisions would give Congress the ability—which it most obviously would use—to steamroll the States whenever they got in the way:

[T]he legislature of the United States are vested with the great and uncontrollable powers, of laying and collecting taxes, duties, imposts, and excises; of regulating trade, raising and supporting armies, organizing, arming, and disciplining the militia, instituting courts, and other general powers. And are by this clause invested with the power of making all laws, *proper and necessary*, for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government. And if they may do it, it is pretty certain they will; for it will be found that the power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way.<sup>278</sup>

Over time, Brutus argued, the federal government's ability to steamroll the States would leave the latter as mere husks: "the individual states will be totally supplanted, and they will retain the mere form without any of the powers of government."<sup>279</sup>

It is difficult to overstate how right Brutus was. To take just one of countless examples, consider medical marijuana. In 1996, the people of California passed Proposition 215, which allowed "seriously ill" Californians to use marijuana under the direction of a physician. California was the first State in the country to adopt such a law, and they did it through the purest and most direct form of democracy—a voter initiative. That was precisely the kind of local regulation that Brutus celebrated. No matter what Texans or Virginians or New Yorkers think about medical marijuana, Brutus's idea was that no one knows better than Californians what is best for Californians.

In accordance with the new state law, a Californian named Diane Monson cultivated medicinal marijuana in her home. She did not sell it to anyone; she grew it for her own personal use, again, in accordance with state law. But on August 15, 2002, federal agents from the U.S. Drug Enforcement Agency showed up at her house. And “after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.”<sup>280</sup> The federal agents claimed to have the power to raid her home under a federal statute called the Controlled Substances Act.<sup>281</sup>

But what *constitutional* provision conceivably could allow federal agents to raid a home and destroy plants that were planted, grown, and consumed inside the borders of one State and in accordance with that State’s law? Brutus knew the answer 215 years before those federal agents set foot on Ms. Monson’s property: the combination of the Necessary and Proper Clause and the Supremacy Clause.

The federal government’s argument went like this. Everyone agrees that Congress can regulate “interstate commerce” under the Constitution’s Commerce Clause.<sup>282</sup> To be sure, the government conceded, Ms. Monson’s conduct was “purely local” and therefore did not qualify as “interstate” in any sense.<sup>283</sup> Moreover, the government conceded, Ms. Monson’s conduct also was not “commerce” because she was not selling her plants to anyone.<sup>284</sup> And the government also had to concede that Ms. Monson’s purely local, noncommercial conduct could not perceptibly affect the supply or demand of marijuana in interstate commerce; after all, she only had six plants.<sup>285</sup> But, the government argued, if every single marijuana user in the entire country did what Ms. Monson did, well then that *would* affect the interstate marijuana market (in the sense that no one would need to buy marijuana anymore because everyone was growing their own). So even though Ms. Monson’s conduct cannot be characterized as interstate commercial activity, the federal government had power under the Necessary and Proper Clause to regulate it as part of its broader effort to regulate the interstate marijuana market.<sup>286</sup> That, combined with the Supremacy Clause, allowed federal DEA agents to raid Ms. Monson’s home notwithstanding California state law.

It is unclear which is more remarkable—that the Supreme Court accepted the federal government’s arguments<sup>287</sup> or that Brutus correctly predicted the result. Either way, the upshot is that the Necessary and Proper Clause combined with the Supremacy Clause allowed federal DEA agents to push aside a California voter initiative as nothing more than “a clog upon the wheels of the government of the United States.”<sup>288</sup> In words that Brutus himself all but penned, Justice Clarence Thomas dissented:

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can



regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.<sup>289</sup>

And when the federal government oversteps its bounds at the expense of States, it necessarily diminishes the entire concept of States. After all, if California cannot distinguish itself by adopting a particular initiative that its voters wanted, then there really is not a difference between California and, say, Nevada. The federal government's one-size-fits-all policies apply equally in both places, and federal DEA agents can raid homes in both places no matter what state law says.

Of course, it took a long time to get here. There were many incremental violations of the rule of law between Brutus and the raid on Ms. Monson. But again, Brutus predicted that. He recognized that the courts would incrementally expand the federal government's powers, building precedent on precedent, and waiting for the people to acclimate—like a frog in a pot of warming water—to the ever-expanding scope of federal power. Brutus explained:

They [the courts] will be able to extend the limits of the general government gradually, and by insensible degrees, and to accomodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one.<sup>290</sup>

That leads to the Brutus's second insight. As more and more power is stripped from the States and transferred to the federal government, the States obviously retain less and less discretion to respond to their citizens' needs. And that, Brutus argued, would be disastrous because it would affect the citizens' day-to-day happiness. What people *really* care about, Brutus argued, are not the affairs of state but the conditions of life in their local communities:

The state governments are entrusted with the care of administering justice among its citizens, and the management of other internal concerns, they ought therefore to retain power adequate to the end. The preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government. — The happiness of a people depends infinitely more on this than it does upon all that glory and respect which nations acquire by the most brilliant martial achievements.<sup>291</sup>

And, of course, the conditions in local communities vary from north to south, from State to State, and from city to city. As Federal Farmer rightly observed, “one government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the

different states, which by a uniform system of laws would be unreasonably invaded.”<sup>292</sup> The Anti-Federalist writing as “Agrippa” made the same point: “It is impossible for one code of laws to suit Georgia and Massachusetts. They must, therefore, legislate for themselves. Yet there is, I believe not one point of legislation that is not surrendered in the proposed plan.”<sup>293</sup> That is, Californians might prefer lax marijuana laws, Vermonters might prefer strict environmental regulations, and Texans might prefer lower taxes. Yet the ongoing expansion of federal law stamps out those differences.

One way to measure that steady expansion is through the number of statutes that Congress passes under the Supremacy Clause to preempt state law. In the first 110 years of our Nation’s history, Congress passed a total of 30 such statutes.<sup>294</sup> By 2011, however, there were 681.<sup>295</sup> Today, federal law preempts State variation across entire swaths of American life—“ranging from health care, labor, employment, and banking to telecommunications, pharmaceuticals, medical devices, securities, transportation, foreign affairs, and occupational health and safety—and even to habeas corpus and meat inspection.”<sup>296</sup> Those last two examples are particularly surprising because if States have the power to do anything, they have the power to supervise a criminal justice system and to exercise ordinary police powers by inspecting slaughterhouses.<sup>297</sup> The wide swath of federal preemption suggests that States really have lost much of their power to influence the lives of their citizens.

As Justice Brandeis noted almost a century ago, “[i]t is one of the happy incidents of the federal system that 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>298</sup> Then, citizens from other States can vote with their feet—that is, they can move to States that have (in the voters’ view) successful social and economic experiments, and they can move away from States that fail. That dynamic—sometimes called “competitive federalism”—is good for States who want to differentiate themselves, and it is good for citizens who want to choose a State that reflects their preferences. But it is impossible in a system—predicted by Brutus and his fellow Anti-Federalists—that squashes any variation at the State level with broad and overwhelming preemptive law at the federal level.

#### *B. The Solution: Expand the Tenth Amendment*

*The Texas Plan would restore the balance of power between the federal and state governments by limiting the former to the powers expressly delegated to it in the Constitution.*

The Tenth Amendment was supposed to prevent the federal government from overwhelming the States. Obviously, it failed. So this piece of the Texas Plan would slightly modify the Tenth Amendment language to restore the intended purpose of the Amendment.

The Tenth Amendment has its roots in criticisms launched by the Anti-Federalist pseudonymously known as “Federal Farmer.” As noted above, Federal Farmer argued that the natural course of human ambition and the Constitution’s structure would lead to the hollowing out of States and their elimination as “useless and burdensome” relics.<sup>299</sup> Not only that, Federal Farmer also argued that was by design. That is, he accused Federalists like Hamilton and Madison of *wanting* to destroy the States: “Some of the advocates [for the Constitution] are only pretended federalists; in fact they wish for an abolition of the state governments.”<sup>300</sup> Why would they want to get rid of States? Federal Farmer pointed to a sinister motivation—namely, the Federalists’ desire for glory, power, and control at the expense of ordinary people’s happiness:

The fact is, that the detail administration of affairs, in this mixed republic, depends principally on the local governments; and the people would be wretched without them: and a great proportion of social happiness depends on the internal administration of justice, and on internal police. The splendor of the monarch, and the power of the government are one thing. The happiness of the subject depends on very different causes: but it is to the latter, that the best men, the greatest ornaments of human nature, have most carefully attended: it is to the former tyrants and oppressors have always aimed.<sup>301</sup>

Those are obviously bold words. But they were bold words that worked. Less than two years after the Framers adopted the Constitution, in 1791, they adopted the Tenth Amendment to placate critics like Federal Farmer. The ratified text of the Amendment says: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>302</sup>

Some have puzzled over what the Tenth Amendment was supposed to accomplish. For example, the Supreme Court has said:

The amendment 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 it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.<sup>303</sup>

As simple as that “truism” is, it has long been abandoned. Whatever power the Tenth Amendment had when it was ratified is altogether ignored today. One reason why is how it came to be. The Tenth Amendment was based on a similar provision that the States adopted in the Articles of Confederation. The latter

provided: “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>304</sup> The careful reader will note that the Articles of Confederation included the word “expressly,” whereas the Tenth Amendment omits it.

That was intentional. When the Framers were debating the Tenth Amendment, two members of Congress—Thomas Tudor Tucker (S.C.) and Elbridge Gerry (Mass.)—proposed to include the word “expressly” in the Tenth Amendment.<sup>305</sup> James Madison opposed the effort, stating that “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.”<sup>306</sup>

Madison’s concern was understandable in the late Eighteenth Century. After all, the central reason for the Constitutional Convention of 1787 was that the Articles of Confederation went too far in decentralizing power to the States and did not go far enough in empowering the federal government to take action. As noted above, whatever concerns Madison had about the weakness of the federal government then are inapplicable now. And in all events, the real question is not whether the Constitution must “recount every minutia”; the question is where the power over “every minutia” lies when the Constitution is silent.

What Madison and his colleagues really wanted was a vertical balance of powers between the States and the federal government.<sup>307</sup> That balance has now shifted beyond what the Founders envisioned and has suffered a full tilt toward the federal government. Just as the Constitutional Convention was necessary to re-balance the power between the States and the national government in 1787, so too is constitutional amendment necessary to re-balance the power to rein in a federal government that has exceeded its intended purpose.

*C. The Solution: Give States Authority to Challenge Federal Actions that Exceed Enumerated Powers*

*The Texas Plan would give state officials the power to sue in federal court when federal officials overstep their bounds.*

The penultimate piece of the Texas Plan would allow States and state officials to take legal action against federal officials and the United States for exceeding their enumerated powers. This part of the Texas Plan fixes one of the great ironies in American constitutional law. The same Supreme Court that has dismissed the Tenth Amendment as a “truism”<sup>308</sup> and a “tautology”<sup>309</sup> also has repeatedly refused to enforce it. The upshot of the Court’s approach is that the thing we all know to be true—that Congress cannot exceed its enumerated powers—

has been rendered false by the fact that the courts often refuse to do anything about it.

This problem dates back approximately 100 years. In 1923, the Supreme Court dismissed a lawsuit by the Commonwealth of Massachusetts, which argued that the Maternity Act of 1921 violated the Tenth Amendment.<sup>310</sup> The Maternity Act gave federal dollars to States that chose to comply with its provisions for reducing maternal and infant mortality. Massachusetts argued that the law exceeded Congress's enumerated powers, and "that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights or lose their share of the moneys appropriated."<sup>311</sup> The Court rejected those arguments and held that Massachusetts did not present a justiciable controversy. The Texas Plan would overturn results like that and give States a special right to challenge federal actions.

As recently as 1976, the Supreme Court upheld the Tenth Amendment's intended purpose. In *National League of Cities v. Usery*,<sup>312</sup> the Court agreed that the federal government had exceeded its enumerated powers and invaded a traditional area of state sovereignty. In that case, States challenged the constitutionality of the Fair Labor Standards Act as applied to the minimum-wage and maximum-hour laws for state employees. The Court held that the FLSA was unconstitutional as applied to the States' "traditional government functions," such as how much they pay their employees.<sup>313</sup> The Court further held "that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."<sup>314</sup>

Less than a decade later the Supreme Court proved correct the concerns expressed at the Founding that judges would hijack the Constitution. In 1985, the Supreme Court erroneously overturned *National League of Cities* in a case called *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>315</sup> In *Garcia*, the Court determined that it was too difficult for judges to determine whether a particular governmental function was traditionally assigned to the States or to the federal government.<sup>316</sup> The Court recognized, of course, that

[m]any constitutional standards involve undoubted gray areas, and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation [and instead reserved to the States under the Tenth Amendment].<sup>317</sup>

Indeed, as discussed above, the Eighth Amendment provides a particularly vivid illustration of a constitutional “gray area” where the Court does not mind unworkable standards, inconsistent results, and vigorous judicial policymaking.<sup>318</sup>

When it comes to the Tenth Amendment and protection of the States, however, the *Garcia* Court determined that the *National League of Cities* standard was too gray and, therefore, the entire constitutional provision is basically meaningless. As the dissenters in *Garcia* summed it up: “A unique feature of the United States is the federal system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court’s opinion to the concept of federalism, today’s decision effectively reduces the Tenth Amendment to meaningless rhetoric.”<sup>319</sup>

To be fair, the Tenth Amendment as it exists today is not “meaningless rhetoric.” For example, even after *Garcia*, the Supreme Court has held that the Tenth Amendment prohibits Congress from directing States to “take title” to nuclear waste.<sup>320</sup> The Amendment still prohibits Congress from “commandeering” state and local officials to enforce federal laws.<sup>321</sup> And when federal officials exceed their authority, state officials still sue and win; Texas’s efforts to stop the President’s unilateral and unlawful “executive actions” on immigration are only the latest example.<sup>322</sup>

Even so, the Tenth Amendment remains a shell of its pre-*Garcia* self. For example, a decade after *Garcia*, the State of Texas invoked the Tenth Amendment to challenge the federal government’s commandeering of state resources to force state taxpayers to provide educational, healthcare, and other services to undocumented immigrants.<sup>323</sup> Notwithstanding the fact that the federal government’s decisions imposed millions of dollars in uncompensated costs on States like Texas, the Court held that its Tenth Amendment claim was not “cognizable”—that is, it did not belong in court.<sup>324</sup>

The best (if not the only) way to restore the Tenth Amendment’s intended protections is to give State officials broad rights to enforce it in court. That is, States should receive “special solicitude” to sue the federal government.<sup>325</sup> And the Texas Plan would prevent courts from ducking claims by state officials against the unlawful actions of the federal government. Without consistent and uniform judicial redress, the States are in an untenable position and the Tenth Amendment becomes virtually unenforceable in the ordinary case: the federal government can violate the Constitution, exceed its enumerated powers, abuse the States and denigrate the States’ prerogatives, and the States are powerless to stop it. That deprives the States, and their citizens, a right guaranteed by the Founders.

Again, as with so many parts of the Texas Plan, this Tenth Amendment reinforcement does not protect the States as ends in themselves. The point is that the rule of law requires *someone* to keep the federal government in check. And the

States—with judicially enforceable rights to challenge breaches of the enumerated powers—are the ideal parties to do it.

*D. The Solution: Repeal Amendment*

*The Texas Plan would allow a two-thirds majority of the States to override a federal law or regulation.*

The final part of the Texas Plan is popularly known as the “Repeal Amendment.” The Repeal Amendment would allow a super-majority of States to repeal provisions of federal law. It was originally proposed by Georgetown law professor Randy Barnett and the Speaker of Virginia’s House of Delegates,<sup>326</sup> and as many as ten States already have voiced support for it.

The Repeal Amendment responds to a canard that has been repeated countless times in federalism discussions over the last sixty years. That canard comes from a law review article entitled “The Political Safeguards of Federalism,” by Herbert Wechsler.<sup>327</sup> Wechsler’s basic argument is that federalism—and by that he means the relationship and balance of power between the national and State governments—is most naturally protected by the political process. Federal law is “interstitial,” he argued, in the sense that it fills in gaps left by the States.<sup>328</sup> The States play integral roles in the selection of all federal officials—from members of Congress to the President.<sup>329</sup> And finally, given the immense political processes at work in these issues, courts should stay out of them.<sup>330</sup>

Wechsler’s argument was hugely influential. It formed the cornerstone of the Supreme Court’s latest decision to hold that the Tenth Amendment is not judicially enforceable.<sup>331</sup> And it remains the orthodox answer to any complaint that the federal government is somehow treading on the prerogatives of the States or the rights that the Constitution reserves to the people.

In reality, however, Wechsler’s argument is nothing more than an amendment to the Constitution that nullifies the Tenth Amendment based on his perspective of the political process. His position misses the mark because it assumes the Founders—and the ratifying States—intended the Tenth Amendment to have no meaning. That contradicts basic constitutional interpretation that requires a deference to the ratifiers of an Amendment, who presumably would not pass a meaningless provision. Laws without enforcement mechanisms are nothing more than sentiments. And it is striking that the Supreme Court has not held that other provisions of the Bill of Rights are merely unenforceable sentiments. The Tenth Amendment should be no different, and it does not protect second-class rights.

Even assuming Wechsler's point was valid in the past, it is dramatically invalid today. The principal "political safeguard of federalism" at the time of the Founding was the process for selecting Senators. Under the original Constitution, they were selected by the various State legislatures rather than direct elections by the people.<sup>332</sup> But the Seventeenth Amendment changed that. And any doubt regarding the efficacy of the remaining political checks to protect the States' prerogatives is put to rest by the results of our current system (as discussed at length in the foregoing sections).

In reality, Wechsler had it backwards. The States' influence over federal officials and federal law is now virtually nil. And just as the people can use ballot initiatives when their elected representatives are unresponsive, the Repeal Amendment would allow States to directly repeal federal law when their federal officials are unresponsive. In short, the Repeal Amendment provides—perhaps for the first time—a *genuine* political safeguard of federalism.



## V. THE PROCESS

As demonstrated in the preceding pages, the federal government has sailed far from its constitutional moorings. Even for those who support some, most, or all of the results that the federal government has reached, there is no denying that those results—in particular since the New Deal—have been achieved primarily in derogation of the Constitution rather than in furtherance of it. The question is what should be done about it.

The Framers of our Constitution experienced the evils of an arbitrary government that was unmoored from the rule of law. And the Constitution they drafted is the product of their reaction to that evil. At the end of the day, “We the People” either believe that the Framers’ wisdom to guard the rule of law against an arbitrary government remains relevant today or it does not.

If Americans today still have faith in the Framers’ handiwork, two consequences naturally follow. First, it is long past time to start taking the Constitution seriously. That means confronting the reality of just how egregiously the federal government has broken its constitutional restraints. And second, taking the Constitution seriously requires taking *all* of it seriously—including Article V.

Article V sets out the process for amending the Constitution. The Founders clearly understood the necessity of amending the Constitution as the country grew and evolved. They not only anticipated the need to amend the Constitution; importantly, they made clear that States—and their citizens—should play a pivotal role in the amendment process even when all three branches of the federal government think the amendments are unnecessary.

### A. *Article V*

Article V provides:

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 . . . .<sup>333</sup>

Thus, Article V establishes two paths for proposing constitutional amendments. Congress controls the first path. Under it, Congress can propose constitutional amendments by a two-thirds vote in both houses. The States control the second path. Under it, the two-thirds of the state legislatures can call for a constitutional

convention to propose particular amendments. In either case, no amendment becomes effective until it is ratified by three-fourths of the States.

In the history of our country, we have amended the Constitution 27 times. At least two things are striking about those amendments. First, 21 of our 27 amendments were ratified before the New Deal. That is surprising because Article V is built on the Framers' recognition that they could not foresee the future perfectly, and that as time went by, additional changes to the document would prove necessary. As Joseph Story explained:

A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people.<sup>334</sup>

The further we get from the Founding, “the new phases of human affairs” should dictate additional constitutional amendments—not fewer. Indeed, Story explained that the philosophy underlying Article V was that it would allow each new generation of Americans to assume responsibility for refining the Constitution and bringing it closer and closer to perfection:

[The Constitution's] framers were not bold or rash enough to believe, or to pronounce it to be perfect. They made use of the best lights, which they possessed, to form and adjust its parts, and mould its materials. But they knew, that time might develop many defects in its arrangements, and many deficiencies in its powers. *They desired, that it might be open to improvement; and under the guidance of the sober judgment and enlightened skill of the country, to be perpetually approaching nearer and nearer to perfection.*<sup>335</sup>

And the Framers were right that we would need to make additional changes to the Constitution as time went on; their mistake was failing to predict that the Supreme Court would supply those amendments by judicial fiat instead of allowing the people to use the Article V process. This point is explained in greater detail in Part III.C. above.

The second striking fact about our previous amendments is that all 27 were proposed using Article V's first path—that is, through Congress. Never in the history of our Nation have “the legislatures of two thirds of the several states . . . call[ed] a convention for proposing amendments.”<sup>336</sup> Again, that result would be a

shock to the Framers—especially because, as explained above, our present-day need for a constitutional reformation is that the federal government has abused its powers and ignored its constitutional limitations.

The Framers included the second path for proposing constitutional amendments as a protection against federal overreach. Some at the Constitutional Convention—most notably Elbridge Gerry and Alexander Hamilton—suggested that Congress should have a veto power over any constitutional amendments.<sup>337</sup> And that argument was defeated by George Mason, who argued:

It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for an amendment.<sup>338</sup>

Mason further argued that it would be “exceptionable & dangerous” to give Congress a veto on amendments because “no amendments of the proper kind would ever be obtained by the people if the [national] Government should become oppressive, as he verily believed would be the case.”<sup>339</sup>

To be sure, the Framers did not want to make it easy for the States to propose amendments. That is why Article V requires two-thirds of the state legislatures to apply for a constitutional convention. But it is equally true that the Framers did not want either mode of amending the Constitution to be impossible. As James Madison explained in the *Federalist*, Article V “guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.”<sup>340</sup>

### *B. Objections to an Article V Convention Lack Merit*

The Framers intended for States to call for conventions to propose constitutional amendments when, as now, the federal government has overstepped its bounds. And over the last 200 or so years, there have been hundreds of applications calling for such a convention spread out among virtually every state legislature. Yet no application has reached the critical two-thirds threshold to require the convention.

The States’ previous failures to reach the two-thirds threshold for a convention could stem from the fact that, before now, circumstances did not demand it. But it is also possible that the States’ efforts have been thwarted by counterarguments that surely will surface again in response to the Texas Plan. Whatever influence such counterarguments may have in previous contexts and other state legislatures’ applications for constitutional conventions, they lack merit here.

As an initial matter, the Texas Plan and the need for a constitutional convention cannot be dismissed as “radical.” It is the predicted norm rather than a deviation from it. It is expressly mentioned in the Constitution, and the proposed path is no less a part of our foundational charter than any other provision of that document. Moreover, as George Mason proved, the need for a convention called for and led by the States was foreseeable at the Founding.

And the sky has not fallen when the States have called for conventions in the past. For example, in 1977, Texas called for a convention to propose a balanced budget amendment.<sup>341</sup> And at one time, the nationwide balanced-budget movement was only two States shy of the two-thirds needed to call for a convention on the subject.<sup>342</sup> Likewise, a push for a convention to limit income tax rates was only two States shy of going into effect.<sup>343</sup> Finally, a coalition was only one State shy of the two-thirds necessary to call a convention for the direct election of Senators; Congress preempted that effort by proposing the amendment itself.<sup>344</sup> Thus, even though the States have not yet successfully called for a convention, the effort cannot be dismissed as radical or unprecedented.

Nor can critics credibly claim that a convention is “scary” or that it somehow threatens valuable tenets of the Constitution. That is so for at least two reasons. First, whatever happens at the convention, no amendments will be made to the Constitution unless and until they are approved by an overwhelming majority (three-fourths) of the States. That is an extraordinary super-majority requirement that ensures, in James Iredell’s words, that “[i]t is highly probable that amendments agreed to in either of [Article V’s] methods would be conducive to the public welfare, when so large a majority of the states consented to them.”<sup>345</sup> It takes only 13 States to block any measure from becoming a constitutional amendment.

Second, it is not as if the three-fourths approval requirement is the Constitution’s only failsafe against imprudent amendments. The Constitution also leaves it to the States to limit the scope of the convention itself. In fact, four States already have applied for constitutional conventions that include some portion of the Texas Plan, and all of them limit their applications to specific issues.<sup>346</sup> Likewise, the Texas Legislature can limit its application for a convention—or its participation in a convention—to the specific issues included in the Texas Plan and discussed above. To the extent the convention strayed from those issues, Texas’s consent to the convention’s activities would automatically dissolve. State legislatures could even command in their laws authorizing participation in a convention that the state must vote against any constitutional convention provision not authorized by the state.

Some nonetheless argue that the Constitution does not allow state legislatures to limit the scope of a convention. The critics seize on this argument to raise the specter of a “runaway convention,” in which the States propose a convention to debate limited amendments, but in which the delegates end up

throwing the entire Constitution in the trashcan. Even if that happened, none of the delegates' efforts would become law without approval from three-fourths of the States. But even on its own terms, the criticism lacks merit.

The specter of a “runaway convention” goes like this. First, the critics argue, the Constitution says state legislatures “shall call a Convention for proposing Amendments,” not for *confirming* a pre-written amendment that the state legislatures included in their applications for a convention.<sup>347</sup> That means, the critics say, that States must call general, open-ended conventions; the convention delegates then perform the work of drafting the amendments; and the States' only option is to give a thumbs-up or thumbs-down at the end of the convention process. If the Framers of Article V wanted to authorize conventions limited to particular issues, the critics conclude, they would have said so.

It is true that Article V does not expressly authorize States to limit conventions to particular issues—but the problem for would-be critics of the Texas Plan is that Article V *also* does not require general and open-ended conventions. Indeed, that is by design. As noted above, the whole point of the second path for proposing amendments was to *empower* States to propose amendments to the Constitution. In adopting that second path, the Framers agreed with George Mason that the States should have constitutional redress when the federal government overstepped its bounds. And nothing that Mason (or his fellow Framers) said would suggest that the States were somehow limited in *how* they exercised that power to defend their prerogatives against a federal government.<sup>348</sup> To the contrary, James Madison specifically noted that the Constitution was silent on the issue,<sup>349</sup> and he argued that that silence was good and necessary to preserve the States' flexibility. In Madison's words, “Constitutional regulations [of such matters] out to be as much as possible avoided.”<sup>350</sup>

While the Constitution's text is silent on the topic, the Framers themselves were not. To take just one example, George Nicholas pointed out during Virginia's ratification debates that conventions called by the States could—indeed, *would*—be limited to particular issues: “The conventions which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations.”<sup>351</sup> And because the States would limit their applications for conventions to particular issues, “[i]t is natural to conclude that those states who apply for calling the convention will concur in the ratification of the proposed amendments.”<sup>352</sup> Of course, it would not be natural to assume that the States would support the results of the convention they called if—as the critics argue—the States could have zero assurances regarding what the convention delegates would do at that convention.

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The very thing that belies any allegation of radicalism in the Texas Plan—namely, the super-majority requirements for proposing and ratifying amendments—arguably undermines its efficacy as a check on federal overreach. The latter was the principal point of Patrick Henry, one of the greatest orators of the Eighteenth Century and a ferocious Anti-Federalist. He argued that the States' power to amend the Constitution did not go nearly far enough to protect the people from an overbearing federal government. In particular, he bemoaned Article V's super-majority requirements:

This, Sir, is the language of democracy; that a majority of the community have a right to alter their Government when found to be oppressive: But how different is the genius of your new Constitution from this! How different from the sentiments of freemen, that a contemptible minority can prevent the good of the majority! . . . If, Sir, amendments are left to the twentieth or tenth part of the people of America, your liberty is gone forever. . . . It will be easily contrived to procure the opposition of one tenth of the people to any alteration, however judicious. The Honorable Gentleman who presides, told us, that to prevent abuses in our Government, we will assemble in Convention, recall our delegated powers, and punish our servants for abusing the trust reposed in them. Oh, Sir, we should have fine times indeed, if to punish tyrants, it were only sufficient to assemble the people!<sup>353</sup>

Patrick Henry might be right that even an assembly of the people will be insufficient to restore the rule of law and to bring the federal government to heel. And it is true that Article V allows a minority to oppose any amendment that the overwhelming majority of Americans support.

But far from dissuading the effort to amend our Constitution, Henry's words should encourage it. The benefits of the Texas Plan are many because any change effectuated by an assembly of the people will force the federal government—whether in big ways or small—to take the Constitution seriously again. And the downsides of such an assembly are virtually nonexistent, given that any change to our Constitution's text requires such overwhelming nationwide support. The only true downside comes from doing nothing and allowing the federal government to continue ignoring the very document that created it.

NOTES

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<sup>1</sup> See ANNENBERG PUBLIC POLICY CENTER, *THE GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS* (Sept. 2011).

<sup>2</sup> An audio clip of the question and Speaker Pelosi’s response can be found at <https://www.youtube.com/watch?v=08uk99L8oqQ>.

<sup>3</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

<sup>4</sup> The Federalist No. 51, at 322 (Madison) (Clinton Rossiter ed. 1961) [hereinafter “THE FEDERALIST”].

<sup>5</sup> John Adams, *Thoughts on Government* (Apr. 1776) (reprinted in 1 THE FOUNDERS’ CONSTITUTION 108 (P. Kurland & R. Lerner eds. 1987) [hereinafter “FOUNDERS CONSTITUTION”]).

<sup>6</sup> MASS. CONST. art. XXX (1780).

<sup>7</sup> ARTHUR L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 13 (1953).

<sup>8</sup> THE FEDERALIST No. 45, at 290 (Madison).

<sup>9</sup> THE FEDERALIST No. 51, at 323 (Madison).

<sup>10</sup> THE FEDERALIST No. 45, at 290-91 (Madison).

<sup>11</sup> Brutus No. 15 (reprinted in 1 FOUNDERS’ CONSTITUTION 284).

<sup>12</sup> Gallup, *Confidence in Institutions*, available at <http://www.gallup.com/poll/1597/confidence-institutions.aspx>.

<sup>13</sup> U.S. CONST. art. I, § 1.

<sup>14</sup> U.S. CONST. art. II, § 1 (emphasis added).

<sup>15</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>16</sup> 2 FOUNDERS’ CONSTITUTION 25.

<sup>17</sup> See *id.* at 25-26 (noting that May 31st draft of Congress’s vesting clause would have given that body the power “[t]o negative all laws, passed by the several States, contravening, in the opinion of the national legislature, articles of union or any Treaties subsisting under the authority of the union”).

<sup>18</sup> Most notable in that regard was an Anti-Federalist who wrote under the pseudonym, “An Old Whig.” An Old Whig argued that the Constitution gave Congress enough power to command the entire Nation and to obviate the individual States:

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“[B]y their proposed constitution, [the Framers] seem to have resolved to give the new continental government every kind of power whatsoever, throughout the United States. This power I have already attempted to show, is not limited by any stipulations in favour of the liberty of the subject, and it is easy to shew, that it will be equally unchecked by any restraint from the individual states. The treasure of the whole continent will be entirely at their command.

An Old Whig, No. 6 (reprinted in 2 FOUNDERS’ CONSTITUTION 414).

<sup>19</sup> See THE FEDERALIST No. 45, at 288-94. Madison’s explanation is worth quoting at length:

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members.

*Id.* at 291.

<sup>20</sup> *Id.* at 292-93.

<sup>21</sup> THE FEDERALIST No. 17, at 118 (Hamilton).

<sup>22</sup> *Ibid.*

<sup>23</sup> Legislative Petitions of the General Assembly, 1776-1865.

<sup>24</sup> THE FEDERALIST No. 17, at 120 (Hamilton).

<sup>25</sup> *Ibid.*

<sup>26</sup> 21 C.F.R. § 1240.61(a); see also FDA seeks permanent injunction against Pennsylvania dairy, available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm252727.htm>.



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<sup>27</sup> *E.g.*, 50 C.F.R. § 622.37. If a federal officer suspects that a fisherman caught undersized fish, the officer can storm the boat without a warrant, inspect the catch, and impose up to \$100,000 in civil penalties for the violation. *See* 16 U.S.C. § 1858; *Yates v. United States*, 135 S. Ct. 1074 (2015).

<sup>28</sup> *See* 80 Fed. Reg. 37,054 (June 29, 2015), *stayed sub nom. In re EPA*, 803 F.3d 804 (6th Cir. 2015).

<sup>29</sup> *See* The Story of the Creation of the Nation's First Hospital, *available at* <http://www.uphs.upenn.edu/paharc/features/creation.html>.

<sup>30</sup> *Over-regulated America*, THE ECONOMIST (Feb. 18, 2012).

<sup>31</sup> *See* U.S. CONST. art. I, § 8, cl. 6 (counterfeiting); *id.* cl. 10 (piracy); U.S. CONST. art. III, § 3, cl. 1 (treason).

<sup>32</sup> *See* <http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations>.

<sup>33</sup> *See* <http://www.wsj.com/articles/SB10001424052970204903804577082770135339442>.

<sup>34</sup> *See* <http://www.laweekly.com/news/busted-for-off-leash-dog-man-ordered-not-to-leave-southern-california-4880203>

<sup>35</sup> *See* <http://www.heritage.org/research/reports/2009/07/the-unlikely-orchid-smuggler-a-case-study-in-overcriminalization>.

<sup>36</sup> *See* THE FEDERALIST No. 17, at 119 (Hamilton) (“It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union.”).

<sup>37</sup> MICHAEL GREVE, THE UPSIDE-DOWN CONSTITUTION 389 (2012); *see also id.* chs. 2-3 (discussing the various provisions of the Constitution that force States to compete against each other for people and businesses).

<sup>38</sup> *See* Phillip Reese, *Roughly 5 Million People Left California In the Last Decade*, SACRAMENTO BEE, *available at* [www.sacbee.com/site-services/databases/article32679753.html](http://www.sacbee.com/site-services/databases/article32679753.html).

<sup>39</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>40</sup> *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (upholding a federal statute that regulates marijuana, even when it is not sold to anyone, let alone in commerce with foreign nations, among the several states, or with the Indian tribes); *Alderman v. United States*, 565 F.3d 641 (9th Cir. 2009) (Congress can regulate mere noncommercial possession of body armor), *cert. denied*, 562 U.S. 1163 (2011).

<sup>41</sup> See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION ch. 11 (rev. ed. 2014).

<sup>42</sup> *Raich*, 545 U.S. at 58 (Thomas, J., dissenting).

<sup>43</sup> See THE FEDERALIST No. 45, at 292 (Madison).

<sup>44</sup> U.S. CONST. art. I, § 9, cl. 6.

<sup>45</sup> See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987).

<sup>46</sup> BARNETT, *supra* note 41, at [538], [541].

<sup>47</sup> *Id.* at [541].

<sup>48</sup> THE FEDERALIST No. 45 (Madison), at 293 (emphasis added).

<sup>49</sup> THE FEDERALIST No. 42 (Madison), at 267-68.

<sup>50</sup> See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

<sup>51</sup> *Id.* at 12.

<sup>52</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>53</sup> See WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132-62 (1995).

<sup>54</sup> See Franklin D. Roosevelt, Fireside Chat 9: On “Court-Packing” (Mar. 9, 1937), available at <http://millercenter.org/President/speeches/speech-3309>.

<sup>55</sup> *Ibid.*

<sup>56</sup> 300 U.S. 379 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)).

<sup>57</sup> See *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>58</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Shreveport Rate Cases*, 234 U.S. 342 (1914).

<sup>59</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>60</sup> See 65 Fed. Reg. 81,419 (Dec. 26, 2000) (listing the Braken Bat Cave Meshweaver, or *Cicurina venii*, as an endangered species); Vianna Davila, *Tiny Spider is a Big Roadblock*, SAN ANTONIO EXPRESS-NEWS (Sept. 8, 2012) (noting that federal regulation of the cave spider stopped a \$15 million highway project in San Antonio); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding the constitutionality of Congress’s prohibition against the harassment of the Delhi Sands Flower-Loving Fly, an endangered species that lives exclusively within the State of California and that never has been bought or sold or otherwise traded in commerce with anyone); *id.* at 1061 (Sentelle, J., dissenting)

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(“The proposition that the federal government can, under the Interstate Commerce Clause, regulate an activity which is neither interstate nor commerce, reminds me of the old chestnut: If we had some ham, we could fix some ham and eggs, if we had some eggs. With neither ham nor eggs, the chances of fixing a recognizable meal requiring both amount to nil. Similarly, the chances of validly regulating something which is neither commerce nor interstate under the heading of the interstate commerce power must likewise be an empty recitation.”); *supra* note 40, and accompanying text.

<sup>61</sup> See *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (“The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 586 (1985) (O’Connor, J., dissenting) (“[S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers” under the Commerce Clause.).

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>63</sup> *M’Culloch v. Maryland*, 17 U.S. 316, 347 (1819).

<sup>64</sup> James Madison, Vices of the Political System of the United States (reprinted in 1 FOUNDERS’ CONSTITUTION 166, 166-67).

<sup>65</sup> *Id.* at 167.

<sup>66</sup> Articles of Confederation, art. III (1781).

<sup>67</sup> See THE FEDERALIST No. 41 (Madison), at 262 (“Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power ‘to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,’ amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.”).

<sup>68</sup> U.S. CONST. art. 1, § 8, cl. 12.

<sup>69</sup> U.S. CONST. art. 1, § 8, cl. 9.

<sup>70</sup> U.S. CONST. art. 1, § 8, cl. 7.

<sup>71</sup> See THE FEDERALIST No. 41 (Madison), at 263 (“Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.”).

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<sup>72</sup> 2 Annals of Cong., House of Representatives, 1st Cong., 2nd Sess. 1686 (1790).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> 6 Annals of Cong., House of Representatives, 4th Cong., 2nd Sess. 1712 (1796).

<sup>76</sup> *Ibid.*

<sup>77</sup> See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997).

<sup>78</sup> *Id.* at 1717 (emphasis added).

<sup>79</sup> *Id.* at 1727.

<sup>80</sup> See 39 Annals of Cong., House of Representatives, 17th Cong., 1st Sess. 1838 (1822) (“It is contended, on the one side [by people who agreed with Madison’s statements at the Founding], that, as the National Government is a Government of limited powers, it has no right to expend money, except in the performance of acts authorized by the other specific grants, according to a strict construction of their powers; that this grant in neither of its branches gives to Congress discretionary power of any kind, but is a mere instrument, in its hands, to carry into effect the powers contained in the other grants. To this construction I was inclined in the more early stage of our Government; but, on further reflection and observation, my mind has undergone a change, for reasons which I will frankly unfold.”).

<sup>81</sup> *Id.* at 1849.

<sup>82</sup> *United States v. Butler*, 297 U.S. 1 (1936).

<sup>83</sup> *Id.* at 77.

<sup>84</sup> See *supra* notes 53-56, and accompanying text.

<sup>85</sup> See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (holding Congress had power to promote “the general welfare” by spending federal tax dollars to cajole States to create unemployment funds).

<sup>86</sup> The “Troubled Asset Relief Program” was established by the Economic Stabilization Act of 2008. See Pub. L. No. 110-343, Div. A, Title I, § 101, Oct. 3, 2008, 122 Stat. 3767. The statute authorizes the Treasury Secretary virtually unfettered discretion to spend up to \$750 billion in federal tax dollars “to purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.” 12 U.S.C. § 5211(a)(1).

<sup>87</sup> *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>88</sup> Unless otherwise indicated, all data on spending, revues, debts, and deficits are reported at [http:// www.usgovernmentspending.com](http://www.usgovernmentspending.com).

<sup>89</sup> See <http://www.cbpp.org/research/policy-basics-where-do-our-federal-tax-dollars-go>

<sup>90</sup> See CIA's World Fact Book, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html>.

<sup>91</sup> See <http://www.heritage.org/federalbudget/typical-family-spent-like-government>.

<sup>92</sup> See Steven G. Calabresi, *The Answer is a Balanced Budget Amendment*, AMERICAN SPECTATOR (Oct. 2011).

<sup>93</sup> See *ibid.*

<sup>94</sup> See Lawson, *supra* note 3, at 1231 (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” (footnote omitted)); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

<sup>95</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 141, 143 (1689).

<sup>96</sup> MONTESQUIEU, THE SPIRIT OF THE LAWS, Book XI, ch. 6 (1748).

<sup>97</sup> Virginia Declaration of Rights, § 5 (June 12, 1776) (reprinted in 3 FOUNDERS’ CONSTITUTION 491).

<sup>98</sup> THE FEDERALIST No. 47 (Madison), at 301.

<sup>99</sup> *Ibid.*

<sup>100</sup> John Adams, Thoughts on Government (Apr. 1776) (reprinted in 1 FOUNDERS’ CONSTITUTION 109).

<sup>101</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>102</sup> *Ibid.*

<sup>103</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>104</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) (reprinted in 1 FOUNDERS’ CONSTITUTION 644).

<sup>105</sup> An Old Whig No. 5 (Fall 1787) (reprinted in 3 FOUNDERS’ CONSTITUTION 501).

<sup>106</sup> Records of the Federal Convention (reprinted in 3 FOUNDERS’ CONSTITUTION 491); see also *id.* at 493 (“A unity of the Executive he observed would savor too much of a monarchy.”).

<sup>107</sup> James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787) (reprinted in 3 FOUNDERS' CONSTITUTION 501).

<sup>108</sup> The twenty-second amendment, which limits Presidents to two elected terms, was not ratified until 1951.

<sup>109</sup> Cato No. 4 (reprinted in 3 FOUNDERS' CONSTITUTION 499).

<sup>110</sup> Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788) (reprinted in 3 FOUNDERS' CONSTITUTION 505).

<sup>111</sup> THE FEDERALIST No. 70 (Hamilton), at 424.

<sup>112</sup> THE FEDERALIST No. 71 (Hamilton), at 431.

<sup>113</sup> *Id.* at 434.

<sup>114</sup> *Id.* at 435.

<sup>115</sup> THE FEDERALIST No. 47 (Madison), at 301.

<sup>116</sup> HAMBURGER, *supra* note 94, at 8.

<sup>117</sup> *See supra* note 107, and accompanying text.

<sup>118</sup> *See, e.g.*, THE FEDERALIST No. 78, at 464-72 (Hamilton).

<sup>119</sup> *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1802); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-13 n.(a) (1792) (recounting the circuit court opinions by Wilson, Jay, and Iredell).

<sup>120</sup> *See, e.g.*, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); HAMBURGER, *supra* note 94, at 283-321.

<sup>121</sup> *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

<sup>122</sup> 24 Stat. 209.

<sup>123</sup> *See United States v. Easton*, 144 U.S. 677 (1892).

<sup>124</sup> *Id.* at 688.

<sup>125</sup> *Ibid.* By contrast, in 1897, Congress passed “An Act To Prevent the Importation of Impure and Unwholesome Tea.” 29 Stat. 604, chap. 358, U.S. Comp. Stat. 1901, p. 3194. That statute created a “board of tea experts” within the Treasury Department, which is one of the President’s cabinet-level executive branch agencies. The statute gave the board of tea experts the power to create standards for the “taste and flavor” of tea, and to bar the importation of teas that the experts determined were not up to snuff. *Buttfield v. Stranahan*, 192 U.S. 470, 475 (1904). A would-be importer of unwholesome tea challenged

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the statutory scheme as an unconstitutional delegation of lawmaking power to the executive branch board of tea experts. And the Supreme Court rejected the challenge:

We are of opinion that the statute, when properly construed, as said by the circuit court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

*Id.* at 496. That is, the tea statute passed constitutional muster because Congress made the determination to ban the importation of certain kinds of tea and left it to the President’s executive branch agency to enforce (or execute) that statutory determination.

<sup>126</sup> Pub. L. No. 73-67, 48 Stat. 195, enacted June 16, 1933.

<sup>127</sup> 48 Stat. at 200, 15 U.S.C. § 709(c).

<sup>128</sup> Exec. Order 6256 (Aug. 19, 1933).

<sup>129</sup> *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>130</sup> *Id.* at 418-19.

<sup>131</sup> Its full name was the “Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.”

<sup>132</sup> *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 524 (1935).

<sup>133</sup> *Id.* at 529-30.

<sup>134</sup> *Id.* at 542.

<sup>135</sup> *See supra* notes 53-56, 84, and accompanying text.

<sup>136</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938).

<sup>137</sup> *Id.* at 2.

<sup>138</sup> *Id.* at 10.

<sup>139</sup> *Id.* at 12.

<sup>140</sup> *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *Yakus v. United States*, 321 U.S. 414, 425-27 (1944).

<sup>141</sup> 42 U.S.C. § 7411.

<sup>142</sup> *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,661 (Oct. 23, 2015); NERA, *Energy and Consumer Impacts of EPA’s Clean Power Plan* (Nov. 7, 2015).

<sup>143</sup> See S.J. Res. 24, 114th Cong., 1st Sess. (2015).

<sup>144</sup> S.J. Resolution 24 passed by a 62 vote margin in the House and a six-vote margin in the Senate.

<sup>145</sup> See Statement of Administration Policy, S.J. Res. 24—Disapproving EPA Rule on Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units (Nov. 17, 2015), *available at* [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr24s\\_20151117.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr24s_20151117.pdf); Memorandum of Disapproval on S.J. Res. 24 (Dec. 18, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-24>.

<sup>146</sup> See U.S. CONST. art. I § 7.

<sup>147</sup> See THE FEDERALIST No. 39 (Madison), at 240-46.

<sup>148</sup> See, e.g., THE FEDERALIST No. 52 (Madison), at 325; THE FEDERALIST No. 53 (Madison), at 330; THE FEDERALIST No. 62 (Madison), at 376; THE FEDERALIST No. 63 (Madison), at 382; THE FEDERALIST No. 64 (Jay), at 390; THE FEDERALIST No. 65 (Hamilton), at 396; THE FEDERALIST No. 67 (Hamilton), at 407; THE FEDERALIST No. 68 (Hamilton), at 411; THE FEDERALIST No. 69 (Hamilton), at 415; THE FEDERALIST No. 70 (Hamilton), at 423.

<sup>149</sup> See THE FEDERALIST No. 64 (Jay), at 392; *see also* THE FEDERALIST No. 63 (Madison), at 384 (system should prevent Congress from passing laws “stimulated by some irregular passion, or some illicit advantage”).

<sup>150</sup> See *infra* Part V.

<sup>151</sup> *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474-75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

<sup>152</sup> See *id.* at 475 (“[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.”).

<sup>153</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012).

<sup>154</sup> See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1193-98 (1999).

<sup>155</sup> N.Y. City Health Code [24 RCNY] § 81.53 [b], [c].

<sup>156</sup> New York City Charter § 556.



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<sup>157</sup> See *New York Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 550 (N.Y. 2014) (Reed, J., dissenting).

<sup>158</sup> *Id.* at 548.

<sup>159</sup> Records of the Federal Convention (reprinted in 4 FOUNDERS' CONSTITUTION 592).

<sup>160</sup> *Id.* at 593.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Id.* at 594.

<sup>163</sup> *Id.* at 594-95.

<sup>164</sup> U.S. CONST. art. VI, cl. 2.

<sup>165</sup> An Old Whig No. 2 (reprinted in 4 FOUNDERS' CONSTITUTION 598).

<sup>166</sup> Federalist No. 33 (Hamilton), at 201 (emphasis added).

<sup>167</sup> THE FEDERALIST No. 44 (Madison), at 284.

<sup>168</sup> THE FEDERALIST No. 46 (Madison), at 296.

<sup>169</sup> THE FEDERALIST No. 45 (Madison), at 291.

<sup>170</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>171</sup> There are myriad examples of such “independent” agencies, which purport to exercise the President’s powers to enforce federal law even without being accountable to the President. Examples include the CIA, FTC, NLRB, SEC, SSA, and the USPS. The Supreme Court long ago held that the Constitution allows the creation and existence of these agencies. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

<sup>172</sup> See *supra* note 94, and accompanying text.

<sup>173</sup> Indeed, Professor Hamburger explains that the Framers adopted the Constitution precisely because they wanted to prohibit as unlawful such executive decrees. See HAMBURGER, *supra* note 94, at 7-8.

<sup>174</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 261.

<sup>175</sup> 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1831, at 694 (1833).

<sup>176</sup> *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000).

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<sup>177</sup> *Id.* at 867-68.

<sup>178</sup> THE FEDERALIST No. 46 (Madison), at 296.

<sup>179</sup> *Geier*, 529 U.S. at 885-86.

<sup>180</sup> *Id.* at 587 (Thomas, J., concurring in judgment).

<sup>181</sup> As Justice O'Connor has explained:

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes. The Constitution contemplates an indestructible Union, composed of indestructible States, a system in which both the State and National Governments retain a separate and independent existence.

*FERC v. Mississippi*, 456 U.S. 742, 777-78 (1982) (O'Connor, J., dissenting) (internal quotation marks omitted). This facet of the Texas Plan also would harmonize the doctrine of preemption, in which *Geier* always has been somewhat anomalous. For example, the Supreme Court often emphasizes: “*In all pre-emption cases*, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added; quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Given that “all preemption cases” should turn on clear statements from Congress, it makes little sense to allow administrative agencies to preempt state law without *any* statement from Congress (let alone a clear one).

<sup>182</sup> THE FEDERALIST No. 78 (Hamilton), at 467; *see also* James Wilson, Pennsylvania Ratifying Convention (Dec. 1787) (reprinted in 4 FOUNDERS’ CONSTITUTION 229).

<sup>183</sup> U.S. CONST. art. III, § 1.

<sup>184</sup> *Ibid.*

<sup>185</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>186</sup> THE FEDERALIST No. 78 (Hamilton), at 465.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> Jeffrey Rosen, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015).

<sup>190</sup> *Ibid.*

<sup>191</sup> Federal Farmer No. 15 (reprinted in 4 FOUNDERS' CONSTITUTION 233).

<sup>192</sup> *Id.* at 232-33.

<sup>193</sup> Brutus No. 12 (reprinted in 4 FOUNDERS' CONSTITUTION 236-37).

<sup>194</sup> *Ibid.*

<sup>195</sup> Brutus No. 11 (reprinted in 4 FOUNDERS' CONSTITUTION 235).

<sup>196</sup> Brutus No. 15 (reprinted in 4 FOUNDERS' CONSTITUTION 238).

<sup>197</sup> *See* THE FEDERALIST No. 81 (Hamilton), at 485.

<sup>198</sup> *Ibid.*

<sup>199</sup> Brutus No. 15 (reprinted in 4 FOUNDERS' CONSTITUTION 238).

<sup>200</sup> *See, e.g.,* Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805: Political Forces and Press Reaction*, 14 AM. J. LEGAL HISTORY 55-75 (1970); Richard Ellis, *The Impeachment of Samuel Chase*, in AMERICAN POLITICAL TRIALS 57-76 (Michael R. Belknap ed. 1994).

<sup>201</sup> THE FEDERALIST No. 81 (Hamilton), at 484-85.

<sup>202</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>203</sup> *See* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 274 (1997).

<sup>204</sup> Andrew Jackson, Veto Message (July 10, 1832), in 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576 (James D. Richardson ed., 1897).

<sup>205</sup> *Id.* at 581.

<sup>206</sup> Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 230 (1999).

<sup>207</sup> 60 U.S. 393 (1856).

<sup>208</sup> Lincoln's First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Basler ed. 1953).

<sup>209</sup> U.S. CONST. art. VI, cl. 2.

<sup>210</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1802).

<sup>211</sup> See PLATO, THE REPUBLIC 473d-473e (“Unless the philosophers rule as kings or those now called kings and chiefs genuinely and adequately philosophize, and political power and philosophy coincide in the same place, while the many natures now making their way to either apart from the other are by necessity excluded, there is no rest from ills for the cities, my dear Glaucon, nor I think for human kind, nor will the regime we have now described in speech ever come forth from nature, insofar as possible, and see the light of day of the sun.”).

<sup>212</sup> In *Chisholm v. Georgia*, 2 U.S. 419 (1793), the Supreme Court held that States did not enjoy sovereign immunity when sued by citizens of other States in federal court. Two years later, the States ratified the Eleventh Amendment to overturn that result. See U.S. CONST. amdt. XII.

<sup>213</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment).

<sup>214</sup> MONTESQUIEU, *supra* note 96, Book XI, ch. 6.

<sup>215</sup> *United States v. United Mine Workers of America*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring in judgment).

<sup>216</sup> 5 WRITINGS OF JAMES MADISON 294 (G. Hunt ed., 1904) (emphasis added).

<sup>217</sup> STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 412 (F. Wharton ed., 1849).

<sup>218</sup> Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed. 1897).

<sup>219</sup> U.S. CONST. amdt. VIII.

<sup>220</sup> Bill of Rights, § 10, 1 W. & M., 2d Sess. c.2 (Dec. 16, 1689). The excessive penalties prohibition was prompted by the Case of Titus Oates, 10 How. St. Tr. 1079 (K.B. 1685). Titus Oates was convicted of two counts of perjury for concocting the “Popish Plot” during the reign of King Charles II. As punishment for those lies, he was stripped of his clerical dress, imprisoned for life, and sentenced to be pilloried in various places throughout London five times a year for the rest of his life. See 5 FOUNDERS’ CONSTITUTION 368.

<sup>221</sup> MONTESQUIEU, *supra* note 96, Book VI, ch. 12.

<sup>222</sup> See 5 FOUNDERS’ CONSTITUTION 374.

<sup>223</sup> *Id.* at 374-75.

<sup>224</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>225</sup> *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

<sup>226</sup> *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

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<sup>227</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>228</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010).

<sup>229</sup> *Roper v. Simmons*, 543 U.S. 551, 607-08 (2005) (quoting Federalist No. 78).

<sup>230</sup> U.S. CONST. art. III, § 3.

<sup>231</sup> 18 U.S.C. § 2381.

<sup>232</sup> 4 BLACKSTONE, COMMENTARIES 369 (1769) (reprinted in 5 FOUNDERS' CONSTITUTION 371).

<sup>233</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

<sup>234</sup> U.S. CONST. amdt. V. Justice Scalia's explanation of this point is worth quoting at length:

A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now*, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,” and that no person shall be “deprived of life ... without due process of law.” Nevertheless, today Justice Breyer takes on the role of the abolitionists in this long-running drama, arguing that the text of the Constitution and two centuries of history must yield to his “20 years of experience on this Court,” and inviting full briefing on the continued permissibility of capital punishment.

*Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring).

<sup>235</sup> JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 138 (reprinted in 5 FOUNDERS' CONSTITUTION 310).

<sup>236</sup> *Id.* § 222.

<sup>237</sup> *See generally* 5 FOUNDERS' CONSTITUTION 302-43 (collecting sources).

<sup>238</sup> *See Kelo v. City of New London*, 545 U.S. 469 (2005); ILYA SOMIN, THE GRASPING HAND: “KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN (2015).

<sup>239</sup> U.S. CONST. amdt. I.

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<sup>240</sup> DAVID HUME, OF THE LIBERTY OF THE PRESS (1742) (reprinted in 5 FOUNDERS' CONSTITUTION 117).

<sup>241</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>242</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>243</sup> *United States v. Stevens*, 559 U.S. 460 (2010).

<sup>244</sup> *Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

<sup>245</sup> *Brown v. Entertainment Merchants Association*, 132 S. Ct. 81 (2011).

<sup>246</sup> *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

<sup>247</sup> THE FEDERALIST No. 78 (Hamilton), at 468-69.

<sup>248</sup> U.S. CONST. art. V.

<sup>249</sup> See, e.g., THE FEDERALIST No. 49 (Madison), at 313-17 (describing the debate between Madison and Jefferson).

<sup>250</sup> As Elbridge Gerry put it: "The novelty & difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt." Records of the Federal Convention (reprinted in 4 FOUNDERS' CONSTITUTION 576).

<sup>251</sup> *Ibid.*

<sup>252</sup> Articles of Confederation, art. XIII.

<sup>253</sup> St. George Tucker, Blackstone's Commentaries (1803) (reprinted in 4 FOUNDERS' CONSTITUTION 583).

<sup>254</sup> *Ibid.*

<sup>255</sup> Under the original Constitution, Senators were selected by state legislatures. See U.S. CONST. art. I, § 3. The Framers preferred indirect election of Senators as a way of protecting the States. As Madison put it, "It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems." Federalist No. 62 (Madison). The Seventeenth Amendment removed that link and made Senators directly elected by the people. See U.S. CONST. amdt. XVII.

<sup>256</sup> *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting).

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<sup>257</sup> The Constitution’s Elections Clause provides: “The times, places and manner of holding elections for Senators and Representatives, shall be prescribed *in each state by the legislature thereof.*” U.S. CONST. art. I, § 4 (emphasis added). Arizona did not want its legislature to be responsible for redistricting; it wanted a redistricting commission to perform that task, notwithstanding the text of the Constitution.

<sup>258</sup> *Arizona State Legislature*, 135 S. Ct. 2652.

<sup>259</sup> *Id.* at 2677-78 (Roberts, C.J., dissenting).

<sup>260</sup> NEB. CONST. art. V, § 2.

<sup>261</sup> N.D. CONST. art. VI, § 4.

<sup>262</sup> *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>263</sup> That canon is a “rule of statutory construction,” which provides: “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Ibid.*

<sup>264</sup> *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>265</sup> *Mehrens v. Greenleaf*, 227 N.W. 325, 328 (Neb. 1929).

<sup>266</sup> *See* U.S. CONST. art. III, § 2, cl. 2 (“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”).

<sup>267</sup> *See United States v. Klein*, 80 U.S. 128 (1871).

<sup>268</sup> *See, e.g., Felker v. Turpin*, 518 U.S. 651, 667 n.2 (1996) (Souter, J., concurring).

<sup>269</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1802).

<sup>270</sup> Letter from George Washington to Rev. William Gordon (July 8, 1783) (reprinted in 1 FOUNDERS’ CONSTITUTION 220).

<sup>271</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>272</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>273</sup> U.S. CONST. art. VI, § 2.

<sup>274</sup> As the editors of the *Founders’ Constitution* summarized it, “[t]he primacy of domestic policy was clearly a premise of Anti-Federalist thinking; not glory, but domestic

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happiness; not foreign adventures, but the peaceful enjoyment of liberty.” 1 FOUNDERS’ CONSTITUTION 245.

<sup>275</sup> Madison’s articulation of this point merits extended quotation:

The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?

THE FEDERALIST No. 45 (Madison), at 288-89.

<sup>276</sup> Brutus No. 1 (reprinted in 1 FOUNDERS’ CONSTITUTION 261).

<sup>277</sup> Brutus No. 11 (reprinted in 1 FOUNDERS’ CONSTITUTION 282).

<sup>278</sup> Brutus No. 1 (reprinted in 1 FOUNDERS’ CONSTITUTION 261).

<sup>279</sup> Brutus No. 7 (reprinted in 1 FOUNDERS’ CONSTITUTION 273).

<sup>280</sup> *Gonzales v. Raich*, 545 U.S. 1, 7 (2005).

<sup>281</sup> 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq.*

<sup>282</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>283</sup> *Raich*, 545 U.S. at 17.

<sup>284</sup> *Id.* at 18.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Id.* at 18-19 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).



<sup>287</sup> *Id.* at 22.

<sup>288</sup> Brutus No. 1 (reprinted in 1 FOUNDERS' CONSTITUTION 261).

<sup>289</sup> *Raich*, 545 U.S. at 57-58 (Thomas, J., dissenting).

<sup>290</sup> Brutus No. 15 (reprinted in 1 FOUNDERS' CONSTITUTION 284).

<sup>291</sup> Brutus No. 7 (reprinted in 1 FOUNDERS' CONSTITUTION 274).

<sup>292</sup> Federal Farmer No. 1 (reprinted in 1 FOUNDERS' CONSTITUTION 259).

<sup>293</sup> Agrippa No. 4 (reprinted in 1 FOUNDERS' CONSTITUTION 268).

<sup>294</sup> See U.S. ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES 7, fig. 1 (Sept. 1992).

<sup>295</sup> Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 324 (2012).

<sup>296</sup> *Ibid.*

<sup>297</sup> See, e.g., *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (emphasizing “the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause”); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasizing that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,” finding that regulation of a bacon processor was part of Illinois’s historic police powers, and nonetheless finding the state law preempted by the Federal Meat Inspection Act); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (“[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”).

<sup>298</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>299</sup> Brutus No. 15 (reprinted in 1 FOUNDERS' CONSTITUTION 284).

<sup>300</sup> Federal Farmer No. 6 (1 FOUNDERS' CONSTITUTION 273).

<sup>301</sup> Federal Farmer No. 17 (reprinted in 1 FOUNDERS' CONSTITUTION 277).

<sup>302</sup> U.S. CONST. amdt. X.

<sup>303</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>304</sup> Articles of Confederation, art. II (1781).

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<sup>305</sup> 1 Annals of Congress 761, 767 (Aug. 18, 1789) (reprinted in 5 FOUNDERS' CONSTITUTION 403).

<sup>306</sup> *Ibid.*

<sup>307</sup> See, e.g., Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1792-93 (2005).

<sup>308</sup> *Darby*, 312 U.S. at 124.

<sup>309</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>310</sup> See *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>311</sup> *Id.* at 482.

<sup>312</sup> 426 U.S. 833 (1976).

<sup>313</sup> *Id.* at 849-52.

<sup>314</sup> *Id.* at 854.

<sup>315</sup> 469 U.S. 528 (1985).

<sup>316</sup> *Id.* at 546-47.

<sup>317</sup> *Id.* at 540 (internal alterations, quotation marks, and citation omitted).

<sup>318</sup> See *supra* notes 219-234, and accompanying text.

<sup>319</sup> *Id.* at 560 (Powell, J., dissenting).

<sup>320</sup> See *New York v. United States*, 505 U.S. 144 (1992).

<sup>321</sup> See *Printz v. United States*, 521 U.S. 898 (1997).

<sup>322</sup> See *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

<sup>323</sup> See *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

<sup>324</sup> *Id.* at 666.

<sup>325</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

<sup>326</sup> See Randy E. Barnett & William J. Howell, *The Case for a "Repeal Amendment,"* WALL ST. J. (Sept. 16, 2010).

<sup>327</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

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<sup>328</sup> *Id.* at 545.

<sup>329</sup> *See id.* at 546 (“Representatives no less than Senators are allotted by the Constitution to the states, although their number varies with state population as determined by the census. Though the House was meant to be the “grand depository of the democratic principle of the government,” as distinguished from the Senate’s function as the forum of the states, the people to be represented with due deference to their respective numbers were the people of the states. And with the President, as with Congress, the crucial instrument of the selection— whether through electors or, in the event of failure of majority, by the House voting as state units—is again the states. The consequence, of course, is that the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.”).

<sup>330</sup> *Id.* at 545-46.

<sup>331</sup> *See Garcia*, 469 U.S. 528.

<sup>332</sup> *See* U.S. CONST. art. I, § 3.

<sup>333</sup> U.S. CONST. art. V.

<sup>334</sup> STORY, COMMENTARIES ON THE CONSTITUTION § 1821.

<sup>335</sup> *Id.* § 1822 (emphasis added).

<sup>336</sup> U.S. CONST. art. V.

<sup>337</sup> *See* Records of the Federal Convention (reprinted in 4 FOUNDERS’ CONSTITUTION 577).

<sup>338</sup> *Id.* at 576.

<sup>339</sup> *Id.* at 577.

<sup>340</sup> THE FEDERALIST No. 43 (Madison), at 278.

<sup>341</sup> *See* Tex. H.C.R. 31 (1977).

<sup>342</sup> RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 73-78, 78-89 (1988). Currently there are 27 States with active resolutions calling for a balanced budget amendment, and “[a]s many as 13 more states may take up the matter this year.” Editorial, USA Today (Jan. 6, 2016), *available at* <http://www.usatoday.com/story/opinion/2016/01/06/marco-rubio-constitutional-convention-balanced-budget-editorials-debates/78328702/>.

<sup>343</sup> *See* Cyril F. Brickfield, Problems Relating to a Federal Constitutional Convention, 85th Congress, 1st Sess., at 8-9, 89 (House Judiciary Committee 1957).

<sup>344</sup> *See id.* at 7, 89.

<sup>345</sup> Debate in North Carolina Ratifying Convention (July 29, 1788) (reprinted in 4 FOUNDERS' CONSTITUTION 582).

<sup>346</sup> *See* Ala. H.J.R. 112 (2015); Alaska S.J.R. 18 (2014); Ga. S.R. 736 (2014); Fla. S. Mem. 476, 658 (2014).

<sup>347</sup> *See, e.g.*, Charles L. Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626 (1979); Charles L. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Charles L. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962-64 (1963).

<sup>348</sup> *See, e.g.*, Grover Rees III, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL'Y 79 (1982).

<sup>349</sup> *See* Records of the Federal Convention (reprinted in 4 FOUNDERS' CONSTITUTION 577).

<sup>350</sup> *Id.* at 578.

<sup>351</sup> Debate in the Virginia Ratifying Convention (June 6, 1788) (reprinted in 4 FOUNDERS' CONSTITUTION 582).

<sup>352</sup> *Ibid.*

<sup>353</sup> *Id.* at 581.