

# Tulsa Law Review

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Volume 51 | Issue 3

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Spring 2016

## Structure and Relationship in American Federalism: Foundations, Consequences, and "Basic Principles" Revisited

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### Recommended Citation

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## STRUCTURE AND RELATIONSHIP IN AMERICAN FEDERALISM: FOUNDATIONS, CONSEQUENCES, AND “BASIC PRINCIPLES” REVISITED

Connor M. Ewing\*

*The goal of this Essay is to construct an account of the American federal system organized around its structural and relational components and to develop an initial delineation of what I call the politics of sovereignty of the American constitutional order—the patterns of political behavior and discourse, the relationships, and the institutional interactions that characterize and decisively shape debates over the scope and location of government power. That account and the politics it structures, I will argue, are necessarily dynamic. An ancillary goal of this Essay is to illustrate some of the implications and requirements of the account of the federal system that I offer. That is attempted through a close analysis of the “basic principles” announced by Chief Justice Roberts in his opinion in National Federation of Independent Business v. Sebelius (NFIB).*

*Part I sets forth the structural components and institutional arrangements of the federal system. A review of the constitutional logic of federalism and mechanisms designed to preserve the federal bargain demonstrates that the federal system is underdeterminate, that is, it fixes no single division of power between levels of government and instead permits a range of potential state-federal relationships within permissible constitutional bounds. In Part II, I examine the notion of “attachment” in both the *The Federalist* and the writings of several prominent Anti-Federalists. I argue that the attachment of the people—their connections and commitments to a government—is a crucial determinant of the configuration of state and national power, which configurations are enabled by federal underdeterminacy.*

*In Part III, I critically evaluate the “basic principles” of the state-federal relationship articulated by Chief Justice John Roberts in his NFIB opinion. I argue that his, and to a large extent the Court’s, understanding of the federal system entails*

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*denying both constitutional underdeterminacy and the consequences of the variability of the people’s attachment to their governments. Here I devote the most attention to the canon of constitutional avoidance, which the Court employed to uphold the Individual Mandate as a lawful exercise of Congress’s taxing power. After a sustained critique of the use of the canon in NFIB, I conclude by describing an alternative model of judicial review—which I call processual review—that is at once consonant with the understanding of the federal system offered in Parts I and II and yet distinct from the process-based theories offered by scholars like Herbert Wechsler, Jesse Choper, and Larry Kramer.*

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*What I shall discuss is the great extent to which, in dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.*

Charles L. Black, *Structure and Relationship in Constitutional Law*<sup>1</sup>

#### I. INTRODUCTION

In his Edward Douglass White Lectures, presented in 1968 at Louisiana State University, Charles Black presented a critique of American constitutional interpretation

1. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

that, though nearly half a century old, still warrants serious consideration. His point of departure was the observation that in attempting to answer constitutional questions, we have opted for an interpretive method that seeks to derive meaning and direction from the constitutional *text*. This is, in his words, “the method of purported explication or exegesis of the particular textual passage.”<sup>2</sup> The “particular-text style”<sup>3</sup> forces those in search of constitutional guidance to focus on texts that are “in form directive of official conduct, rather than . . . those that declare or create a relationship out of the existence of which inference could be drawn.”<sup>4</sup> In its place, he outlined and advanced an inference-based interpretive methodology, one “sounding in the structure of federal union, and in the relation of federal to state governments.”<sup>5</sup> Black’s emphasis on structure and inference has had a profound impact on constitutional reasoning, serving, for example, as a model for one of the six modalities of constitutional interpretation identified by Philip Bobbitt in his seminal work, *Constitutional Fate: Theory of the Constitution*.<sup>6</sup>

It is no coincidence that Black’s discussion of structural inference and relational interpretation took the federal system as a primary object of consideration. Not only is the text-based method he critiques prevalent in federalism jurisprudence, but the state-federal relationship is also, perhaps, the constitutional example *par excellence* of the need to draw inferences from structure and relationship. To fully appreciate the force and potential of the analytical posture Black advocated, we must do more than provide correctives to instances in constitutional law of the absence of such reasoning. Indeed, we must reorient our focus and shift from the interpretive domain of constitutional law to the larger realm of constitutional politics in which law is inscribed. Although Black reasoned from legal disputes centered on specific textual provisions to the relevant structures and relationships that clarify the questions presented, the nature of the American polity can also be glimpsed if we reverse that order and begin with the structures and relationships fundamental to the constitutional order. Thus reversed, the goal becomes to arrive at a clear understanding of our constitutional *regime*, so that interpretations of our constitutional *text* can proceed on a reliable foundation.

Implicit in the idea of a written constitution is a notion of defined government, of explicit declarations that establish guidelines for the legitimate use of political power and enumerate the proper objects, purposes, and means of legislation and regulation.<sup>7</sup> In

2. *Id.* at 7.

3. *Id.* at 8.

4. *Id.*

5. *Id.* at 11.

6. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). See pages 74-92 for his discussion of the structural modality and pages 77-80 for his direct engagement with Black’s arguments in *STRUCTURE AND RELATIONSHIP*, *supra* note 1.

7. This formulation, specifically the choice of “defined government” instead of “limited government” or some other formulation, is intended to set to the side questions about the nature of constitutional limitations. While the argument presented here certainly bears on those questions, a full treatment is beyond the scope of this inquiry, though one dimension of the debate is considered below. See *infra* pp. 713-16. For a recent and particularly cogent colloquy on the meaning of “limited government,” as well as a survey of the broader debate of which it is a part, compare Richard Primus, *The Limits of Enumeration*, 124 *YALE L. J.* 576 (2014) (arguing that the internal limits canon, which holds that “the powers of Congress must always be construed as authorizing less legislation than a general police power would,” is wrong), with Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 *YALE L. J. FORUM* 180, 181 (2014) (rejecting Primus’s central contention on the basis that “the constitutional text, reasonably interpreted,

republican governments, those enumerations and limitations are intended to manifest the sovereignty of the people by identifying them, rather than those who govern, as the ultimate source of political authority. While the people are sovereign, they select representatives to exercise sovereign political power over the polity. But this presents a complication. Even as sovereignty in a constitutional democracy signifies the ultimate rule of the people—Lincoln’s “political community without a political superior”<sup>8</sup>—it also signifies governmental actors with “no higher enforcement agency—no political superior.”<sup>9</sup> Making sense of sovereignty in a constitutional democracy requires coming to terms with the tension between the sovereignty of the people and the sovereignty of the people’s government(s). As a result, republican constitutional politics are characterized by what could be called a *politics of sovereignty*: the patterns of political behavior and discourse, relationships, and institutional interactions that characterize debates over the scope and location of government power.

The nature of a constitutional regime’s politics of sovereignty is largely the function of the structure of its political institutions and the relationships between the government and the people. In federal systems, the presence of two levels of government—national and sub-national, each purporting to act on behalf of the people they represent—fundamentally shapes the politics of sovereignty. In federal regimes, the perennial question of politics—what should government do?—is complicated by a further question of specification: which government should do those things?<sup>10</sup> As David Epstein notes in his study of *The Federalist*, the only unqualifiedly national component of the “partly federal, and partly national”<sup>11</sup> Constitution that Madison identifies in *Federalist* 39 is the “government’s ‘operation’ on individuals.”<sup>12</sup> As a consequence, in the American constitutional order “men have two masters, although each is only a master with respect to its own ‘objects.’”<sup>13</sup> Moreover, as we see in both Publius’s case for the Constitution and the Anti-Federalists’ response, there was neither a clear nor comprehensive division of powers between the states and the national government. Rather than establish a determinate state-federal relationship, the Constitution set forth the legal and political processes through which that relationship would be contested, defined, and revised. The federal system is fundamentally *underdeterminate*: the Constitution fixes no single division of power between levels of government and instead permits a range of potential state-federal relationships within permissible constitutional bounds. The underdeterminacy of American federalism inheres principally in the structural configuration of governing institutions and the relationships between citizens

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communicates that the sum of all actual delegated federal power amounts to something less than all possible delegated power”).

8. Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 434 (Roy P. Basler ed., 1953).

9. SOTIROS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS* 152 (2013).

10. In his study of federalism and American political development, *FEDERALISM AND THE MAKING OF AMERICA* 8-9 (2012), David Brian Robertson presents a cogent analysis of this aspect of the American federal system.

11. *THE FEDERALIST* NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961).

12. DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 51 (1984).

13. *Id.* at 51-52.

and their respective governments.<sup>14</sup>

The goal of this Essay is to construct an account of the American federal system organized around its structural and relational components and to develop an initial delineation of the politics of sovereignty of the American constitutional order. That account and the politics it structures, I will argue, are necessarily dynamic, resisting the static conceptions and synchronic analyses that dominate judicial and, to a lesser extent, academic treatments of the topic. Understanding this account of American federalism requires inferential and relational reasoning, a recognition with increasing though still muted prominence in the academic literature.<sup>15</sup> An ancillary goal of this Essay is to illustrate some of the implications of the account of the federal system that I offer. This is attempted through a close analysis of the “basic principles” announced by Chief Justice Roberts in his opinion in *National Federation of Independent Business v. Sebelius*.<sup>16</sup> Because *NFIB* provides a self-conscious and deliberate judicial engagement with the nature of the federal system, it stands as an instructive example of not only *what* the various members of the Court think about American federalism, but also *how* they think about it.

Part I sets forth the structural components and institutional arrangements of the federal system. A review of the constitutional logic of federalism and the mechanisms designed to preserve the federal bargain demonstrates that the federal system is underdeterminate, that is, it permits a range of potential state-federal relationships within permissible constitutional bounds. In Part II, I examine the notion of “attachment” in both *The Federalist* and the writings of several prominent Anti-Federalists. I argue that the attachment of the people—their connections and commitments to a government—is a crucial determinant of the configuration of state and national power made possible by federal underdeterminacy. In Part III, I critically evaluate the “basic principles” of the state-federal relationship articulated by Chief Justice John Roberts in his *NFIB* opinion. In that section, I argue that his understanding of the federal system, which is shared by many on the Court, entails denying both constitutional underdeterminacy and the consequences of the variability of the people’s attachment to their governments. It is here that I devote the most attention to the canon of constitutional avoidance, employed by the Court to uphold the Individual Mandate as a lawful exercise of Congress’s taxing power. After a sustained critique of the use of the canon in *NFIB*, I briefly sketch an alternative model of judicial review—one which I call *processual review*—that is at once consonant with the understanding of the federal system offered in Parts I and II and yet distinct from the process-based theories offered by thinkers like Herbert Wechsler, Jesse Choper, and Larry Kramer.

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14. I employ this notion of *underdeterminacy*—as well as the term itself, instead of “indeterminacy” or “ambiguity”—in conformity with others who have addressed the question of the nature of constitutional powers and the degree of textual constraint. See, e.g., MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 5 n.23 (2013). For a discussion of underdeterminacy and its relation to related terms like “vagueness” and “ambiguity,” see Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, OXFORD HANDBOOK ON LANGUAGE AND LAW (Lawrence Solan and Peter Tiersma eds., 2012).

15. For the most direct and elaborate development of this argument, see Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014).

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

## II. THE STRUCTURE OF SOVEREIGNTY

American federalism is often described as consisting in a “balance” between state and national power, a “balance” reflecting the intentions of the founders and thus providing a normative guide for constitutional interpretation.<sup>17</sup> The goal of this part of the Essay is to advance a contrary understanding of the federal system. Indeed, I argue that the balance model is the theoretical antipode to what the Constitution establishes—a two-level federal system with an underdeterminate division of political power resulting in a contested jurisdictional line between the federal and state governments. The first section describes the underdeterminate division of political power in the federal system, which I label the *constitutional logic of federalism*. In the second section, I discuss protections intended to preserve the federal bargain in light of federal underdeterminacy. Finally, I conclude with a brief discussion of the Tenth Amendment, which is often interpreted as precluding the underdeterminacy that is central to the account of the federal system I offer.

A. *The Constitutional Logic of Federalism*

To understand the structure and logic of American federalism, we can begin by asking a foundational question: What does the Constitution constitute? The Preamble declares, “We the People . . . do ordain and establish this Constitution for the United States of America,” signaling that the charter will govern the collective endeavors of the several states. The unstated premise is that the states themselves are not constituted by the Constitution. Rather, they are recognized as extant political bodies and are treated as such throughout the Constitution. Apart from the question of whether the act of ratification constituted a national people, we can conclude that it did constitute a national government in a political context where sovereign states already existed and would continue to exist in some modified status.<sup>18</sup> The question, then as it is now, is how the national government stands in relation to the states.

This point may seem self-evident, but it is in fact deeply consequential. Because the states exist in the Constitution largely by implication—their political functions taken as granted—we can identify a crucially important feature of the federal system’s design: its underdeterminate dispensation of political power between the states and the national government. Consider the two options available to the Constitutional Convention. The first was to comprehensively divide state from national power, drawing a clear jurisdictional line between the two levels and, in so doing, creating a determinate state-federal relationship. But that is emphatically what the Convention did not do, for reasons of both possibility and efficacy. First, such an endeavor would have been impossible.

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17. See, e.g., *id.* at 2661 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting) (“the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene”); and *Davis v. Monroe Cnty. Bd. of Elections*, 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting) (“the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power”). For an academic development of this understanding, see Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365 (2014).

18. See Lash, *supra* note 7, at 183-89 (reviewing the dominant theories of federalism and the place and understanding of sovereignty therein).

The delegates could not have identified every possible political contingency and specified the proper political authority and process appropriate to each. And even if they could have done so, the political divisions at the Convention would have frustrated attempts to agree on the specified authority and processes for each contingency. Second, it would have been counterproductive to seek a determinate state-federal relationship. The very “stability and energy” the convention sought to combine with “the inviolable attention due to liberty, and to the Republican form”<sup>19</sup> required the ability to address contingencies in the most effective and appropriate manner, instead of relying on the foresight of a convention unable to comprehend the political demands of the future. The latter was the failing of the Articles of Confederation and left the “Government of the United States . . . destitute of energy.”<sup>20</sup>

The *locus classicus* for the argument against determinacy is *Federalist* 37. There Madison discusses the “arduous . . . task of marking the proper line of partition, between the authority of the general, and that of the State Governments.”<sup>21</sup> After comparing the difficulties faced by the Convention to those faced by “the most acute and metaphysical Philosophers”<sup>22</sup> and “the most sagacious and laborious naturalists,”<sup>23</sup> he concludes,

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment. . . . Here then are three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas.<sup>24</sup>

Perhaps, though, this could be thought Publian dissembling. It would, after all, benefit those who favor national over state power to claim that it was impossible to clearly distinguish national from state objects. If so, then the guise of impossibility could facilitate the establishment of expansive national power. But the truth is that *Federalist* 37 was (at least) the second time this argument had appeared. After completing the draft constitution, the delegates transmitted a letter to Congress introducing their handiwork. There they admitted:

It is at all Times difficult to draw with Precision the Line between those Rights which must be surrendered and those which may be reserved[.] And on the present Occasion this Difficulty was increased

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19. THE FEDERALIST NO. 37, at 233 (James Madison).

20. THE FEDERALIST NO. 15, at 93 (Alexander Hamilton).

21. THE FEDERALIST NO. 37, at 234 (James Madison).

22. *Id.* at 235.

23. *Id.*

24. *Id.* at 236-37.

[*sic*] by a Difference among the several States as to their Situation[,] Extent[,] Habits[,] and particular Interests.<sup>25</sup>

To add a final complication, as Edward Purcell observes, the imprecise division of state and federal power was reinforced by the fact that “the Constitution conceived of both levels of government as counterpoised forces protecting the same vague and contested values—liberty, property, and republicanism.”<sup>26</sup> Hence, the contention that the constitutional division of state and national power is underdeterminate is supported by both the testimony of members of the Constitutional Convention and by the purposes they conceived both levels of government as serving.

The overlap between state and federal governments that Purcell recognizes points to the inevitable consequences of the course chosen by the Convention to construct a federal system. Rather than attempt to specify the exact set of points at which state power yields to national power (or, perhaps importantly, vice versa<sup>27</sup>), the delegates opted for grants of power and restrictions thereon. To wit, the Constitution enumerates the powers of the national government,<sup>28</sup> identifies explicit restrictions on both national<sup>29</sup> and state power,<sup>30</sup> and specifies the requirements of interstate conduct.<sup>31</sup> Additionally, the national government was endowed with the “executive Power” and “judicial Power,” housed, respectively, in the office of the president and the federal courts. The result was a federal government possessed of the inherent powers of national sovereignty—preservation of national security, superintendence of interstate conflict, management of the national economy, and the conduct of foreign diplomacy. At the same time, states maintained “most of the policy tools for governing everyday American life,”<sup>32</sup> including the powers to regulate local commerce, to ensure local peace, and to preserve and further local welfare.

The result of the Convention’s labors was a *mélange* of exclusively national, exclusively state, and concurrently exercised powers. Though defined in broad strokes, the compound republic was characterized by underdeterminacy, as there was neither an exhaustive division between state and federal power nor a clear jurisdictional line drawn

25. See MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 584 (1966) [hereinafter Farrand, RECORDS, accompanied by citation to the volume, followed by a colon and the appropriate page number(s).]

26. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 191 (2007).

27. There is reason to believe that the directionality of this point is important. Consider, for example, an articulation of the state-federal relationship that begins from the perspective of national power. The jurisdictional line would be found at the outer edge established by the full scope of the powers that the Constitution grants to the national government. If, however, the analysis is reversed, and state power is the starting point, then the jurisdictional line would be found at the edge of the full extent of the states’ powers, as expressed in their constitutions and the traditional body of police powers. Unless these two analyses can be said to establish the same jurisdictional line, then it seems reasonable to conclude that the directionality of the analysis is consequential for the contours of the state-federal relationship. Here we see the significance of the relational dimensions of the state-federal *relationship*, a point alluded to by Gerken, *supra* note 15, at 113-19.

28. U.S. CONST. art. I, § 8; art. III, § 3; art. IV, § 3 and 4.

29. *Id.* art. I, § 9.

30. *Id.* art. I, § 10.

31. *Id.* art. IV, §§ 1-2.

32. Robertson, *supra* note 10, at 32.

between the two. This meant that the “true meaning” of the state-federal relationship could not be arrived at through legal analysis or constitutional interpretation. Rather, it was an essentially political (and thus contested) question. As David Epstein argues, “While the Constitution does enumerate the objects of the central government, the partition between states and nation will not be as much a legal issue as a political one.”<sup>33</sup> Coupled with the underdeterminacy of the federal system, the inherently political nature of the state-federal relationship meant that the division of powers between levels of government could reflect the will of the people. “If . . . the people should in future become more partial to the federal than to the State governments,” Madison argued in *Federalist* 46, noting that only superior administration could accomplish this, then “they ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”<sup>34</sup> Unless this capacity of the people was to be an illusion, there had to be a means by which the people’s partiality could be meaningfully registered. By allowing for the jurisdictional line to be subject to political negotiation, the underdeterminacy of the federal system did exactly that.

Two specific constitutional provisions underscore the underdeterminacy of the state-federal relationship, and the consequent need for an inferential and relational conception of American federalism. The first is the Necessary and Proper Clause, which makes clear that the Constitution’s identification of congressional powers must not be read as an exhaustive enumeration. Rather, there are powers undefined by the Constitution that are nonetheless legitimate exercises of national power. To be sure, this clause leaves many questions unanswered, including whether it is an independent grant of power and whether it should be read as conjunctive or not. But that is precisely the point. Not only does the clause point to lawful powers beyond those explicitly granted, its formulation raises further questions about the extent of national legislative power. The Necessary and Proper Clause makes clear that the national government possesses discretionary power that by its very nature can permit only description and not enumeration.

The second provision is the Supremacy Clause, which declares that the Constitution, its laws, and treaties “shall be the supreme Law of the Land,”<sup>35</sup> and that state judges are bound by that supreme law. Consider what makes this clause consequential, that is, what prevents it from being “mere surplusage.”<sup>36</sup> If the Constitution’s division of power was exhaustive, then this clause would be superfluous; it would follow as a matter of logic that the national government was supreme in the instances it was granted power and not supreme where the states were granted power. In other words, there would be no questions occasioned by state-federal relations that a determinate division of power could not resolve because all such relations would be comprehended by a determinate federal system. However, if the Supremacy Clause is to serve anything more than a merely hortative function, it is because the Constitution’s definition of the federal system is *not* determinate, and the clause is required to address

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33. Epstein, *supra* note 12, at 53.

34. THE FEDERALIST NO. 46, at 317 (James Madison).

35. U.S. CONST. art. VI, § 2.

36. *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

those instances to which the text does not reach but federal supremacy is nonetheless intended to apply. Equally important, the Supremacy Clause explicitly identifies the actors and bodies of law relative to which national supremacy is to be understood. Rather than simply assert the superiority of the national government, the Supremacy Clause indicates that the supremacy of federal law—whatever exactly that meant—would necessarily develop and be properly understood in relation to state governments.

*B. Preserving the Federal Bargain: Three “Levels” of Constraints*

The underdeterminate federal system described above casts new light on a question central to the Convention and ratification debates: Which level of government stands to gain from an underdeterminate definition of the state-federal relationship? The Anti-Federalist critique of the Constitution (addressed further in Part II) focused on the threat of consolidation they saw in the institutions established and powers granted by the document. For their part, the Federalists had the exact opposite fear. As Publius argued in (*inter alia*) *Federalist* 17, 31, and 45,<sup>37</sup> it was at least as likely that the states would encroach on the national government, and the national government would be comparably ill-equipped to rebuff state encroachments. Both camps were united by the concern that the federal bargain reached at the Convention would not hold. Thus, two closely related questions are presented. First, what *kind* of protections does the Constitution provide for the federal system? And second, what *specific protections* does it provide? Both of these questions bear heavily on the political processes that the underdeterminate federal system structures and the political contestation that, in turn, shapes that system.

To answer the first question, we can advert to the identification, made by Filippov, Ordeshook, and Shvetsova, of three “levels” of constraints employed to preserve federal systems.<sup>38</sup> The first level entails “constraints that correspond in part to explicit bargains among federal subjects over the allocation of authority between them and the federal center, and other limits on their and the center’s actions.”<sup>39</sup> These protections consist of clear textual commitments identifying the extent of and limitations on the powers granted and prohibited, as well as promises guaranteeing autonomy in certain spheres. Level-two constraints encompass institutional structures and arrangements, both of which “define[] the national state, its relation to federal subjects, and its relation to the ultimate sovereign, the people.”<sup>40</sup> Finally, level-three constraints are the values—political, cultural, and ideological—that serve to buttress the federal system. Though

37. See THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (“It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.”); 31:198 (Hamilton: “It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments.”); THE FEDERALIST NO. 45, at 310 (James Madison) (“We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. . .[A]s the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded.”).

38. See MIKHAIL FILIPPOV, PETER C. ORDESHOOK, & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 33-41 (2004).

39. *Id.* at 36.

40. *Id.*

Filippov *et al.* focus on the operation of these values in elites, I follow Sanford Levinson and, as we shall see in Part II, James Madison in interpreting these level-three protections as being constitutionally grounded in the people.<sup>41</sup> Employing these distinctions, we can address the second question concerning specific protections provided by the Constitution. The balance of this Part focuses on the first two levels, while Part II addresses level-three protections.

### 1. Level One: Explicit Bargains

Just as dividing state from federal powers cannot be an exact science, distinguishing level-one from level-two protections can at times be challenging because textual exhortations often accompany structural guidelines, and institutional arrangements frequently incorporate a textual promise. Moreover, as Filippov *et al.* note, level-two protections serve in part to sustain level-one promises: “no Level I clause or provision can be of much consequence unless fortified by a second level of rules and procedures.”<sup>42</sup> Nonetheless, several level-one protections can be identified in the Constitution. The first, which has already been discussed, is the Article VI Supremacy Clause. There we see the declaration that the Constitution and federal law are supreme, though no structural provisions accompany that claim. The clause stops short of “confer[ring] authority on any specific level or branch to say definitively what the Constitution meant when disputes arose.”<sup>43</sup> Another such protection is offered by the Tenth Amendment, which states that all powers not delegated or prohibited are reserved to the states or to the people.<sup>44</sup> Because I discuss this amendment at greater length in the following section, it will suffice for present purposes simply to note that it serves only a declaratory, as opposed to directly institutional or procedural, purpose.

The Preamble to the Constitution could plausibly serve as a level-one constraint as well. An argument to this effect would hold that the Preamble articulates the ends for which the national government was established and, as such, should guide the interpretation of national powers vis-à-vis state powers. Finally, a set of level-one protections can arguably be found in the grants of “legislative,” “executive,” and “judicial” powers in the opening sections of Articles I, II, and III, respectively. On this argument, these grants of power would be understood to identify the types of power of which national power partakes and would invite distinctions between these national powers and the parallel but distinct powers of the several states. But defending this argument, along with level-one justifications for the other examples cited, requires

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41. See pp. *infra* 704-10.

42. FILIPPOV ET AL., *supra* note 38, at 73; see also *infra* pp. 723-25.

43. Purcell, *supra* note 26, at 141. Purcell goes on to argue that the Oath Clause (U.S. CONST. art. VI, § 3) “rather plausibly suggested that all [state and federal officials] were equally responsible for interpreting and enforcing the new charter. Such a compromise promised little but future contestation. *Id.*”

44. By similar logic, the Ninth Amendment serves as a level-one constraint on the federal system. Making this argument, however, requires a fair amount of historical exposition and more space than is available here. For the most developed versions of this argument, see KURT LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009) and *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801 (2008). Lash’s argument for the federalism-regarding purposes of the Ninth Amendment poses a sharp challenge to its principal application in American constitutional law—privacy jurisprudence. For Lash’s engagement with this issue, see *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219 (2013).

resources beyond those supplied by the Constitution's text alone. That is, it requires precisely the kind of structural and relational inference that Charles Black observed was largely forsaken in American constitutional law. And though there are strong arguments for the constitutional significance of the provisions cited here, the fact remains that they have been frequently neglected in favor of provisions that are either more clearly directive or minimize the degree of inferential reasoning required to reach an authoritative conclusion.<sup>45</sup>

## 2. Level Two: Institutions

It was precisely this weakness of level-one protections that motivated Madison's argument against "parchment barriers" in *Federalist* 48. Rather than rely on mere textual declarations, "which appears to have been principally relied on by the compilers of most of the American constitutions," it was necessary to devise "some more adequate defense . . . for the more feeble, against the more powerful, members of the government."<sup>46</sup> As regards the federal system, such defenses come in the form of at least four level-two constraints: the rules of representation in the national legislature, the federal courts, state management of federal elections, and the state militia power. Starting with the first of these, the so-called Great Compromise reached at the Convention brought a mix of proportional and state-based representation to the national government. In the House of Representatives the rule of representation was "People-as-Union," according to which the Union was defined as a popular constituency.<sup>47</sup> On this rule, the national "People" was the object of representation. The rule in the Senate was "States-as-Union," by which the states were identified as the units of representation. Consequently, the representation of individual citizens in the upper chamber was tied to their status as citizens of the several states, and not primarily as members of a national constituency. The equal representation of the states is buttressed by the guarantee, in Article V, that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." The Senate's advice and consent powers on presidential appointments and treaties serve also to ostensibly inflect these exercises of national power with the input of the states.

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45. Of the provisions discussed here, the clearest example of this phenomenon is probably the Preamble, with the Tenth Amendment being a close second. The least clear example is ostensibly the Supremacy Clause, as ubiquitous as it is in the case law treating conflicts between state and federal laws. But even these instances illustrate the point advanced here. For it is rarely enough to simply point to the Supremacy Clause as conclusive proof of a federal law's legitimacy. Instead, the clause is often cited as a trump card, played after it has been shown that the federal law in question was a legitimate exercise of a national power, which in turn requires recourse to more clearly directive provisions.

46. THE FEDERALIST NO. 48, at 333 (James Madison).

47. It is important, though, to note the significance of the states here too, as state boundaries still structure the apportionment of House seats and, as a result, House districts. See U.S. CONST., art. I, § 2 & amend. XIV, § 2. This point is made by Michael W. McConnell in *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL'Y 103, 111 (2000-2001). ("But even the House of Representatives, the members of which supposedly represent 'the People,' not states, flunks the 'one person, one vote' test."). Hence, it is understandable why this point would increase in salience in direct proportion to the emphasis on meeting the standard—set out in *Reynolds v. Sims*, 377 U.S. 533 (1964)—of "one person, one vote." See also *Gray v. Sanders*, 372 U.S. 368, 379-81 (1963). Nonetheless, the distinction between the States-as-Union and the People-as-Union still stands because it rests on the presence or absence of mediation between citizens and their representatives, not the relative weight of citizens' votes for their representatives. My thanks to Mariah Zeisberg for pressing this point.

The combination of rules of representation in Congress meant that the national legislative process would, in effect, model a virtual negotiation between the two objects of federal representation: the national People and the several states. Though the Senate is arguably the most significant component of state influence in the national government, it is important to recognize the ways in which undue state influence was *avoided*. Three such features that are commonly cited are the state legislatures' lack of power to recall senators and control senatorial salaries (both of which would have enabled them to punish disobedience or non-cooperation), as well as the Senate's six-year term of office (which meant that many senators would be in office longer than the state officials that appointed them).<sup>48</sup>

Second, the Constitution grants to the states the power to manage national elections. According to Section 2 of Article I, the qualifications for voting in elections for the House of Representatives are determined by the states' qualifications for their most numerous legislative branch. Until the passage of the Seventeenth Amendment, state legislatures were also empowered to choose the senators that would represent them.<sup>49</sup> Though the states were given the power to determine the "Times, Places, and Manner" of elections for the House and Senate, the Constitution also granted Congress the power to "make or alter such Regulations, except as to the Place of Chusing Senators."<sup>50</sup> As regards the election of the president, Article III empowers the state legislatures to determine how their electors will be appointed. Though these provisions have been altered significantly over the course of American history—most notable by the Fifteenth, Seventeenth, and Nineteenth Amendments—the states nonetheless retain the power and autonomy to significantly influence the election of national representatives.

The third level-two protection is the federal judiciary, which is endowed by Article III with the "judicial Power of the United States" and, by implication from the Supremacy Clause, is empowered to enforce the state-federal relationship established by the Constitution. However, the efficacy of this protection for preserving state power depends on the degree to which the Constitution determinately defines the federal system. For if there is, as I have argued, a non-negligible degree of underdeterminacy, the federal judiciary's power to police the boundaries of that federal system merely begs the question of what those boundaries are. From the standpoint of state power this concern is enhanced by the fact that, despite its powers of enforcement, the judiciary is still a *national* judiciary. Unlike the system proposed by the New Jersey Plan, according to which state courts would have effectively served as the lower federal courts, the Constitution gives the national government full control—from appointment to confirmation to salary—over the federal judiciary. The very same reasons that underlay the Anti-Federalist opposition to the Senate could be applied to the federal court system. As Alison LaCroix convincingly argues in her study of the origins of American federalism, through its rejection of Madison's proposed national veto and subsequent adoption of the Supremacy Clause, the Convention opted for a markedly *judicial*

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48. See SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 311 (2012).

49. U.S. CONST. art. I, § 3.

50. U.S. CONST. art. I, § 4.

resolution of conflicts over the federal system.<sup>51</sup> To the extent the federal judiciary expressed the views of the governmental level of which it was a part, the courts offered little comfort to those skeptical of the protections the Constitution offered to state autonomy and power.

The fourth, and for our purposes final, level-two constraint on the federal bargain is the states' ability, implied by several provisions of the Constitution, to maintain a militia. Article I, Section 8 grants Congress the power to "call[] forth the Militia" and to "provide for organizing, arming, and disciplining" it when called into the "Service of the United States." Additionally, Article III identifies the president as the Commander in Chief not only of the "Army and Navy of the United States," but "of the Militia of the several States, when called into the actual Service of the United States." And, of course, there is the Second Amendment, which prefaces its recognition of the right of the people to keep and bear arms with the enigmatic declaration, "A well regulated Militia, being necessary to the security of a free State." Though these provisions grant the national government some measure of control over the state militias and clearly foresee some possible form of cooperative relationship, the more important point is that they recognize the very existence of state militias, implicitly condoning the continuation of these state-based military forces. Indeed, far from repudiating the role of violence in the federal system, the Second Amendment goes as far as to underscore the legitimacy of armed resistance in defense of freedom. Taken together, the constitutional provisions recognizing the state militia power identify armed resistance as not only a possible but also a licit recourse in event of federal overreach. And, like so much else in the Constitution, the definitions of the terms on which the use of the militia power would depend are left unelaborated.

### *C. Interlude: The States' Rights Amendment?*

Given its legal and historical importance for claims of state power, the Tenth Amendment merits separate consideration. The traditional constitutional proof-text for states' rights claims,<sup>52</sup> the Tenth Amendment can plausibly be read to preclude (or at least significantly weaken) the argument for federal underdeterminacy that I have advanced. In this regard, two points are relevant. The first is that, for all the rhetorical fodder the amendment can provide advocates of state power, it actually does nothing to clarify the specific dimensions of the state-federal relationship. In fact, consistent with my analysis of the constitutional logic of federalism, by recognizing "powers not delegated . . . nor prohibited"<sup>53</sup> it acknowledges that there are aspects of the state-federal relationship that are not captured by the Constitution's text. Moreover, as Levinson argues, the amendment "provides no clue at all as to what precisely *is* assigned to the national government or prohibited to the states."<sup>54</sup> This recognition in no way clarifies

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51. ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 132-74 (2008).

52. *See, e.g., Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding unconstitutional the Fair Labor Standards Act as applied to state employees); *New York v. United States*, 505 U.S. 144 (1992) (holding the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act unconstitutional for, in part, violating the Tenth Amendment).

53. U.S. CONST. amend. X.

54. LEVINSON, *supra* note 48, at 309.

the extent—to say nothing of the scope of legitimate application—of federal powers granted by the Constitution, which would seem to be the true ground of contention in debates that center on the Tenth Amendment.

The second point concerns the significance of the amendment's final clause. After recognizing that there are powers beyond those delegated to the national government and prohibited to the states, the amendment concludes that those undefined powers "are reserved to the States respectively, or to the people." While most arguments in the states' rights vein place emphasis on the reservation to the states, it must be remembered that those undefined powers are also reserved to the people. The addition of "the people" to the analysis of the state-federal relationship not only underscores the popular basis of republican government; it also foregrounds—but does not resolve—the question of where the people stand in relation to both levels of government. For example, the meaning would be quite different if the amendment concluded with "reserved to the States respectively, *that is to the people*," a formulation that would have equated the people in their political capacity with the states. Similarly, it could have read "reserved to the States respectively, *and not to the people*," which would have implied that the division of power is a zero-sum enterprise, with every addition to national power coming at the expense of an otherwise state-possessed power.

Both of those alternative formulations are markedly different from what the Tenth Amendment actually says, what it means, and the political realities it underscores. For Joseph Story, the amendment served as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution."<sup>55</sup> As he argues in his *Commentaries*,

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.<sup>56</sup>

Here, Story emphatically identifies the people as the foundation of political power, the ultimate sovereign who in a federal system delegates *all* political power.<sup>57</sup> On this reading, the Tenth Amendment pays homage to Madison's arguments in *Federalist* 37 and 46 by gesturing towards the people's role in shaping the contours of the state-federal relationship. But the addition of the people to the state-federal equation raises a host of

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55. Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION III: 752 (1991 [1833]).

56. *Id.* (emphasis in original). Significantly, this passage is followed by a discussion of the nature of powers delegated to government. After recounting the efforts in Congress to add the word "expressly" to the original draft of the Tenth Amendment, Story writes, "On that occasion it was remarked, that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the constitution descended to the most minute details. It is a general principle, that all corporate bodies possess all powers incident to a corporate capacity, without being absolutely expressed." *Id.* at 752-53.

57. See James Wilson, *Pennsylvania Ratifying Convention*, 1 THE FOUNDERS' CONSTITUTION 8:18 (arguing that denying the people the ability to delegate power to the general government is tantamount to allowing the subordinate States "to dictate to their superiors . . . to the majesty of the people").

further questions. Where do the people fit into the process by which the state-federal line is contested? How does the presence of two fundamentally different governments affect the political meaning of a decision to support one over the other? What does it even mean in a federal system to choose one government over the other? It is to these questions that I now turn.

### III. THE RELATIONSHIPS OF SOVEREIGNTY

Thus far we have seen that the constitutional division between state and federal powers was underdeterminate and that, as a result, the precise contours of the state-federal relationship were subject to contestation and change. But, we must now ask, why does it matter? Put more precisely, what is it that makes this underdeterminacy and relational contestation relevant to an inquiry into the nature and development of the federal system? Answering this question takes us from the first component of our analysis, the structure and institutional arrangement of the federal system, to the second component, the relationships between the two levels of government and their citizens. Those relationships are the subject of this part of the Essay. I begin with a discussion of what Sanford Levinson has called the “political sociology” of federalism, focusing specifically on the concept of “attachment” in Publius’s arguments in behalf of the Constitution.<sup>58</sup> In the second section, I broaden the focus to inquire into the substance of the Anti-Federalists’ treatment of attachment. Taken together, these two sections reveal that, despite important differences concerning the nature of attachment, Federalists and Anti-Federalists alike saw it as a crucial component of the underdeterminate federal system. Whereas Federalists acknowledged citizens’ prevailing attachment to state governments and argued that it was an important, though not inalterable, limit on federal power, Anti-Federalists feared that the creation of a national government would provide a new object of attachment whose very presence would undermine state power, over time leading to a consolidated government.

#### *A. Level Three: The Political Sociology of Federalism*

Even before Publius published the first *Federalist* essay, the Convention’s proposal was attacked for presenting to the people a “consolidated government,” that is, one “whose natural, perhaps inevitable tendency would be to annihilate the state governments or reduce them to insignificance.”<sup>59</sup> Typical of this genre of critique is The Federal Farmer’s contention in his first essay, where he argues,

The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of being thirteen republics, under a federal head, it is clearly designed to make us one

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58. See LEVINSON, *supra* note 48, at 318; see also Sanford V. Levinson, *Union and States’ Rights 150 Years after Sumter: Some Reflections on a Tangled Political and Constitutional Conundrum*, in *UNION & STATES’ RIGHTS: A HISTORY AND INTERPRETATION OF INTERPOSITION, NULLIFICATION, AND SECESSION 150 YEARS AFTER SUMTER* (Neil H. Cogan ed., 2013).

59. *Chapter 8 Introduction*, THE FOUNDERS CONSTITUTION (last visited Apr. 10, 2016), <http://press-pubs.uchicago.edu/founders/documents/v1ch8I.html>.

consolidated government. . . . The plan proposed appears to be partly federal, but principally however, calculated ultimately to make the states one consolidated government.<sup>60</sup>

This fear was echoed in the essays of Brutus,<sup>61</sup> Agrippa,<sup>62</sup> and the Impartial Examiner,<sup>63</sup> as well as Robert Yates and John Lansing's letter to the governor of New York, "Objections to the Federal Constitution."<sup>64</sup> It was also a common critique in the state ratifying conventions. For example, in the Pennsylvania ratifying convention, John Smilie argued that "it is fair and reasonable to infer, that it was in contemplation of the framers of this system, to absorb and abolish the efficient sovereignty and independent power of the several States, in order to invigorate and aggrandize the general government."<sup>65</sup> In Virginia's convention, Patrick Henry made the same argument, illustrated by reference to the Constitution's opening claim to speak in the name of a single *national* People:

I rose yesterday to ask a question, which arose in my own mind. When I was asked the question, I thought the meaning of my interrogation was obvious: The fate of this question and America may depend on this: Have they said, we the States? Have they made a proposal of a compact between States? If they had, it would be a confederation: It is otherwise most clearly a consolidated government.<sup>66</sup>

In short, the debate over the Constitution quickly coalesced around the fear that, in either the short or the long term, the power of the states would be eroded while that of the national government would increase *pari passu*.

How could Publius respond to this accusation? Early in *The Federalist*, Hamilton engaged the consolidation charge, arguing that the federal government's attempt to usurp the powers of the states "would be as troublesome as it would be nugatory."<sup>67</sup> But his argument in behalf of the Constitution ultimately rested on conjecture about the disposition of national representatives—"I confess I am at a loss to discover what temptation the persons intrusted [sic] with the administration of the general government could ever feel to divest the States of the authorities of that description."<sup>68</sup> Later in *The Federalist* Madison identified the national and federal components of the "compound

60. *Federal Farmer no. 1*, 1 THE FOUNDERS CONSTITUTION 8:12 (last visited Apr. 10, 2016), <http://press-pubs.uchicago.edu/founders/documents/v1ch8s12.html>.

61. See, e.g., Brutus, Nos. 1 & 11, in THE ANTI-FEDERALIST 108-17, 162-67 (Herbert Storing ed., 1985).

62. See, e.g., Agrippa, Nos. 4 & 6, in THE ANTI-FEDERALIST 234-36, 238-40 (Herbert Storing ed., 1985).

63. See The Impartial Examiner, No. 1, THE ANTI-FEDERALIST 286-91 (Herbert Storing ed., 1985).

64. Robert Yates & John Lansing, *Yates and Lansing's Letter*, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480-482 (Jonathan Elliot ed., 2d ed. 1863).

65. John Smilie, *Pennsylvania Ratifying Convention*, 1 THE FOUNDERS' CONSTITUTION 8:16, <http://press-pubs.uchicago.edu/founders/documents/v1ch8s16.html>.

66. Patrick Henry, *Virginia Ratifying Convention*, 1 THE FOUNDERS' CONSTITUTION 8:38, <http://press-pubs.uchicago.edu/founders/documents/v1ch8s38.html>.

67. THE FEDERALIST NO. 17, 98 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

68. *Id.* at 97-98.

republic” (*Federalist* 37), explained how the proposed Constitution conformed to republican principles (*Federalist* 39), and provided a general defense of the powers delegated to the national government (*Federalist* 41-43). Nonetheless, as the excerpt from The Federal Farmer attests, fears of consolidation persisted. And so in *Federalist* 45 and 46, Madison presents his case for why states will have the advantage over the national government, rendering the Anti-Federalists’ charges of consolidation baseless. The lynchpin of Madison’s argument is found in *Federalist* 46, where he writes,

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.<sup>69</sup>

The conceptual anchor of this argument is Madison’s emphasis on the “attachment of the people,” a relationship of familiarity, connection, and trust that will prevent the national government from encroaching on the states.

Sanford Levinson has described Madison’s argument in *Federalist* 46 as “one of *political sociology* and not one based on the raw text of the Constitution, which scarcely supports in an unequivocal way a reading of significantly limited national powers.”<sup>70</sup> He presents Madison’s argument about attachment as maintaining “ordinary citizens will naturally identify with their state governments and view the national government as a fairly remote, and possibly mistrusted, entity.”<sup>71</sup> In other words, relative to the national government, the state governments will be larger, better known to the people, and more able to directly benefit more people than the national government. As such, they will be the objects of their trust and allegiance. The people will identify with their state governments and, for that reason, they will resist attempts to transfer power to the relatively unknown and remote federal government.

In evaluating Madison’s argument in No. 46, it is critically important to recognize the basis for his contention that states needn’t fear consolidation. Rather than rest his argument on Filippovian level-one or level-two protections of the federal bargain, like those discussed in Part I, Madison invoked level-three protections: the cultural and ideological values of the people. Of the five state advantages over the federal

69. THE FEDERALIST NO. 46, at 292-93 (James Madison) (Henry Cabot Lodge ed., 1888).

70. Sanford Levinson, *Union and States’ Rights*, *supra* note 58, at 246 (emphasis in original).

71. *Id.* at 319.

government that he identified in *Federalist* 45, three were rooted in the sentiments or commitments of the people: “the weight of personal influence,” “the predilection and probable support of the people,” and “the disposition and faculty of resisting and frustrating the measures of each other.”<sup>72</sup> Incidentally, the remaining two—“the immediate dependence of the one on the other” and “the powers respectively vested in them”—are directly connected to the degree of determinacy of the federal system, which, in light of my argument in Part I, would call into question how strong these state advantages actually are.

At the end of the day, Madison argued, constitutional text and institutional design only go so far. Within the broad parameters established by the Constitution, many of the details of the state-federal relationship depend on which government enjoys the attachment of the people. And precisely because there is underdeterminacy in the federal system, the people are able to choose which government to trust, or, put slightly differently, which government to entrust with the power to act on its behalf. In this way, underdeterminacy supplies the conditions necessary for the people’s attachment to be politically consequential. As Josh Chafetz has argued, “the balance of powers between the federal government and the states must remain to some degree indeterminate. If there is no indeterminacy, then there is no possibility for conflict; and if there is no possibility for conflict, then there is no opportunity for the people to choose their champion.”<sup>73</sup> Because there is indeterminacy, conflict is inevitable; and because conflict is inevitable, the people will be able to choose to which government to attach itself. Accordingly, the national and state governments will act where the people deem proper, and the state-federal relationship will reflect these determinations. Federal underdeterminacy and the variable constitutional authority resulting from the people’s attachment are reciprocal features of the American federal system.<sup>74</sup>

Though Levinson identifies only *Federalist* 46 in his discussion of the political sociology of American federalism, the concept and consequences of the “attachment of the people” pervade *The Federalist*. In his seminal study, *The Political Philosophy of The Federalist*, David Epstein connects the notion of attachment to Madison’s discussion in *Federalist* 37 of the “proper line of partition” between the state and federal governments, arguing that that line would be “determined by the degree to which the people are or become attached to one or the other.”<sup>75</sup> Epstein grounds Madison’s contention that the states will have the advantage over the national government to, at least in part, an argument made in *Federalist* 17. There Hamilton identifies the states’ “administration of criminal and civil justice” as the source of the “one transcendent

72. THE FEDERALIST NO. 45, at 288 (James Madison) (Henry Cabot Lodge ed., 1888).

73. Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L. J. 1084, 1093 (2011) (Chafetz’s use of *indeterminate* is synonymous with *underdeterminate* as it’s used in this Essay). See *supra* note 14 (noting the distinction between *underdeterminate* and *indeterminate* in the relevant legal philosophic literature).

74. Variable constitutional authority along these lines is a central emphasis of Mariah Zeisberg’s work; see *supra* note 14; see also Zeisberg, *Constitutional Fidelity and Interbranch Conflict*, 13 THE GOOD SOCIETY 24-30 (Dec. 2004). For a similar, though ultimately distinct, notion of variable authority, see Wayne Moore, *Variable Constitutional Authority: Madisonian Founding Perspectives*, 2 AMER. POL. THOUGHT 217 (2013).

75. EPSTEIN, *supra* note 12, at 52.

advantage belonging to the province of the State governments.”<sup>76</sup> Not only is the states’ administration of justice carried out in close physical proximity to the people, it is also responsible for the protection of their lives and property. Both of these considerations would serve to remind the people of the importance, even necessity, of their state governments.

But, as one might expect knowing Hamilton’s confidence in an energetic national government, there is more to this argument than is perhaps apparent on the first reading. For in the course of his assurances that states will benefit more than the federal government from the people’s attachment, he identifies the principal qualification to the states’ advantage. After asserting that affections decrease “in proportion to the distance or diffusiveness of the object,” he concludes that local governments will be the object of the people’s stronger bias.<sup>77</sup> But appended to that conclusion is a vitally important condition: “unless the force of that principle should be destroyed by a much better administration of the latter [i.e., the government of the Union].”<sup>78</sup> Thus Hamilton not only opens the door to the possibility that the people’s attachment may shift to the new national government, he also identifies the process by which that shift can happen. The national government can, in effect, win over the people by doing well what it is charged with doing. Ten essays later, Hamilton again picks up this line of reasoning, candidly admitting that many of the *Federalist* essays have presented “reasons . . . to induce a probability that the general government will be better administered than the particular governments.”<sup>79</sup> And because there is no justification for the opinion that the general government will be administered worse than the state governments, “there seems to be no room for the presumption of ill-will, disaffection, or opposition in the people.”<sup>80</sup> In other words, there is no reason to believe that the national government could not outperform the state governments and, in so doing, attract the attachment of the people. While it is true that the people’s extant attachments to the states could persist, a beneficial and, in time, respected national government could change that. And with that change could come theretofore un contemplated exercises of national power.<sup>81</sup>

### *B. Attachment and the Anti-Federalist Fear of Consolidation*

Lest one get the impression that Publius’s treatment of attachment is a function more of an idiosyncratic or biased (collective) mind than of broader conceptual importance, we can also look to the Anti-Federalist critique of the Constitution. Recourse to the Anti-Federalists is helpful also for emphasizing that the argument I am advancing is neither an argument about original intent nor one that unnecessarily privileges the

76. THE FEDERALIST NOS. 17, 99 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

77. *Id.*

78. *Id.*

79. *Id.* at 27:159-160.

80. *Id.* at 27:159.

81. Given Publius’s anonymity at the time of publication, it wasn’t likely that the authors’ arguments would be interpreted through the specific lens of their reputations or, as in the case of Madison and Hamilton, known antipathy towards state governments. But it is nonetheless remarkable that in an essay (which itself is part of a larger enterprise) devoted to convincing skeptics of the Constitution’s merits, Publius forthrightly acknowledged the logical implications of the argument about attachment and the potentialities of the federal system.

writings of a single individual (Madison) or writer (Publius). Rather, it seeks to understand the political system established and the regime inaugurated by the Constitution, and cites as illustration and support those who “saw best and farthest.”<sup>82</sup> Indeed, when we look to the Anti-Federalists we find a more nuanced and compelling understanding of attachment than is presented in *The Federalist*. And for good reason. While Publius’s discussions were concerned only with stasis—the peoples’ attachments were and would remain with their state governments—writers like The Federal Farmer, Brutus, and Agrippa were forced to deal with the *possibility of choice* presented by the proposed Constitution. With the addition of another government that acted directly on individuals, state governments would have to compete for the peoples’ allegiances and would always be under threat of losing their attachment. Accordingly, they were forced to argue developmentally, painting a picture not only of what the Constitution would do in the short term but also of what kind of regime it would create over the long run. For this reason, while the variability of constitutional authority is implied in Publius’s treatment of attachment, it is a central concern of the Anti-Federalist critique of the federal system established by the Convention.<sup>83</sup>

We can begin to understand the Anti-Federalist notion of attachment by identifying an important area of common ground they shared with the Federalists. Both groups saw the attachment of the people as a central concern of statecraft and, by extension, as a crucial determinant of the contours of the state-federal relationship. Thus, for example, John Smilie’s argument that “the attachment of the citizens to their government and its laws is founded upon the benefits which they derive from them” parallels Hamilton’s argument in *The Federalist* about attachment following the quality of government administration.<sup>84</sup> Additionally, Brutus’s claim that every government must be supported either by force or “by the people having such an attachment to it” is echoed by Madison’s pairing in *Federalist* 46 of attachment and the power to maintain a militia as guarantors of state autonomy.<sup>85</sup> Finally, there is Centinel’s belief that “time and habit” give “stability and attachment . . . to forms of government,”<sup>86</sup> which mirrors Madison’s belief, expressed at the Convention, that attachments of association and knowledge

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82. GORDON WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 128 (2011). I cite this characterization well aware that Wood believes it was the Anti-Federalists, and not the Federalists, who best understood the political world to come and the consequences of the constitutional regime they opposed. Indeed, as I argue below, seeing farthest was not only a substantive merit of much Anti-Federalist argumentation; it was also a practical necessity. *See infra* pp. 699-700.

83. Though beyond the scope of this essay, it should at least be noted that a comprehensive assessment of the relevance of attachment to the understanding of the Convention’s proposal would have to connect both Publius’s and the Anti-Federalists’ arguments back to the records of the federal convention. A cursory review of the Convention proceedings only underscores the discussion presented here, and several relevant episodes from the Convention are thus adduced. It also reveals that, in contrast to (many of) the ratification debates, attachment frequently appears in connection with the question of what influences the allegiances of representatives and how political structures and requirements can exploit or avoid those influences as desired. *See, e.g.*, Debate of the Federal Convention (Aug. 9, 1787), 2 RECORDS OF THE FEDERAL CONVENTION 230-42 (Max Farrand ed., 1937).

84. John Smilie, *Pennsylvania Ratifying Convention*, 1 THE FOUNDERS’ CONSTITUTION 8:16 (last visited Apr. 10, 2016), <http://press-pubs.uchicago.edu/founders/documents/v1ch8s16.html>.

85. Brutus, No. 4, in THE ANTI-FEDERALIST 129 (Herbert J. Storing ed., 1985); *see also* Federal Farmer, No. 28, in THE ANTI-FEDERALIST (Herbert J. Storing ed., 1985).

86. Centinel, No. 1, in THE ANTI-FEDERALIST 14 (Herbert J. Storing ed., 1985).

constitute a government's "greatest strength and support."<sup>87</sup> Examples could be multiplied further, but these suffice to establish the point that for Federalists and Anti-Federalists alike, the attachment of the people was a deeply consequential component of the design and operation of government.

But here, as elsewhere, the two groups disagreed in the particulars. The Federalists saw attachment as a function of effective governance, which had been undermined by the state governments so beloved by the Anti-Federalists. As Herbert Storing has described this position, "[a] government that can actually accomplish its resolves, that can keep the peace, protect property, and promote the prosperity of the country, will be a government respected and obeyed by its citizens."<sup>88</sup> But for the Anti-Federalists, attachment was the product of support freely given, of a confidence borne of knowledge of and proximity to one's governors. The extended republic proposed by the Constitution threatened the ability of individuals to gain such knowledge by increasing the distance between them and their government. Accordingly, it threatened the possibility that attachment could be freely given. This was, to the Anti-Federalist mind, a critical defect of the Constitution because there was only one alternative to voluntary attachment: force.<sup>89</sup>

Thus we see in the Anti-Federalist critique an almost constant pairing of voluntary attachment and the coercive force of a central government, framed by the argument that the extended republic undermines the prerequisites of voluntary attachment. We have already seen the thrust of Brutus's argument on this point, but its centrality to his opposition to the Constitution merits further attention. In his first essay he writes,

Men who, upon the call of the magistrate, offer themselves to execute the laws, are influenced to do it either by affection to the government, or from fear; where a standing army is at hand to punish offenders, every man is actuated by the latter principle, and therefore, when the magistrate calls, will obey. . . . The body of the people being attached, the government will always be sufficient to support and execute its laws, and to operate upon the fears of any faction which may be opposed to it, not only to prevent an opposition to the execution of the laws themselves, but also to compel the most of them to aid the magistrate; but the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States, as necessary for these purposes.<sup>90</sup>

Obedience by force or voluntary attachment—those are the two available sources for the support and assistance that all governments depend on to implement their laws.

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87. Robert Yates, Notes from the Federal Convention (June 23, 1787), in 1 RECORDS OF THE FEDERAL CONVENTION 391, 392 (Max Farrand ed. 1937) (quoting James Madison) (emphasizing the conceptual and linguistic commonalities between the authors of *The Federalist* and others).

88. Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 43 (2008).

89. *Id.* at 16 (identifying three "fundamental considerations" that underlie the defects of the large republic. Its inability to "enjoy a voluntary attachment of the people to the government and a voluntary obedience to the laws" is listed first).

90. Brutus, *No. 1*, in THE ANTI-FEDERALIST 115 (Herbert J. Storing ed., 1985).

But, as Richard Henry Lee argued, a consolidated nation “cannot be governed in freedom.” Whereas at the state level, “opinion founded on the knowledge of those who govern, procures obedience without force,” the extended republic obliterates that opinion by diminishing the requisite knowledge, “and force then becomes necessary to secure the purposes of civil government.”<sup>91</sup>

We have seen that the Anti-Federalists’ treatment of attachment is a constitutive part of a broader critique of the extended republic. But the burden of my argument is to show that their treatment of attachment is bound up in the nature of the federal system; that is, that their critique is not just about the size of the nation to be governed by the Constitution, but also the structure of the federal system proposed to govern it. To the opponents of the Constitution, it was clear that the federal system as structured by the Constitution fundamentally changed the economy of attachment. Where there was once voluntary attachment to a known and physically proximate government, there would be a transactional attachment—an allegiance rooted in the things government does and provides—with a far-off government. Moreover, the federal system changed the calculus of attachment. In addition to trafficking in another currency of allegiance, the mere existence of an additional layer of government would destabilize the states by offering an exit option. If states did not merit the support of their citizens, under the Constitution the latter could punish the former not only by electing national-level representatives to assume erstwhile state duties but also by electing state-level representatives more favorable to national power or policies. States would now have to compete for the people’s support, and they would have to do so on the national government’s terms.

I conclude with a brief comment on the relationship between the substance and practical imperatives of the Anti-Federalist critique of the Constitution. Reading the Anti-Federalist response to the Convention’s proposal, one is struck by its predictive, almost prophetic tones. Theirs was an appraisal not so much about what the Constitution does in the immediate or short term as it was an attempt to understand and describe what the Constitution *would do*—to the citizen, the government, and the regime. They were acutely aware that “the Constitution is much more than a constitution of government,”<sup>92</sup> that it would define both the ends towards which government was oriented and the means by which those ends would be pursued; as a result, it would constitute the *people* as much as their government. They saw not only the alterations to American governance posed by the Constitution, but the subsequent changes that those alterations would beget. Hence, they argued not that ratification of the Constitution would immediately institute a consolidated government but that it was “calculated ultimately to make the states one consolidated government,”<sup>93</sup> and that, “although the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.”<sup>94</sup> The Federalists, on the other hand, faced a different imperative—to assure those skeptical of national power

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91. STORING, *supra* note 88, at 17 (2008) (quoting Letter from Richard Henry Lee to Samuel Adams (Aug. 8, 1789)).

92. Barber, *supra* note 9, at 174.

93. Federal Farmer, *No. 1*, in *THE ANTI-FEDERALIST* 37 (Herbert J. Storing ed., 1985).

94. Brutus, *supra* note 90, at 110.

that the Constitution did not create an unnecessarily powerful federal government. Accordingly, they focused on the many things that the Constitution would not immediately change, foremost among which was the vast body of state powers that, for reasons of popular attachment and government capacity, would *for the time being* remain with the states. It was left to the Anti-Federalists to identify and explain how even those could in time be changed by the government proposed by the Constitution.

#### IV. “BASIC PRINCIPLES” RECONSIDERED

The underdeterminacy of the federal system, expressed in both the structures and relationships of federal sovereignty, means that the meaning of the state-federal relationship is contested, defined, and renegotiated through constitutional politics. As Keith Whittington has argued, federalism is “a continuing tension contained within, and created by, the founding document. Partly because of that ambiguity, the resolution of that tension is a political, and not merely a legal task that has fallen on subsequent generations.”<sup>95</sup> This insight has deep roots in American political and legal thought. As John Marshall observed in *McCulloch v. Maryland*, “the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.”<sup>96</sup> Though the parameters of the state-federal relationship are established by the Constitution, the answer to the fundamental question of political sovereignty—who gets to decide?—is a function of the episodic resolution of the structural and relational underdeterminacies inherent in American federalism. According to the understanding I have advanced in this Essay, the federal system structures debates over sovereignty and, as a result, comprises a fundamental disharmony in the constitutional order. Gary Jacobsohn has defined these disharmonies as latent tensions rooted in the polity’s institutional arrangements, intellectual and political traditions, value commitments, and aspirations. “Unlike structures such as houses,” he writes, “constitutions . . . are in decisive ways characterized by disharmony, a condition that generates a dialogical process that may result in changes in identity that, however significant, only rarely culminate in a wholesale transformation of the constitution.”<sup>97</sup> The argument of this Essay has been that in the American federal system this dialogical process takes place between governmental institutions and between governments and their citizens.

Federal underdeterminacy was in part the result of a commitment to resolve deep divisions through the political process and to allow for changes over time in the division between state and federal power. However, though courts “could not reduce the relevant constitutional principles to legal precision,” the lesson of American political history is that they have nonetheless exercised interpretive dominance in this domain.<sup>98</sup> And this is very much the consequence of our constitutional design, which explicitly rejected a

95. Keith Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 *PUBLIUS* 1, 1 (1996).

96. 17 U.S. 316, 405 (1819).

97. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 325-26 (2010).

98. Whittington, *supra* note 95, at 7. See KEITH WHITTINGTON, *THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2009) (discussing the origins and rise of judicial supremacy).

legislative resolution of federalism questions in favor of a markedly (though not exclusively) judicial resolution.<sup>99</sup> By now, the tension between the determinacy of judicial reasoning and interpretation, on the one hand, and federal underdeterminacy, on the other, should be apparent. Nonetheless, applying the argument I have advanced in this Essay to a concrete case can further illustrate its central claims. Moreover, the recent political and legal battle over the Patient Protection and Affordable Care Act (ACA) vividly illustrates the substantive implications of these claims. Accordingly, in this section I critically evaluate the four “basic principles” identified in Chief Justice John Roberts’s opinion in *National Federation of Independent Business v. Sebelius*<sup>100</sup> to demonstrate how the structural and relational considerations discussed in this Essay bear on the Court’s decision to uphold the ACA’s Individual Mandate provision as a lawful exercise of Congress’s taxing power, but not as a lawful exercise of its regulatory authority pursuant to the Commerce Clause.<sup>101</sup> As I endeavor to show, Roberts’s articulation of the state-federal relationship entails the denial of the two fundamental premises of the federal system that I have presented in this Essay—that the Constitution established an underdeterminate relationship between the states and the national government, and that the attachment of the people can play a crucial role in resolving (if only temporarily) those underdeterminacies. While this is apparent in the first three “basic principles,” it is especially clear, and especially consequential, in the fourth, which concerned the use of the canon of constitutional avoidance to uphold the Individual Mandate as a lawful use of Congress’s taxing power. Accordingly, I discuss this canon at some length, offering a sustained critique of its use in *Sebelius*. I conclude by sketching an alternative model of judicial review—*processual review*—that is consistent with the structural and relational understanding of the federal system presented in Parts I and II and yet distinct from the conception of review derived from the most prominent process-based theories of federalism.

#### A. Four “Basic Principles” and Three Critiqued

Chief Justice Roberts begins his *Sebelius* opinion with an articulation of the “basic principles” that form the background against which the questions presented in the case must be considered. Though Roberts does not explicitly enumerate these principles, the following four can be readily identified from his discussion:

“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”<sup>102</sup>

99. See LaCroix, *supra* note 51; Chafetz, *supra* note 73 (arguing that judicial resolution is not the *only* constitutional means of resolving state-federal conflicts). See also Allison LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41 (2011) (exploring the possible political history of an American Republic with a national veto).

100. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-80 (2012).

101. Thus limited, my inquiry doesn’t address the other dimensions of the Court’s *Sebelius* decision. See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U.L. REV. 1 (2013) (clarifying and explaining the many issues at play in the opinions).

102. *Sebelius*, 132 S. Ct. 2566, 2577 (2012).

While “the Federal Government . . . must show that a constitutional grant of power authorizes each of its actions . . . [t]he same does not apply to the States, because the Constitution is not the source of their power.”<sup>103</sup>

“This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power.”<sup>104</sup>

“Our permissive readings of [Congress’s enumerated] powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. . . . Our deference in matters of policy cannot, however, become abdication in matters of law.”<sup>105</sup>

#### 1. Principle (1): Limited Federal Powers

Roberts begins his analysis by quoting John Marshall’s observation in *McCulloch v. Maryland*, noted at the outset of this Part, “that ‘the question respecting the extent of the powers actually granted’ to the Federal Government ‘is perpetually arising, and will probably continue to arise, as long as our system shall exist.’”<sup>106</sup> But what for Marshall was a reflection on the inevitable consequences of constitutional underdeterminacy is for Roberts a license for judicial oversight and intervention. That this question will continue to arise, Roberts argues, implies that some institution must provide an answer: “Resolving this controversy requires us [i.e., the Judiciary] to examine both the limits of the Government’s power, and our own limited role in policing those boundaries.”<sup>107</sup> Central to this argument is the conflation of two notions of limited governmental powers, which conflation is occasioned by the “perpetually arising” questions posed by federal underdeterminacy. Whereas Roberts’s formulation of Principle (1) cites the *finite* nature of the federal government’s powers, his justification for judicial review cites the *restricted* or *bounded* nature of those powers. Hence, federal underdeterminacy coupled with a focus on the restrictions on government power furnishes the justification for judicial policing of the “boundaries” of federal power.

As the language of Principle (1) suggests, Roberts’s analysis is headed straight for the Tenth Amendment. After claiming that “the restrictions on government power foremost in many Americans’ minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights,”<sup>108</sup> he reminds the reader that the Constitution did not at first include a Bill of Rights in part “because the Framers felt the enumeration of powers sufficed to restrain the Government.”<sup>109</sup> The Bill of Rights, Roberts argues, formalized this understanding of enumerated powers: “And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: ‘The powers not delegated to the United States by the Constitution . . . are reserved to the States

103. *Id.* at 2578.

104. *Id.*

105. *Id.* at 2579.

106. *Id.* at 2577 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)).

107. *Sebelius*, 132 S. Ct. at 2577.

108. *Id.*

109. *Id.* at 2578.

respectively, or to the people.”<sup>110</sup> One must assume, of course, that Roberts’s language on this point (as elsewhere) is carefully chosen, which makes his choice of “made express” more than a little suggestive. In crafting the Tenth Amendment, the First Congress, led by Madison, “avoided anything that might revive the Articles of Confederation’s stingy formula limiting the central government to powers ‘expressly’ enumerated.”<sup>111</sup> As I argued above,<sup>112</sup> the Tenth Amendment does nothing to make the state-federal relationship any less underdeterminate than it already is. Indeed, it stands as a testament to that underdeterminacy by acknowledging that the Constitution does not provide an exhaustive division of power between the states and the federal government. Moreover, nowhere in Roberts’s analysis does he address the role of the people in determining the scope or location of government powers, which was a crucial interpretive component for Joseph Story. Thus understood, Roberts’s description of the Amendment must be read as an attempt to impose greater determinacy on the constitutional text than it can plausibly bear.<sup>113</sup>

## 2. Principle (2): The States

Roberts’s discussion of the Tenth Amendment serves as a natural pivot point to an invocation, via *New York v. United States*, of state sovereignty.<sup>114</sup> Citing the states’ police powers, which entail local control of “the facets of government that touch on citizens’ daily lives,” he writes, quoting *Federalist* 45, “The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.” As I explained earlier, *Federalist* 45 is one of two essays (along with No. 46) in which Madison addresses the Anti-Federalists’ consolidation charge, arguing that the states will “have the advantage of the federal Government.”<sup>115</sup> But the nature of that advantage is crucially important. In Nos. 45 and 46, Madison identifies a host of considerations intended to show that the proposed Constitution could not result in a consolidated government. Those considerations, I have argued, fall into two categories. First, there are structural relationships that are themselves subject to the underdeterminacy of the federal system—the immediate

110. *Id.* (quoting U.S. CONST. amend. X).

111. AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 320 (2005) (emphasis in original). *See also* AKHIL AMAR, *THE BILL OF RIGHTS* 119-124 (1998); *ARTICLES OF CONFEDERATION* of 1781, art. II (“Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

112. *See* THE FEDERALIST, *supra* notes 19-21.

113. It is impossible to resist noting the echo of *Hammer v. Dagenhart* in Roberts’s use of “made express.” There Justice Day wrote the Tenth Amendment’s excluded “expressly” back into the Constitution, arguing that, “In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people *the powers not expressly delegated to the National Government are reserved*” 247 U.S. 251, 275 (1918) (emphasis added). In response to both Day and Roberts, it will suffice to cite not just the text of the Tenth Amendment but also James Madison’s observation in Congress on Aug. 18, 1789, in the face of an attempt to include “expressly” in the amendment draft: “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.” *See* ANNALS OF THE CONGRESS OF THE UNITED STATES (Joseph Gales, Sr. ed., 1834), I:790.

114. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 618-19 (2000).

115. THE FEDERALIST NO. 45, at 311 (Jacob E. Cooke ed., 1961).

dependence of the one [government] on the other” and “the powers respectively vested in them.”<sup>116</sup> And second, there are contingent political realities that depend on the capacity, size, and respectability of the federal government, all of which influence the people’s attachment thereto—“the weight of personal influence,” “the predilection and probable support of the people,” and “the disposition and faculty of resisting and frustrating the measures of each other.”<sup>117</sup> Madison’s characterization of the “powers reserved to the several States” that Roberts cites in his discussion of Principle (2) is far from the articulation of a principle of constitutional design. Rather, it is an appraisal of the current state of popular opinion and government capacity that yields the conclusion that there are natural limits, alongside but independent of constitutional limits, on the power of the federal government. We hear nothing in Roberts’s treatment of state power about the variability of the people’s attachment, to say nothing of the argument in *The Federalist* that the federal government would likely be a more efficient administrator than the states and, as a result, further attract the people’s confidences and support.<sup>118</sup> To generalize Madison’s observation of practical politics to a principle of constitutional design requires an extension of reasoning unsupported by the logic of either *The Federalist* or, more importantly, the Constitution.

Furthermore, Roberts’s citation of *Federalist* 45 is somewhat puzzling given how the paragraph from which his selected quotation is drawn concludes. Madison clarifies that the change proposed by the Constitution “consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS.”<sup>119</sup> But he continues immediately thereafter to distinguish those invigorated powers from a separate power: “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>120</sup> Thus, the quote Roberts cites is part of the conclusion Madison derives from an argument defending particular powers of the proposed national government, those “principally concerned with external objects.” These powers, Madison stresses, are not new powers added by the Constitution but original powers invigorated thereby. Hence, the conclusion Madison draws about those original powers—that, in the political world as then constituted, they leave undisturbed various state powers—cannot properly apply to powers that truly are new, of which the commerce power is the principal example cited. For an argument that culminates in the rejection of a Commerce Clause justification for congressional action, this is, to say the least, an inauspicious start.

### 3. Principle (3): The Police Power

Roberts’s denial in Principles (1) and (2) of federal underdeterminacy and the consequences of the variability of the people’s attachment both persists in and furnishes the basis for his contention in Principle (3) that the powers of the federal government mustn’t be construed as “creating a general federal authority akin to the police

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116. *Id.*

117. *Id.*

118. *See, e.g.*, THE FEDERALIST NOS. 17, 29.

119. *Id.* at 314 (emphasis in original).

120. *Id.*

power.”<sup>121</sup> Here again we see the influence of his interpretation of *Federalist* 45, but this time he has gone one step further. Whereas Principle (2) made Madison’s observation into a rule of constitutional design, in Principle (3) it is the foundation for a constitutionally protected category of state powers. Such a conception of the state-federal relationship is the hallmark of a determinate understanding of the federal system. What is particularly striking about this argument is that after stressing the point that state powers are not grounded in the Constitution [Principle (2)], Roberts then argues that those very powers serve as affirmative limits on Congress’s constitutional powers. While Roberts makes a point of citing Marshall’s opinion in *McCulloch v. Maryland* throughout the introduction to his own opinion, it must be acknowledged that his understanding of the state-federal relationship is a mirror image of Marshall’s, in that it reverses the central components. For Marshall, a proper understanding of the state-federal relationship was attained by first fleshing out the meaning and extent of national sovereignty and then determining the points at which state power must yield to national power.<sup>122</sup> But for Roberts, the exact opposite is true. Understanding the extent of national power *begins* with the acknowledgment that it is limited by a body of supreme state powers. Nowhere is this difference more clear than in Roberts’s invocation of state police powers,<sup>123</sup> the doctrinal innovation contrived by the Taney Court to oppose Marshall’s understanding of the state-federal relationship.<sup>124</sup>

#### B. Principle (4): Constitutional Avoidance

As important as they are in their own right, Principles (1)-(3) merit additional attention for the subsequent argument they enable, which Roberts introduces with his fourth principle: “Our permissive reading of [Congress’s enumerated] powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. . . . Our deference in matters of policy cannot, however, become abdication in matters of law.”<sup>125</sup> Having set the stage with Principles (1)-(3) for rejecting the Commerce Clause justification for the ACA’s Individual Mandate in the face of constitutional doubts, Roberts provides in Principle (4) the justification for interpreting and ultimately upholding the mandate as an exercise of Congress’s taxing power. Unlike the first three principles, Principle (4) expressed the general sense of the whole Court: no justice disagreed with the proposition that in certain circumstances the Court can—indeed, should—prioritize statutory interpretations that avoid rather than confront constitutional doubts. There were, to be sure, strong disagreements among the justices surrounding the canon’s use.<sup>126</sup> But those concerned *the necessity of employing* or *the proper threshold for triggering* such a construction in the case at hand, not whether it was improper for the Court ever to consider doing so. The clear message of *NFIB*

121. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

122. In addition to *McCulloch v. Maryland*, see Marshall’s opinion elaborating his theory of national sovereignty in *Cohens v. Virginia*, 19 U.S. 264 (1821).

123. *Sebelius*, 132 S. Ct. at 2578.

124. *See, e.g.*, *Mayor of New York v. Miln*, 36 U.S. 102 (1837); *Briscoe v. Bank of Kentucky*, 36 U.S. 257 (1837).

125. *Sebelius*, 132 S. Ct. at 2579.

126. *Cf. id.* at 2593-94 (Roberts, C.J.); *id.* at 2650-55 (Scalia, Kennedy, Thomas, Alito, J., dissenting).

(perhaps one of the few) is that the avoidance canon is a *per se* legitimate and valuable tool of statutory interpretation that is only invalid *per accidens*. For this reason, the observation made in 1967 by Judge Henry Friendly could just as well have been spoken in 2012: “questioning the doctrine of construction to avoid constitutional doubts is rather like challenging Holy Writ.”<sup>127</sup>

The canon of constitutional avoidance is actually a set of related propositions.<sup>128</sup> In its most general form, it holds that when a congressional enactment is susceptible of more than one plausible interpretation and one of those is (potentially) constitutionally problematic while the other is not, the non-problematic interpretation should prevail. The parenthetical suggests that the canon is, perhaps, not as straightforward as it may at first appear. And indeed, in practice the avoidance canon admits of two versions: the classical and the modern.<sup>129</sup> On the classical version, if on its most natural reading a statute would be unconstitutional, then and only then can the judge seek an alternate plausible interpretation on which it would be constitutional. On the modern version, if a statute’s most natural reading raises constitutional doubts or difficult constitutional questions, the judge should adopt an interpretation that avoids such questions. The difference between the two versions can be put in terms of the threshold for triggering the canon’s use. For the classical version, the threshold is a finding of unconstitutionality for the most natural reading; for the modern, it is a finding of constitutional doubts or difficult constitutional questions.

Though the classical version was a fixture of constitutional jurisprudence throughout much of the nineteenth century, it gave way to the modern version in the early twentieth century because of growing unease with the constitutional analysis required by classical avoidance.<sup>130</sup> As William Kelley puts it, “a court could not recognize the circumstances calling for its invocation until it had first effectively engaged in judicial review and concluded that a particular reading of a statute would render it unconstitutional.” But the subsequent adoption of a permissible interpretation made the preceding constitutional analysis look like dicta, thus putting the Court “in the apparent position of rendering advisory opinions on constitutional questions.”<sup>131</sup> Formally recognizing these concerns in the 1909 case *Delaware & Hudson*,<sup>132</sup> the Court began shifting to the modern version of the avoidance canon.

Of the various justifications offered for the avoidance canon, the two most prominent are also those most relevant to the inquiry at hand. First, as argued at some length by William Eskridge and his co-authors,<sup>133</sup> a norm of construing statutes to avoid constitutional doubts reflects a commitment to legislative supremacy. As Kelley notes, the development of the modern version of the canon was part and parcel of an effort to

127. HENRY J. FRIENDLY, BENCHMARKS 211 (1967).

128. *See generally*, ROBERT KATZMANN, JUDGING STATUTES 50-54 (2014).

129. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949-50 (1997).

130. *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840-41 (2001).

131. *Id.* at 840.

132. *United States ex. rel. Attorney General. v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

133. Kelley, *supra* note 130, at 843-44 (citing WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2000)).

establish “that the Court defers to Congress and thereby serves the separation of powers by not deciding constitutional questions.”<sup>134</sup> Because the will of the people is expressed through their representatives in Congress, the Court should make every effort to respect its collective judgment as to what the Constitution means and permits. Such respect requires avoiding the conclusion that Congress acted unconstitutionally when an alternate interpretation is available whereby that act could be sustained. Summarizing this line of argument, Gillian Metzger and Trevor Morrison write that according to this legislative supremacy justification, “Congress is presumed to intend to legislate within constitutional limits and to avoid legislating in a way that pushes the constitutional envelope.”<sup>135</sup> Proper adjudication, then, requires honoring congressional judgment.

Second, and closely related to the first justification, the avoidance canon is grounded on the belief that courts should, where possible, avoid creating constitutional law by passing on constitutional questions. Against the backdrop of the rejection of *Lochner*-era jurisprudence and the constitutional limitations it imposed, the Court came to the view that *constitutional* adjudication should be a last resort.<sup>136</sup> This justification is premised on a view of the separation of powers that entails a sharp distinction between law and politics. According to this view, it is for Congress to make laws and for the Court to uphold the Law (i.e., the Constitution). Thus, through giving the legislature wide berth by substantially deferring to its determinations and only addressing constitutional doubts where absolutely necessary, the Court could serve this vision of the separation of powers. Here the conceptual proximity between this justification and the legislative supremacy justification becomes clear. Because Congress is the supreme lawmaker and because the rejection on constitutional grounds of a congressional enactment effectively denies the validity of that supremacy in a particular instance, the Court must limit itself to its proper function: policing and enforcing constitutional limits.

Perhaps unsurprisingly, critics of the avoidance canon have addressed their arguments to the very justifications offered by its defenders. Against the case that the canon respects legislative supremacy, they have argued that the canon does no such thing. For one, constitutional avoidance often requires distorting unambiguous statutory language, or even clear congressional intent, a fact expressed by the very terms of the canon. These critics stress that, because judicial skepticism of the constitutionality of a congressional enactment is inherent in the avoidance canon, it is difficult to cloak in the language of legislative supremacy and deference to popularly elected representatives actions that entail the substitution of a judicial for a legislative judgment. Such was the view of the joint dissent in *NFIB*, which argued that, “to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.”<sup>137</sup> Moreover, the sharp distinction between law and politics that supports the legislative supremacy

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134. *Id.* at 841.

135. Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *FORDHAM L. REV.* 1715, 1718 (2013).

136. *See, e.g.*, *Harriman v. Interstate Commerce Com’n*, 211 U.S. 407 (1908); *Delaware & Hudson*, 213 U.S. 366 (1909). *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (identifying seven principles for avoiding constitutional questions); *see also Kelley, supra* note 130, at 838-39.

137. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas, Alito, J., dissenting).

justification serves to aggrandize the Court's role because it puts beyond legislative control the Court's determination of what is and what is not of constitutional concern. While the Court may in theory be restrained from addressing merely policy-regarding questions, it is the Court that in fact says which questions do and do not qualify as such. How this honors the role and position of the Legislative branch in the constitutional order, these critics contend, is far from clear.

And as for the point about avoiding the unnecessary creation of constitutional law, critics of the canon have persuasively shown that such a justification rings rather hollow. Scholars and jurists alike express this view. Frederick Schauer has stated the critics' case most comprehensively. After observing that the avoidance canon frequently requires the adoption of a strained interpretation, he concludes that, "it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute."<sup>138</sup> Moreover, with an argument that echoes the reasons for which the Court shifted from the classical version of the canon to the modern version, he shows that "because the identification of the 'potential' constitutional problem turns out for this set of cases to be dispositive, the idea that the court is avoiding a constitutional decision is illusory."<sup>139</sup> According to Judge Posner, the avoidance canon serves to in effect create a "judge-made constitutional 'penumbra'"<sup>140</sup> by cordoning off areas of constitutional sensitivity from legislative influence. By avoiding putative constitutional doubts, the Court signals to Congress its convictions (or, at least, inclinations) about the avoided question. While it is true that such a move would fall short of a definitive constitutional ruling, to a rational legislator the message would be the same: this area is off limits. This should be enough, these critics of the avoidance canon contend, to give the lie to the argument that constitutional avoidance avoids the unnecessary creation of constitutional law.

Strikingly absent from the history, defenses, and even critiques of the avoidance canon is any reference to the bearing of the concrete politics surrounding the passage of a congressional enactment on the Court's treatment thereof. Indeed, the Court has deemed such considerations irrelevant to their duty to "say what the law is."<sup>141</sup> For Chief Justice Roberts in *NFIB*, the politics surrounding the Individual Mandate's passage was merely a matter of inconsequential "labels." Responding to the dissent's argument that the mandate's denomination as a "penalty" precluded its justification under the taxing power, Roberts argued that on this view "even if the Constitution permits Congress to do exactly what we interpret the statute to do, the law must be struck down because Congress used the wrong labels."<sup>142</sup> Where politics does enter the Court's calculus, it is at the very abstract level expressed by the distinction between law and politics that

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138. Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995).

139. *Id.* at 89. In a similar vein, Anthony Vitarelli has analogized the avoidance canon to administrative law, arguing that the canon involves—indeed, entails—a "step zero" inquiry that requires "reaching an initial factual determination of constitutional doubt." See Vitarelli, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 837 (2010).

140. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

141. See Metzger & Morrison, *supra* note 135, at 1730.

142. *Sebelius*, 132 S. Ct. at 2597.

justifies the Court's self-proclaimed primacy in matters of law. Politics is that thing Congress and the President do, and in which the Court must not meddle. As far as the Court is concerned, there is a virtual firewall between the politics that produced the statute and the statutory language that comes before the Court. Thus, the avoidance canon denies that the Court's statutory interpretation should be constrained or otherwise influenced by the political facts that attended the piece of legislation under review.

When the matter is stated thusly, it becomes clear that when the Court employs the more extreme version of the avoidance canon it does far more than rewrite the statute, as the joint dissenters in *NFIB* urged.<sup>143</sup> It rewrites the political history of that piece of legislation—the complex series of decisions, deliberations, and public justifications that produced the statute. For the use of the avoidance canon implies that the legislative product Congress produced can be disconnected for legal purposes from *how Congress produced it*. Only then could something as fundamental as the constitutional basis for a piece of legislation be swapped out for another in the face of constitutional doubts. So in the case of the ACA, what is entailed by the Court's upholding the Individual Mandate under the taxing power rather than the commerce power is the belief that (a) the statute would have been no different had congressmen and women justified, debated, and constructed it as a tax rather than a commercial regulation (or vice versa), or (b) it does not matter how Congress justified the bill as it was being constructed, only how the statute stands in relation to (the Court's understanding of) the powers at Congress's disposal. Both of these possibilities are deeply problematic, and we can see exactly why if we return to the fundamental components of the federal system elaborated in Parts I and II: constitutional underdeterminacy and the centrality of citizens' attachment to shaping the precise contours of the state-federal relationship.

Consider first the underdeterminacy of the federal system. The understanding I have advanced foregrounds the role of political construction in the elaboration of the state-federal relationship. Although this view does not necessarily foreclose judicial engagement with legislation touching on the scope of national power, it does highlight the role of politics in the definition of that scope. Moreover, it should lead us to consider, when confronted with a use of the avoidance canon, whether the difference between the constitutional ground avoided and the constitutional ground chosen has any relation to the statute in question. That is, had the Individual Mandate been passed as a tax would it have been any different than if it had been passed as a commercial regulation? For what reasons could one justification have been more salient than another? And in back of these, what does it mean for a law to be passed pursuant to a specific constitutional power and not another?

Questions such as these focus our attention on two considerations. First, there is the relationship between what could be called political form and constitutional function.

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143. By this I mean that the following argument applies most directly to the classical version of the avoidance canon. The insight underlying this distinction is that it's easier to tell, for reasons set out below, whether Congress was acting pursuant to one power and not another than it is to determine if Congress intended to confront or avoid a constitutional question. The complications surrounding its application to the modern version can be set aside here because the version employed by the Court in *NFIB* was markedly classical. See Mark Tushnet, *Did the Chief Justice Have to Decide the Commerce Clause Question in NFIB*, BALKINIZATION (July 3, 2012), <http://balkin.blogspot.com/2012/07/did-chief-justice-have-to-decide.html>.

Recall that the avoidance canon either denies or almost entirely dismisses any relationship between the politics that produced a law and the text of the statute that comes before the Court. Regardless of the politics surrounding the passage of a statute (i.e., its political form), all that matters for the Court is its bearing on valid congressional powers (i.e., its constitutional function). But a sensitivity to the role of politics in structuring the state-federal relationship makes one loathe to close the door on a relationship such as this. Indeed, this sensitivity leads one to interrogate how political forms shape, constrain, or determine constitutional functions and how, as a consequence, constitutional functions are inseparable from the political forms that produce them.

Consider in this light the tax-versus-penalty argument between the joint dissenters and the majority,<sup>144</sup> not as a matter principally of statutory interpretation but rather as a matter of the relationship between politics and policy. Reoriented along these lines, that debate then becomes not about the best reading of the statute in light of its formal properties but about the relationship of those properties to the underlying political-constitutional choices made in the legislative process. When Congress seeks to exercise its taxing power, it acts in recognizable ways. To name just a few, the bill must originate in the House of Representatives,<sup>145</sup> certain committees must be involved in the drafting and markup processes, noncompliance fees must be identified, and collection procedures must be specified. These, in turn, decisively shape the legislation in question, determining, for example, who is empowered to act on behalf of the government and whether new agencies must be created or existing agencies repurposed. Stated more generally, the taxing power puts some legislative tools on the table that otherwise would not be available (e.g., fees to be collected by the IRS), even as it takes other tools off the table (e.g., criminalizing certain behavior under penalty of prosecution), and in so doing dictates certain procedural requirements for the construction and passage of the bill. The same is true for Congress's power to regulate commerce, just as it is for each of its powers set forth in the Constitution. Hence, to substitute one constitutional foundation for another in the face of constitutional doubts is to effectively rewrite the political history that stands behind a statute's text, severing the connection between political forms and constitutional functions.

Moving on from the relationship between political form and constitutional function, we confront the second consideration brought to light when the assumptions underlying the avoidance canon are laid bare and questioned: the role of political constraints in shaping the political processes that produce legislation. When political constraints (or safeguards) are invoked, what is often meant are the features of institutional design or the explicit procedural requirements that give shape to the political process.<sup>146</sup> But this is a very anemic notion of political constraints, on the one hand

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144. *Sebelius*, 132 S. Ct. at 2650-655 (Scalia, Kennedy, Thomas, Alito, J., dissenting).

145. *See, e.g.*, U.S. CONST. art. I, §7. It is in this connection, perhaps, that Origination Clause challenges to the ACA could have significance beyond the strict procedural defect they allege. *See Sissel v. HHS*, 746 F.3d 468 (D.C. Cir. 2014); *Hotze v. Sebelius*, 991 F. Supp. 2d 864, 878 (2014).

146. Not coincidentally, many of these articulations come in the context of the state-federal relationship. The seminal piece is 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) (opposing judicial review to protect the states from Congress on historical and prudential grounds). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000)

focusing on the few procedural requirements set forth in the Constitution and, on the other, frequently conflating the structure of representative institutions with the substance of representation.<sup>147</sup> One can be even more blunt in critiquing this notion of political constraints: it is not quite clear what is *political* about them other than that they structure one subset of political behavior and helpfully buttress the conventional distinction between law and politics. To define political constraints as the constitutionally imposed requirements of, and implicitly limitations on, the legislative process, or as the (putatively) intended substantive effects of institutional design overlooks the profound ways in which certain forms of politics—what I have been calling constitutional politics—serve as constitutional constraints. Moreover, these forms of politics furnish valuable resources for evaluating the quality and constitutional authority of claims about what the Constitution means.

To see how this is the case, we must return to the relational dimensions of the federal system, specifically the role of attachment in shaping the state-federal relationship. Attachment, in both its Federalist and Anti-Federalist variants, rests on epistemic prerequisites. This is not nearly as abstract as it sounds. All it amounts to is this: in order for a citizen to ascertain and evaluate what her governments are doing, she must first know what they are doing. And for attachment to operate well (i.e., for it to give effect and purpose to that citizen's evaluation of her governments in light of her preferences), that knowledge must accurately map onto political reality. Thus, one prerequisite for attachment to operate as a reliable determinant of the state-federal relationship is that there must be some congruence between the public justifications offered to citizens for governmental action and the actions government actually takes. Otherwise, citizens will be either insufficiently informed and thus make unreliable judgments or inaccurately informed and thus make erroneous (or suboptimal) judgments. This, then, adds another element to the connection between political forms and constitutional functions. The result is a three-part chain running from (1) citizens' apprehensions and evaluations of their representatives' actions and justifications to (2) the political forms created by those representatives' behaviors, and then on to (3) the constitutional functions of the legislative outcomes.

How does this understanding of attachment bear on the use of the avoidance canon in *NFIB v. Sebelius*? In a word—profoundly. For by rejecting the Commerce Clause justification for the Individual Mandate and instead upholding it as a lawful exercise of the taxing power, the Court severed whatever connection there may have been between Commerce Clause justifications for the Individual Mandate given during the long debate over the ACA and the constitutional foundation on which it was allowed to stand. Just as important, avoiding the constitutional doubts raised by the Commerce Clause justification in favor of a taxing power justification effectively invalidated public avowals that the ACA was not an exercise of that power.

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(opposing judicial review to protect the states from Congress on the grounds that political parties and national party politics preserve federalism); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552 (1976). For a critical review of these, and other, arguments, see Saikrishna B. Prakash & John Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 *TEX. L. REV.* 1459 (2001).

147. See Kramer, *supra* note 146, at 222-23.

In short, in our representative system the epistemic connection between citizen and government action that serves as the basis for evaluating how well governments act runs through the political process, and thus through the justifications representatives give for their actions. To pass a law under one justification and uphold it against constitutional challenge under another should raise concerns not only about democratic accountability but also about the viability of attachment as a superintending influence on the scope of national power vis-à-vis the states.

Underlying this argument is the observation that certain congressional powers are, at times, less popular than others. The exercise of some powers can be harder to sell to the public than other powers.<sup>148</sup> What the argument about attachment adds to this is the insight that, in the domain of constitutional politics, the prospects of public justification carries constitutional weight. Put differently, a crucial limitation on constitutional powers consists in public opinion organized around constitutional lines. The constitutional powers available to Congress have their own politics, and those politics shape the processes and procedures that produce legislation. This is, to be sure, an argument that admits of empirical investigation. There is some evidence that both the Commerce Clause and taxing power played a role in justifying the Individual Mandate, and an argument is required to establish which power (or powers) serves as the constitutional basis for Congress's action.<sup>149</sup> But that is precisely the point. By examining both the relationship between political form and constitutional function and the actual politics surrounding the debate and passage of a statute, we can understand a great deal about what powers Congress did and did not exercise and, on that basis, evaluate the authority with which it acted. Crucially, though, this requires looking beyond the text of the statute for such information and, indeed, jettisoning the conventional distinction between law and politics on which the avoidance canon is grounded.

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148. For one example relevant to the specific episode under consideration, see the letter of July 16, 2009, signed by twenty-two House Democrats to then-Speaker Nancy Pelosi opposing the use of the taxing power to finance a portion of the total cost of the ACA (on file with author). This letter shows two things. First, that the taxing power was clearly in play during the drafting of the health care law, though in this case not in the precise context of the Individual Mandate. And second, that the potential use of the taxing power was unpopular enough to lead a significant number of Democrats to petition their leader to reconsider.

149. For example, some have argued that because the ACA was subject to criticism as a tax, it is clear that the Commerce Clause was, at best, one among multiple congressional powers at play. See Metzger & Morrison, *supra* note 135, at 1733 (citing DAN BALZ, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 1, 7 (2010)). It is, however, unclear what support that citation is intended to provide for Metzger and Morrison's argument, as neither page referenced substantiates their claim. Nonetheless, opposition along the lines of that expressed by Sen. Tom Coburn's gloss on a Congressional Research Service white paper is sufficient to sustain the proposition that the use of the taxing power as a justification for the Individual Mandate was subject to criticism (on file with author). See also Ezra Klein, *How does the individual mandate work?* WASH. POST VOICES, Mar. 25, 2010 (noting that the "irony of the mandate is that it's been presented as a terribly onerous tax").

Nonetheless, popular and professional reaction, in conjunction with a high profile rejection of the taxing power justification by President Obama are enough to establish the salience, if not the preeminence, of the Commerce Clause justification throughout the drafting and debate of the ACA. See Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES (July 17, 2010), [http://www.nytimes.com/2010/07/18/health/policy/18health.html?\\_r=0](http://www.nytimes.com/2010/07/18/health/policy/18health.html?_r=0) (quoting Jack Balkin saying that President Obama "has not been honest with the American people about the nature of this bill. This bill is a tax. Because it is a tax, it's completely constitutional"). See also Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS (Sept. 20, 2009), <http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax>; Chris Frates & Mike Allen, *Health bill says 'tax' when President Obama says 'not'*, POLITICO (Sept. 21, 2009), <http://www.politico.com/news/stories/0909/27384.html>.

When considerations of constitutional politics—of how constitutional structures and institutions shape political processes—are taken off the table under the guise of a sharp distinction between law and politics or deference to legislative supremacy, all that remains available for analysis (for judges and citizens alike) are formalistic invocations of the Constitution made in the course of the political process. To wit, on this point commentators have adverted to the importance of clear statement rules,<sup>150</sup> constitutional deliberation in Congress, or the relatively new House rule requiring all legislation to be accompanied by a statement identifying the constitutional powers that authorize the enactment of the bill.<sup>151</sup> Far too often, scant attention is paid to the role of *actual politics*, not scripted interactions or formalistic invocations of the Constitution, in the generation of constitutional meaning and authority. For in constitutional politics—the often messy compound of political debates, public justifications, legislative drafting, and the inseparable relationship of political form and constitutional function—are indispensable resources not only for identifying the ways in which the state-federal relationship is contested and redefined, but also for evaluating the authority with which Congress acts. But all of this is obscured by the canon of constitutional avoidance. The question then is, in light of all that has been said about constitutional underdeterminacy and the role of the people’s attachment in shaping the state-federal relationship, what is the Court to do when confronted with a question along the lines of that presented in *NFIB v. Sebelius*? What should the Court do when confronted with a question about the scope of national power vis-à-vis the states?

### C. Federalism and the Court: Not Process-Based But Processual

The emphasis I placed on the political dimensions of the state-federal relationship, both in the preceding argument against the use of the avoidance canon in *NFIB* and in the understanding of the federal system outlined in Parts I and II, raises an obvious question about the propriety of judicial review in such matters. This question is made all the more pressing by the deep literature rejecting judicial review in federalism disputes on the basis of various “political safeguards” of federalism. For instance, in broadly similar ways, Herbert Wechsler, Jesse Choper, Larry Kramer, and Bradford Clark have all argued that the Supreme Court should refrain from reviewing at least one set of federalism questions.<sup>152</sup> Adducing evidence ranging from constitutional structure<sup>153</sup> to

150. See Metzger & Morrison, *supra* note 135, at 1720-24.

151. See Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 174 (2013); Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the United States Senate*, 67 VAND. L. REV. 837 (2014). See also Metzger & Morrison, *supra* note 135 (seemingly expressing hope that the rule will influence congressional behavior in a meaningful way).

In light of these optimistic accounts, a cautionary note is warranted. Despite its potential for inducing, expressing, and codifying constitutional deliberation in the House of Representatives, to date no study has systematically evaluated the content of the Constitutional Authority Statements (CAS) required by House Rule XII (text available at <http://clerk.house.gov/legislative/house-rules.pdf>). The preliminary results of a large-scale analysis of CAS from the 112th Congress suggest that the rule cannot be said to induce or reveal a significant degree of robust constitutional discourse. Further, the analysis suggests that Rule XII either reveals or induces significant noncompliance on behalf of Democratic lawmakers. See Connor M. Ewing, *Theory vs. Praxis: Constitutional Discourse and House Rule XII* (draft and data on file with author).

152. In addition to the sources cited *supra* note 146, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT

the effects of party politics<sup>154</sup> to the role of the separation of powers,<sup>155</sup> these so-called political-process theorists contend that political safeguards such as these supply sufficient protection for states and for the federal system.<sup>156</sup> Critics of this general view, most notably John Yoo and Sai Prakash,<sup>157</sup> have largely focused their efforts on presenting a structural and historical case for judicial review. To wit, they have argued that the review of legislation concerning the scope of national power and the relationship between the federal and state governments (a) follows from the nature of the political system established by the Constitution and (b) was widely expected at the time of the Constitution's creation and ratification.

Supreme Court jurisprudence over the last three decades has mirrored this debate between process-theorists and their critics. The Court's ruling in *Garcia*,<sup>158</sup> finding that the quest for "traditional" or "integral" governmental functions announced nine years earlier in *Usery*<sup>159</sup> was unworkable, was widely interpreted as a partial acceptance of the process-theory of federalism and its implications for judicial review. This was due in no small part to its explicit citation of both Wechsler<sup>160</sup> and Choper.<sup>161</sup> For this reason, this understanding of the state-federal relationship and the Court's role therein has arguably become a basic, though by no means undisputed, principle in its own right. Even so, the Court's embrace of process-based federalism in *Garcia* proved over time to be more of a fling than an enduring romance, suffering, in Larry Kramer's words, both "insult and injury" in the years following its decision.<sup>162</sup> Hence, in addition to the question about judicial review noted at the outset of this section, there is yet another. What, if anything, does this argument add to the debate between process-theorists and their critics about judicial review? I would like to argue that, as illustrated by the foregoing critique of the avoidance canon and the positions advanced in Parts I and II, it adds quite a bit, specifically because it identifies grounds for legitimate judicial review somewhere between wholesale abdication of review (*à la* the process-theorists) and attempts to

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(1980); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

153. See Wechsler, *supra* note 146; Choper, *supra* note 146.

154. See Kramer, *supra* note 146.

155. See Clark, *supra* note 152.

156. A significant proviso, offered most explicitly by Jesse Choper, is that the Court should abandon review of federalism questions but attend assiduously to questions implicating individual rights.

157. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Prakash & Yoo, *supra* note 146.

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

159. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

160. See *Garcia*, 469 U.S. at 551 n.11, 565 n.9, 587 (1985).

161. *Id.* at 551 n.11, 554 n.18.

162. The insult refers to uncommonly blunt judicial and academic criticism of the majority's opinion in *Garcia*. See, e.g., 469 U.S. 528, 580 (Rehnquist, J.J., dissenting) (expressing confidence that the Court would soon come around to his view); William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985) (saying that Justice Blackmun's argument was difficult to take as "other than a good-hearted joke"). The injury refers to the Court's parings of *Garcia*'s central holding in (*inter alia*) *New York v. United States*, 505 U.S. 144 (1992) (striking the "Take Title" provision of the Low-Level Radioactive Waste Policy Amendments Act on the grounds that it impermissibly commandeered state lawmakers); *Printz v. United States*, 521 U.S. 898 (1997) (holding that state executive officials cannot be commandeered by federal mandate in the course of striking down temporary provisions of the Brady Handgun Violence Prevention Act); *Lopez v. United States*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act as an impermissible exercise of Congress's power under the Commerce Clause).

specify the internal limits on congressional powers (*à la* Yoo and Prakash).<sup>163</sup> This notion of judicial review I will call “processual review,” and it can be illustrated by reference to the earlier critique of the avoidance canon and by application to the question presented in *NFIB v. Sebelius*.

Recall that my critique of the avoidance canon invoked considerations that while not strictly procedural, nonetheless involved the substance of the political process. By drawing a connection between political form and constitutional function, and subsequently extending that connection to citizens’ evaluations of governmental actions, I argued that Congress’ enumerated powers decisively shape both its legislative products and processes. In her analysis of constitutional authority in the domain of war powers, Mariah Zeisberg makes a similar move, arguing that the substantive standards that structure the constitutional politics of war and defense can be translated into “a set of standards for assessing the branches’ war powers politics.”<sup>164</sup> These she called “processual” standards. Elsewhere, Zeisberg elaborates on this mode of political analysis, explaining that “democratic processualism allows us to evaluate how well existing democratic institutions and practices evoke the reasons we need to make good judgments . . . [and] focuses on the relationship between practices of reason-giving and the exercise of legitimate authority.”<sup>165</sup> “Democratic processualism,” she concludes, “pertains to the capacity of institutions to elicit forms of reason-giving that are appropriate for the political questions at hand.”<sup>166</sup>

To be clear, Zeisberg does not offer her processual standards as criteria for judicial review.<sup>167</sup> But just as the substantive standards set forth in the Constitution structure the politics surrounding war powers, so too do they structure the politics of the state-federal relationship. And just as processual standards can be derived from the politics of war powers, such standards can be derived from the politics of state-federal relations. That is the essence of my argument about the relationship between political form and constitutional function and the importance of attachment in shaping the state-federal relationship. As I argued was revealed by the use of the avoidance canon in *NFIB*, there are serious constitutional costs when these relationships are severed or obscured. Judicial review can thus play a crucially important role in maintaining these relationships by insisting on congruence between the public justifications and political forms that attended the passage of a piece of legislation and its constitutional functions as a matter of law. To offer a more formal definition, processual review entails (a) the evaluation of legislative acts on the constitutional basis or bases that structured the processes by which those acts were debated, crafted, justified, and ultimately passed, (b) supplemented by the deference to legislative determinations that is correlative of the underdeterminacy of the federal system. Judicial review along these lines would ensure that popular attachment could shape the division of state and national powers while also recognizing

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163. See Primus, *supra* note 7, for a sophisticated critique of this latter position.

164. Zeisberg, *supra* note 14, at 31. A further affinity between this argument and Zeisberg’s is the relevance of constitutional underdeterminacy to the constitutional politics being examined, underdeterminacy that requires attending to the role of politics in constructing constitutional meaning. *Id.* at 5 n.23.

165. Mariah Zeisberg, *Democratic Processualism*, 41 J. SOC. PHIL. 203 (2010).

166. *Id.* at 205.

167. Zeisberg, *supra* note 14, at 261.

Congress's role in constructing the state-federal relationship.

I am under no illusions that this solves all, or perhaps even many, of the complicated and contentious questions presented by a case like *NFIB v. Sebelius*. But I do think it provides at least the outlines of a constitutional theory that does justice to both the best understanding of the federal system and the requirements of a healthy constitutional politics. So in *NFIB*, adherence to processual review would incline the Court against using the avoidance canon as it did provided it could establish that the constitutional basis that would be avoided by the canon's use (i.e., the Commerce Clause) decisively shaped the politics and public justifications surrounding the statute. As alluded to in the argument about establishing the relationships between political forms, constitutional functions, and citizen evaluations, this is not self-evident but instead demands empirical investigation. Thus, the Court would have to evaluate the politics that produced the ACA.<sup>168</sup> But it would do so on the terms that Congress has set for itself, because the evaluation would be guided by the recognized forms of congressional behavior that have developed from Congress' decisions about how its constitutionally granted powers are properly exercised. If it was determined that the Commerce Clause decisively shaped the politics of the Individual Mandate while the Taxing and Spending Clause did not, then the Court should review it on the basis of the Commerce Clause. And, indeed, it would be far better in such a scenario for the Court to strike the mandate on Commerce Clause grounds than uphold it on Taxing and Spending Clause grounds, though nothing in my argument would require that substantive judgment.<sup>169</sup> For unless the connection between political forms and constitutional functions is preserved, then the people cannot evaluate their governments and, on that basis, "choose their champion." And such a result would deny the fundamental nature of our federal system.

## V. CONCLUSION

The burden of this Essay has been to show that an accurate account of the foundations and development of the American federal system must incorporate both its structural and relational components. I have argued that these two components in turn shape two tensions that animate the politics of sovereignty in the American constitutional order: the underdeterminacy of the federal system and the people's attachment to their governments. Among much else, this argument demonstrates that sovereignty is a crucially important analytical concept in American political and constitutional development, not because it has a single, unchanging meaning but precisely because it is essentially contested and constructed through constitutional politics. Sovereignty is both the object of political contestation and part of the background against which that contestation plays out. This relationship suggests that debates over sovereignty take place in a political and legal context structured by the resolution of previous episodes of conflict. The contestation of sovereignty in the American federal system is an integral

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168. In an intriguing way, this necessity evokes a different (and quite well developed) application of processual investigation: processual archaeology. See GORDON R. WILLEY & PHILIP PHILLIPS, *METHOD AND THEORY IN AMERICAN ARCHAEOLOGY* (1958).

169. On this point, I agree with Schauer, *supra* note 138, at 74, but for reasons other than those he offers.

part of the commitment to popular sovereignty because such conflict unsettles any one governmental level's claim to unchecked decisional authority and thus makes possible the aspiration of self-governance. The people's ability to "choose their champion" both undergirds and depends on the underdeterminacy of the state-federal relationship. As goes the latter, so goes the former.

Nowhere in recent political and constitutional history was this clearer than in the Court's opinion in *National Federation of Independent Business v. Sebelius*. Not because the Court affirmed the underdeterminacy of the state-federal relationship or preserved the role for popular attachment that I have described, but because it advanced an understanding of the federal system that decisively rejected both. Through a close evaluation of the four "basic principles" that guided Chief Justice Roberts's analysis, I showed precisely how his arguments jettisoned these fundamental components of the federal system. While all four principles were critiqued for rejecting constitutional underdeterminacy and the role of popular attachment in shaping the federal system, it was the fourth principle, that justifying the Court's use of the canon of constitutional avoidance, that received the greatest attention. By illustrating how the structural and relational components of the federal system meaningfully shape while also rendering meaningful the constitutional politics of federalism, I argued that the avoidance canon as used in *NFIB* entailed a significant distortion of a constitutionally grounded understanding of the federal system. I then sketched the broad contours of what I termed "processual review," a form of judicial review premised on the maintenance of the connections between political forms, constitutional functions, and citizens' evaluations of their governments. Unlike extant models of judicial review derived from process-based theories of federalism, on the one hand, and models predicated on identifying internal limits to constitutional powers, on the other, processual review recognizes and upholds the structural and relational understanding of the federal system that I have advanced. Though processual review by no means resolves all of the questions concerning the scope of national power vis-à-vis the states, it orients judicial inquiry around the fundamental components of the federal system. And in so doing, it serves a central aspiration of our constitutional system: that both our politics and our law would reflect the desires, hopes, and reasoned judgments of the people.