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Securing States' Interests at the 1787 Constitutional Convention: A Reassessment

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Delegates to the Constitutional Convention of 1787 were convinced that their meeting represented the last great chance to save the Union from dismemberment.[1] By the same token, they recognized that the constitution they were to draft would determine the fate of the states composing the Union. In a letter to Edmund Randolph in advance of the Convention, James Madison highlighted the dichotomous nature of the task confronting the delegates intent on strengthening the national government without eliminating the states as political entities.

> [A]n individual independence of the States, is utterly irreconcileable with the idea of an aggregate sovereignty. I think at the same time that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried then whether any middle ground can be taken which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.[2]

Clearly, Madison envisaged that the states would have no role or, at most, a very restricted role, in the operation of the national government. They would be confined to attending to strictly local matters. If the Virginia Plan captured Madison's vision of a system of national government unfettered by state interference or control, the New Jersey Plan reflected the view of those delegates intent on preserving a goodly measure of state sovereignty, so as to prevent the larger states from "swallow[ing] up the smaller ones by addition, division, or by impoverishment."[3]

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1. See, for example, the following observations by George Washington, Elbridge Gerry, and Edmund Randolph, respectively:

That something is necessary, none will deny; for the situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overturned by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion, will inevitably ensue. (Letter of George Washington to Thomas Jefferson, May 30, 1787, repr. in Max Farrand, *Records of the Federal Convention of 1787,* rev. ed., 4 vols. [New Haven: Yale University Press, 1937] 3:31)

The object of this Meeting is very important in my Mind – unless a System of Government is adopted by *Compact, Force* I expect will plant the Standard: for such an anarchy as now exists cannot last long. (Letter of Elbridge Gerry to James Monroe, June 11, 1787, *ibid.,* 45)

Are we not on the eve of war, which is only prevented by the hopes from this convention. (Opening remarks of Edmund Randolph as recorded by James McHenry of Maryland, May 29, 1787, *ibid.,* 1:26.

2. James Madison to Edmund Randolph, April 8, 1787, in *The Papers of James Madison,* ed. Robert Rutland et al., 17 vols. (Chicago: University of Chicago Press, 1975), 9:368.

3. Letter of Delaware delegate George Read to his colleague John Dickinson, urging him to hasten his attendance at the Convention. May 21, 1787, in Farrand, *Records,* 3:26.

The New Jersey Plan, of course, reflected more than just the demand of the smaller states for equality. Were that all that was involved, the Plan might have consisted of one clause spelling out a demand for a one-house national legislature, with each state having an equal vote. But the Plan also represented a demand for the survival of the states as sovereign political entities in a more decentralized federal system than envisaged by the Virginia Plan. In this sense, the New Jersey Plan was statal, and called for a detailed enumeration of federal powers so that the line of demarcation between national and state authority would be clearly delineated. This explains why delegates of some of the larger states also favored the New Jersey Plan's call for an enumeration of national powers while, on the other hand, some of the smaller states were not averse to voting for the broad Virginia formula on powers, since this sub-

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Once the Convention opted for the Virginia Plan over the New Jersey Plan, it could be assumed that the smaller states, and any other group promoting states' interests, had very little influence on the ultimate shape of the Constitution. This coincides with scholarly assessment of the impact of the Virginia Plan. As Catherine Drinker Bowen has written: "The fifteen Resolves [of the Virginia Plan] were . . . the core and foundation of the United States Constitution."[4] And in the words of Max Farrand: "These [Resolves] are important, because amended and expanded they were developed step by step until they finally became the constitution of the United States."[5] The one major provision in the Constitution said to reflect a concession to state sovereignty is that providing for equal representation for all states in the upper house of the legislature.[6] The belief that the composition of the Senate represents the solitary significant departure from the Virginia Plan appears to be sustained by the oft-quoted statement of Charles Pinckney during the Convention debate: "[T]he whole comes to this . . . . Give N. Jersey an equal vote, and she will dismiss her scruples and concur in the Natil. system."[7]

The purposes of this article are to question the facile assumption that the Constitution was a product almost exclusively of the Virginia Plan and to demonstrate that those concerned with states' interests inspired, or at least significantly influenced, the formulation of many more Constitutional provisions than the one dealing with the Senate. Close scrutiny of the Convention debates reveals a complex interplay between the contending interests and groups at Philadelphia and a nuanced response to the need to balance the requirements of the emerging national government with the preservation of state influence. As will be seen, in their dissent from the Virginia Plan, the small states received crucial support, at critical junctures, from the slave states and those devoted generally to preserving state sovereignty.[8] Nearly all spheres of discussion at Philadelphia were permeated by large state-small state differences, and the final document reflected a much more ubiquitous compromise between large and small states, as also between nationalists and those intent on preserving states' interests, than is commonly recognized. In place of Madison's vision of a national government freed from any reliance on the states, the final version of the Constitution accorded the states a significant role and essential involvement in the operation of the national government. Madison's later comment, in Federalist No. 39, that the Constitution "is, in strictness, neither a national nor a federal Constitution, but a composition of both" is far closer to the mark than is generally supposed.[9]

Recognition of how the proponents of states' interests influenced the drafting of the Constitution is, of course, highly significant for legal as well as historiographic considerations. From the legal perspective, appreciating the factors which, for instance,

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ject was not strictly a small state-large state issue. See, on this topic, the discussion in Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: Appleton-Century-Crofts, 1935), 160–61, esp. n.18. See also Michael P. Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention," *Review of Politics* 48 (1986): 166–210, esp. 169–72.

4. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little, Brown, 1966), 18.

5. Max Farrand, *The Framing of the Constitution of the United States* (New Haven: Yale University Press, 1913), 68. Clinton Rossiter sums it up tersely: "Elaborated, tightened, amended, and refined . . . the Virginia Plan became the Constitution of the United States" (*1787: The Grand Convention* (New York: Norton, 1966], 161).

6. See, for example, the discussion in Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development,* 6th ed. (New York: Norton, 1983), 93–97.

The New Jersey Plan, as is well known, also contributed the supremacy clause to the final Constitution, but this hardly represents a concession to states' interests.

7. Farrand, *Records,* 1:255.

8. However, care should be taken not to confuse the stand of proponents of the New Jersey Plan, such as William Paterson, with the demand of states' righters Yates and Lansing, who were not prepared to see any significant enhancement of national power at the expense of the states. Yates and Lansing fought for retention of the basic principle of the Articles of Confederation, whereby the central government would remain the creature of the states. Once the Convention voted to endorse the Virginia Plan as its working document, they left Philadelphia in protest over the process of "consolidation" which they claimed the Convention was instituting. In contrast, Paterson and his colleagues were prepared to embrace national supremacy but sought to accord the states, and more specifically the smaller states, an effective role in the operation of the national government. They refused to allow the larger states exclusive control of the machinery of government. In this regard, as the present article makes clear, their campaign for an effective voice for the smaller states extended throughout the course of the Convention. See Farrand, *Records,* 3:244.

Herman Belz likewise observes that the smaller states "clearly supported a stronger central authority, but they insisted that institutional changes resulting in a stronger Union should rest on an affirmation of states' rights." He goes on to say:

> The New Jersey Plan showed that the basic division in the convention was not between centralizers and localists, but between centralizers like Madison, who at best thought the states might be retained merely as subordinate administrative units, and states'-rights men, who supported both state sovereignty and a stronger central government. (Kelly, Harbison and Belz, *The American Constitution,* 95, 96)

See also Merrill Jensen, *The Making of the Constitution* (New York: Van Nostrand, 1964), 55, 59. But cf. Charles Warren, *The Making of the Constitution* (Boston: Little, Brown, 1928), 150–51, for a different view of the nationalist attitude towards the states. See also the more recent study: Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), *passim.*

On the subject of American sovereignty, see Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425–520.

In the matter of nomenclature, in this article the term "states' righters" is reserved for Yates and Lansing, in order to distinguish them from proponents of the New Jersey Plan and their allies who are here classified as "supporters of states' interests."

9. Of course, Madison uses the term "federal" to mean a system of government that provides for the participation of the states, in contradistinction to "national."

brought about an enumeration of the powers of Congress in place of wide open-ended heads of power adds an entirely new dimension to the Tenth Amendment. The current forensic debate over state sovereignty and the scope of federal authority can draw fresh insights from an analysis of the drafting history of various provisions of the Constitution.[10]

Historiographically, a reassessment of the contribution of the smaller states is relevant to the controversy which has persisted ever since members of the Progressive school of historical interpretation of the Constitution – most prominently, Charles Beard – presented their version of the 1787 events at Philadelphia. The basic premise of that school was that the Constitutional Convention was devoted essentially to fashioning a document which would serve to protect the economic interests of an elitist class in society. "From this point of view," Beard postulates, "the old conception of the battle at Philadelphia as a contest between small and large states – as political entities – will have to be severely modified."[11] Establishing the pervasiveness of the small state–large state dispute throughout the Convention debates constitutes, therefore, a further source of evidence to refute the already severely challenged economic interpretation of the Philadelphia assembly.

The salience of state influence on the final contents and contours of key constitutional provisions may be discerned by focussing on the following four major issues and their denouement at Philadelphia: federal powers; a federal legislative veto; the advice and consent of the Senate; and the Electoral College.

FEDERAL POWERS

Article 6 of the Virginia Plan, as presented by Edmund Randolph to the Convention plenum on May 29, 1787, contained the following provision on the subject of federal power:

> Resolved . . . that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.[12]

Even a cursory glance reveals that this formula of the Virginia Plan confers practically unlimited power on the federal government. Unlike the Articles of Confederation, the provision contains heads of power rather than specified, enumerated, powers. Any subject that the legislature would deem national in scope or impact would justly come within the purview of federal legislation; an individual state would automatically be considered "incompetent" to legislate thereon; and attempted state legislation in such spheres would unquestionably be held to "interrupt" the "harmony of the United States." In effect, the provision would emasculate the power of the states, rendering the federal government all-powerful in any matter in which it sought to ensure national uniformity. No sphere of operation would be immune from federal authority.[13]

The Virginia formula of according the national legislature heads of power to legislate where the separate states are "incompetent" or where "the harmony of the United States is affected" was discussed by the Convention no less than three times. In each instance, the extremely broad formulation of national power provoked critical comment, even from some noted nationalists. On May 31, the first discussion took place in the Committee of the Whole, and the following colloquy ensued:

> Mr. Butler [of South Carolina] apprehended that the taking so many powers out of the hands of the States as was proposed, tended to destroy all that balance {and security} of interests among the States which it was necessary to preserve; and called on Mr. Randolph the mover of the propositions, to explain the extent of his ideas. . . . Mr. Pinkney & Mr. Rutledge [both from South Carolina] objected to the vagueness of the term *incompetent,* and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition.
>
> Mr. Butler repeated his fears that we were running into an extreme in taking away the powers of the States, and called on Mr. Randolp[h] for the extent of his meaning.[14]
>
> Mr. Randolph [of Virginia] disclaimed any intention to give indefinite powers to the national Legislature, declaring that he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination. His opinion was fixed on this point.[15]

10. See *National League of Cities v. Usery,* 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985); and the literature they have spawned. See also the more recent case, *Alden v. Maine,* 119 S. Ct. 224; 144 L. Ed. 2d 636 (1999).

11. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1913), 153 n.1.

12. Farrand, *Records,* 1:21.

13. "This proposal, had it been allowed to stand, would have given Congress vast authority of a vague and undefined character, inconsistent with the very nature of a federal state" (Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development,* 3rd ed. [New York: Norton, 1955], 143).

14. Farrand, *Records,* 1:51–54. The queries of the South Carolina delegates regarding the scope of national powers under the Virginia Plan probably reflected concern about the possibility of national interference in the system of slavery.

15. Randolph's remarks at this point and in the debate on July 16, noted below, seem strangely at variance with the import of the Virginia Plan's provision on powers. Randolph's biographer, John Reardon, describes the episode as follows:

He [Randolph] found it necessary to reassure . . . the

> Mr. Madison said that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning the practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell. But he should shrink from nothing which should be found essential to such a form of Govt. as would provide for the safety, liberty and happiness of the Community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to.[16]

The vote to grant powers in cases "to which the States are incompetent" was 9 in favor, with none opposed and 1 divided; the other clause, giving powers "necessary to preserve harmony among the States" was agreed to unanimously.[17] The report of the Committee of the Whole, submitted to the Convention on June 13, endorsed the formulation of Article 6 of the Virginia Plan on powers.[18]

On June 15, William Paterson presented the New Jersey Plan to the Convention.[19] In contrast to the Virginia formula, Paterson's proposal would have granted the federal government only specific supplementary powers "in addition to" those already "vested in the U. States in Congress, by the present existing articles of Confederation." The new powers would authorize "the U. States in Congress" to raise revenue by means of duties and stamp charges, to regulate trade and commerce between the states and with foreign nations, and to enforce requisitions. This format of distinct enumerated powers would reflect and reinforce the federal (as against national) character of the union, since the Congress, under the New Jersey Plan, would, of course, remain the representative organ of the states, with each state wielding one vote therein.[20] On June 19, the Convention was called upon to decide whether it wished to continue discussion on the Virginia Plan or switch to the New Jersey Plan. After a major address by Madison highlighting the latter's inadequacy, the Convention voted, 7 to 3 with one state divided, to continue with the Virginia Plan.[21]

> delegates that the Virginia Plan did not, in fact, seek to destroy the power of the states. . . . At one point he strongly implied that he considered the preservation of the legitimate power of the states more important than the Union itself, an observation that must have sent a shiver down Madison's spine. (*Edmund Randolph: A Biography* ([New York: Macmillan, 1975], 101)

It is possible that in presenting the Virginia Plan, Randolph did not fully appreciate all of its implications. This seems to be the conclusion of Clinton Rossiter, who writes that the Virginia Plan "suggested a government so different from the Confederation in form, scope, and basis that no one could have been fooled – except perhaps the unsuspecting Randolph himself. (*The Grand Convention,* 169). A letter written by Madison close to the end of his days offers perhaps a more credible explanation:

> It was perfectly understood that the [Virginia] propositions committed no one to their precise tenor or form; and that the members of the [Virginia] deputation would be as free in discussing and shaping them as the other members of the Convention. (Cited by Warren, *Making of Constitution,* 141)

Whatever his considerations, Randolph consistently strove to modify the broad grant of powers proposed. On July 16, he (and George Mason) obviously voted in favor of committing the clause for "a specification of the powers comprised in the general terms." This determined that Virginia's vote would be in the aye column (Farrand, *Records* 2:15, 17). Likewise, he (and again Mason) must have swung Virginia's vote in favor of eliminating the legislative veto, although it was an essential part of Resolution 6 on powers (ibid., 24, 29). And, of course, Randolph served on the Committee of Detail which replaced the Virginia formula on powers with a detailed enumeration (ibid., 97, 106). That Randolph never considered himself tied to the particulars of the Virginia Plan is also evident from the fact that he campaigned for a plural executive, although a single executive was certainly implicit in the Plan (ibid., 1:88, 90, 92). Moreover, by the end of the Convention, Randolph was deploring the "indefinite and dangerous" nature of national power and pointing to the "necessary and proper" clause as a reason for refusing to sign the Constitution. Obviously, neither his presentation of the Virginia Plan to the Convention nor his membership in the Committee of Detail that produced the provision on powers deterred him from voicing this objection (ibid., 2:563, 631). The Constitution, he charged, threatened to undermine state sovereignty. The "definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers" (ibid., 489).

16. Ibid., 1:51, 53. William Pierce of Georgia records Madison's remarks as follows:

> Mr. Maddison said he had brought with him a strong prepossession for the defining of the limits and powers of the federal Legislature, but he brought with him some doubts about the practicability of doing it: – at present he was convinced it could not be done. (Ibid., 60)

Many years later, in 1833, Madison sought to convey the impression that the broad formulation of powers in the Virginia Plan was never intended to be adopted as is. He wrote:

> It can not be supposed that these descriptive phrases were to be left in their indefinite extent to Legislative discretion. A selection & definition of the cases embraced by them was to be the task of the Convention. If there could be any doubt that this was intended, & so understood by the Convention, it would be removed by the course of proceeding on them as recorded, in its Journal. many of the propositions made in the Convention, fall within this remark: being, as is not unusual general in their phrase, but if adopted to be reduced to their proper shape & specification. (Ibid., 3:526–27)

This interpretation does not seem to coincide with the views he expressed at the Convention, as indicated in the text and in Pierce's minutes. Nor does it coincide with the description of the debate on powers he subsequently conveyed to Jefferson, as will be seen below. See text at n.78. See also Warren, *Making of Constitution,* 164. See also below n.44.

17. Farrand, *Records,* 1:47, 54.

18. Ibid., 229, 236.

19. Ibid., 242–45.

20. Implicitly, the New Jersey Plan would also have retained the same system of representation that operated under the Articles of Confederation, namely, state delegates subject to recall and whose salaries are covered by the state governments. All this was rejected when the Convention voted in favor of the Virginia Plan.

21. Ibid., 1:313, 322.

Thereby the Convention signaled its determination to promote a national solution to the problems confronting the Confederation. According to Catherine Drinker Bowen, the vote also confirmed that "the New Jersey Plan was dead, finished. Madison had given it the crowning blow."[22] "The vote to bury the New Jersey Plan was cast," Clinton Rossiter wrote, "and the Convention turned dutifully to a clause-by-clause consideration of the resolutions reported by the committee of the whole."[23] In fact, even if this vote signaled the end of the road for the New Jersey Plan as such, it by no means signaled the end of efforts by states-minded delegates, especially those of the smaller states, to ensure that the provisions of the Constitution would be drafted in a way that would accommodate their views as well. These delegates would make their influence felt for the duration of the discussions, indeed up to the very last day of the Convention.

When the provision in the Virginia Plan on the powers of the national legislature came up for reconsideration on July 16, Butler once again rose to object to the sweeping nature of the powers granted.[24] He called for "some explanation of the extent of this [legislative] power; particularly of the word *incompetent.*" "The vagueness of the terms," he said, "rendered it impossible for any precise judgment to be formed." In response, Mr. Gorham of Massachusetts sought to allay Butler's fears by explaining that "the vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise & explicit."[25] This explanation left Rutledge less than satisfied. If details were to be supplied, he wanted them to be supplied there and then. He "moved that the clause should be committed [to committee,] to the end that a specification of the powers comprised in the general terms, might be reported."[26] But the vote on his motion failed, the delegates being equally divided.[27] Apparently, a considerable number of the delegates were quite content to leave the provision on powers in its present pristine form, which offered the greatest scope for federal action.

The tie vote, however, did not quell agitation for greater specification of the national legislature's powers. The very next day, July 17, Roger Sherman of Connecticut "observed that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States; that he did not like the definition contained in the Resolution." He therefore proposed that the following clause be inserted in the provision on powers:

> To make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.[28]

Sherman's amendment, surprisingly perhaps, was seconded by nationalist James Wilson "as better expressing the general principle."[29] In this vein, he had earlier stressed that "all interference between the general and local Governments should be obviated as much as possible."[30] However, Wilson's nationalist colleague from Pennsylvania, Gouverneur Morris, took exception to the proposed amendment. He found nothing wrong in infringing "the internal police" power of the states when they were guilty of committing "tricks" affecting the "Citizens" of other states, "as in the case of paper money."[31] Sherman attempted to assuage Gouverneur Morris's concern about national authority by reading "an enumeration of powers, including the power of levying taxes on trade."[32] In response, Morris noted that the power of levying "*direct taxation*" was omitted from Sherman's enumeration. "It must have been the meaning of Mr. Sherman," said Morris, "that the Genl. Govt. should recur to quotas & requisitions, which are subversive of the idea of Govt."[33] Sherman acknowledged that provision would have to be made "for supplying the deficiency of other taxation" but, as yet, "he had not formed any" proposal. While Sherman's amendment evoked a positive response from some delegates, failure to include provision for a national power of direct taxation undermined the wider support necessary for adoption. As a result, Sherman's proposal was rejected by a vote of 2 to 8.[34]

Thereupon, Gunning Bedford of Delaware sought to save the first part of Sherman's amendment, which linked federal legislation with "the general interests of the Union."[35] This part of the sixth resolution, with the addition in italics, would now read:

22. Bowen, *Miracle at Philadelphia,* 117.
23. Rossiter, *The Grand Convention,* 179.
24. Farrand, *Records,* 2:17.
25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid., 25.
29. Ibid., 26.
30. Ibid., 1:49. See also the following remarks by Wilson:
    > By a Natl. Govt. he did not mean one that would swallow up the state Govts. as seemed to be wished by some gentlemen. He thought . . . that they might (not) only subsist but subsist on friendly terms with the former. (Ibid., 322)
    >
    > If security is necessary to preserve the one, it is equally so to preserve the other . . . . [L]et us try to designate the powers of each, and then no danger can be apprehended nor can the general government be possessed of any ambitious views to encroach on the state rights. (Ibid., 363)
31. Ibid., 2:26.
32. Ibid.
33. Ibid. (emphasis in original).
34. Ibid.
35. Ibid.

> and moreover to legislate *in all cases for the general interests of the Union,* and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

By omitting the second half of Sherman's proposal, the scope of federal power was expanded, rather than curtailed.[36] Bedford's motion was seconded by Gouverneur Morris, but prompted the following exchange.

> Mr. Randolph. This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police. The last member [part] of the sentence is {also} superfluous, being included in the first.
> Mr. Bedford. It is not more extensive or formidable than the clause as it stands; *no state* being *separately* competent to legislate for the *general interests* of the Union.[37]

Bedford's formulation of the clause was endorsed by a vote of 6 to 4, and in this form it was conveyed, a week later on July 24, to the Committee of Detail.[38]

The debate over the formulation of the powers of the national legislature demonstrated that a considerable segment of the delegates were concerned to define with more precision the powers to be accorded the national government and to delineate the demarcation line between national and state authority. It is noteworthy that among the delegates thus concerned were two members of the nationalist camp, James Wilson of Pennsylvania and Edmund Randolph of Virginia. Their stand assumes particular significance since both men were selected to serve in the five-member Committee of Detail, which was charged with preparing the outline of a constitution on the basis of the resolutions adopted.[39] They were joined in committee by two others who had been quite outspoken in their opposition to the broad formulation of the Virginia Plan on powers: John Rutledge of South Carolina (who was to serve as chairman), and Nathaniel Gorham of Massachusetts. The fifth member was Oliver Ellsworth of Connecticut, a principal proponent of the idea of state equality in the upper chamber of the legislature.[40]

Given this constellation of the Committee of Detail, and given the fact that not only the Virginia Resolutions, but the New Jersey and Pinckney Plans were also conveyed to this Committee, it is little wonder that one of its first acts was to revise the wording of the Virginia Plan and enumerate a detailed list of powers which would appertain to the national legislature.[41] In a very early draft of that Committee (found among the papers of George Mason), the Virginia formula was completely abandoned, and in its place there appeared a rudimentary list of powers, subject to exceptions and limitations in various cases.[42] A second draft of the Committee of Detail incorporated, practically verbatim, the clause on powers to be found in the New Jersey Plan, as Farrand notes in an editorial comment.[43]

When the Committee of Detail completed its labor and presented its ultimate formulation to the plenum on August 6, the draft constitution contained a detailed list of federal powers closely resembling the list contained in Article 1, Section 8, of the final Constitution.[44] Interestingly, when the draft constitution of

36. It may seem strange that Bedford, from the small state of Delaware, should have presented a motion which tended to expand national power – the more so since he had earlier warned the larger states that denial of state equality in at least one branch of the legislature would prompt the smaller states to "find some foreign ally . . . who will take them by the hand and do them justice" (ibid., 1:492). Bedford, however, was apparently not averse to expansion of national power so long as equality was assured. What was needed, from his perspective, was "enlarging the federal powers not annihilating the federal system" (ibid.)

37. Ibid., 2:26–27. (Emphasis in original). (Additions in curved brackets are in original; those in square brackets are by author.)

38. Ibid., 85, 95. For the text of the provision as conveyed to the Committee of Detail, see ibid., 131–32.

39. See ibid., 97, 106.

40. See ibid., 1:193, 201.

41. Ibid., 2:98, 106.

42. Committee of Detail, IV, ibid., 142–44.

43. Committee of Detail, VII, ibid., 157 n.15. The very next draft presents an enumeration of powers (ibid., 167–68). It is not here suggested that the Committee of Detail replaced the Virginia Plan with the New Jersey Plan as its working document. The latter, in any case, only recommended supplementing the list of powers already enumerated in the Articles of Confederation with two further powers. But the Committee did see fit to adopt the pattern of spelling out particular powers rather than heads of powers. Thereby it accepted the recommendation of the New Jersey Plan that the scheme of the Articles be preserved, with additional powers being added to those already enumerated. In this regard, it is perhaps instructive to note what Farrand has said:

> In tracing the work of the committee [of Detail] through its various stages a number of interesting and important things are noticeable. The first of these is that the document which proved to be of the most service to the committee was the articles of confederation. . . . The provisions for the powers of congress, the prohibitions placed upon state action, . . . were taken directly from the articles. . . . It is not too much to say that the articles of confederation were at the basis of the new constitution.
>
> The next most useful documents were the New Jersey and Pinckney plans. These were used more . . . for the purpose of assistance in wording various sections and clauses. (*Framing of Constitution,* 127–28)

44. Jack N. Rakove maintains that replacement of the original open-ended formula of the Virginia Plan with a finite list of powers was probably intended from the beginning (*Original Meanings: Politics and Ideas in the Making of the Constitution* [New York: Knopf, 1996], 84, 178). Lance Banning, going even further, declares categorically that Madison, and the Convention generally, never entertained the thought of leaving the powers of Congress unenumerated (*Sacred Fire of Liberty,* 159). In this, he concurs with the conclusion of Zuckert, "Federalism and the Founding," 178–80. As noted, however, this conclusion would seem not to accord with Madison's summation on the subject of powers in his letter to Jefferson, as cited below in text at n.78. The interpretation pre-

the Committee of Detail was taken up for debate by the Convention, the radical change effected in defining federal powers evoked no comment. Delegates discussed the details of the provision on powers without commenting on the major change that had been instituted. Clearly, there was a consensus that revision of the clause on powers was warranted.[45] The strong sentiment voiced in the plenum for a detailed enumeration, which failed only by a tie vote, coupled with overwhelming support in the Committee of Detail, effectively settled the issue for all parties. Nationalists could feel that central power was adequate to attain all national goals, especially with the addition of the necessary and proper clause, while those concerned with state sovereignty justly felt that they had eliminated the threat of an all-powerful central government whose reach would extend into all spheres of state activity.

The considerations underlying the formulation of the provision on powers are reflected in a letter which Sherman and Ellsworth sent to the governor of Connecticut upon conclusion of the Convention:

> Some additional powers are vested in congress, which was a principal object that the states had in view in appointing the convention. Those powers extend only to matters respecting the common interests of the union, and are specifically defined, so that the particular states retain their sovereignty in all other matters.[46]

This letter highlights the fundamental purpose for which the Convention assembled: to revise the distribution of powers between the state and national governments so as to substantially enhance the authority of the latter. While this was the acknowledged goal, a considerable number of delegates were obviously intent on ensuring that the federal government, with its newly expanded powers, would not interfere with, or eclipse, the authority of the state governments in their domestic affairs. Apparently, these delegates regarded the Virginia formula as a threat to state sovereignty. The format of the New Jersey Plan, which circumscribed the scope of federal authority even while it increased the number of powers to be granted, was a safer instrument than the Virginia Plan's formula for open-ended heads of power. As has been said: "Enumeration marked another moderate victory for the states' rights bloc."[47] In the view of these delegates, there was no need to become involved in, or to dominate, strictly state affairs. This conclusion emerges more starkly from a consideration of the Convention's handling of the legislative veto.

A FEDERAL LEGISLATIVE VETO

Resolution 6 of the Virginia Plan, in addition to its clauses on federal power, also contained a provision for a national legislative veto. The clause ran as follows: "To negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."[48] This legislative veto was derived from an even more ambitious veto scheme formulated by Madison in advance of the Convention.

In a letter to Thomas Jefferson, dated March 19, 1787, Madison referred to "the mortal diseases of the existing constitution" and suggested several key points for inclusion in the proposed new document, including national supremacy and the separation of powers.[49] At the heart of his proposals was a suggestion for a national legislative veto:

> Over & above the positive power of regulating trade and sundry other matters in which uniformity is proper, to arm the federal head with a negative *in all cases whatsoever* on the local Legislatures. Without this defensive power . . . however ample the federal powers may be

sented above in n.16 coincides with that reached by Irving Brant, *James Madison: Father of the Constitution 1787–1800* (Indianapolis: Bobbs-Merrill, 1950), 35–36. However, Brant does not cite Madison's letter to Jefferson.

45. For a conspiratorial interpretation of the work of the Committee of Detail in this matter, see the note by John C. Hueston, "Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers," *Yale Law Journal* 100 (1990): 765–83. In Hueston's words: "This note suggests that rather than simply elaborating upon the existing resolutions, the Committee actually redefined the constitutional balance of state and federal powers by enhancing the rights of states at the expense of sweeping central powers" (ibid., 766). On the basis of his thesis, that the five members of the Committee of Detail "hijacked" the Convention's resolutions to produce a much weaker constitution than was really intended, Hueston reaches the startling conclusion that the final text of the Constitution on state powers should be regarded as only "second choice." "Scholars and judges," he claims, "should redefine intent" in light of this interpretation.

The thrust of his argument is precisely the converse of that presented in this article, that the format of the New Jersey Plan was deliberately adopted by the Committee and endorsed by the Convention out of a strong desire to preserve state sovereignty and as better and more faithfully reflecting the true wishes of the Convention on the division of powers between central and state governments. Hueston, it must be pointed out, completely fails to note that the New Jersey and Pinckney Plans were also conveyed to the Committee of Detail and presumably the Committee was asked to take them also into account in preparing a draft constitution. But above all, as Hueston himself acknowledges, the Committee's Report on powers did not evoke even a murmur of protest from a single member and was solidly confirmed by repeated votes of the Convention for a period of over six weeks. One needs no greater proof that the Committee's formulation of the provision on powers accurately reflected the consensus of the delegates at the Convention and must be regarded as the definitive expression of their will. Any other interpretation flies in the face of the freely expressed decision of the Convention.

46. Sept. 26, 1787, in Farrand, *Records,* 3:99. Pierce Butler, of South Carolina, in a letter dated Oct. 8, 1787, summed it up as follows: "The powers of the General Government are so defined as not to destroy the Sovereignty of the Individual States" (ibid., 103).

47. Kelly and Harbison, *The American Constitution,* 143.

48. Farrand, *Records,* 1:21.

49. Rutland, *Papers of James Madison,* 9:317–22.

> made, or however Clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States. The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority.[50]

Madison's letter to George Washington of April 16, 1787, contained the following paragraph:

> A negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded & defeated. The States will continue to invade the national jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest. Another happy effect of this prerogative would be its controul on the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and of individuals.[51]

While the notion of a legislative veto originated with Madison, the clause as formulated in the Virginia Plan reflects a significant, if subtle, change from Madison's own version, which prescribed a vastly wider scope of operation. Madison had called for "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative." The words emphasized by Madison and his reference to a "Kingly prerogative" indicate that Madison conceived of the veto as an absolute instrument in the hands of the national legislature with which to control the state governments.[52] Clearly enough, the Virginia delegation was not prepared to accept Madison's proposal for an absolute veto; it would go too far. As an alternative, the Virginia delegation proposed that the legislative veto extend only to such state laws as were deemed to be "contravening in the opinion of the National Legislature the articles of the Union."

This emendation of Madison's veto proposal revealed that the delegates to the Constitutional Convention, with all their resolve to tilt the balance of powers between central and state governments in favor of the national government, were not intent on crippling the state governments or of interfering in their purely domestic affairs. So long as state action did not invade the prerogatives of the national government and thereby violate the Articles of the Union, there was no justification for the exercise of a national legislative veto. Underlying the Virginia formulation was the conviction that the expansion of national authority did not require the absolute denial of state sovereignty as envisaged by Madison.

Notwithstanding the setback he had suffered in the Virginia caucus over his proposal for an absolute legislative veto, Madison was not deterred from raising the matter several times in the Convention.[53] On May 31, the limited veto formula of the Virginia Plan was accepted by the Committee of the Whole without "debate or dissent."[54] A week later, on June 8, Charles Pinckney of South Carolina moved that the legislative veto extend to "all Laws which they [members of the national legislature] shd. judge to be improper."[55] "A universality of the power," he said, "was indispensably necessary to render it effectual." Furthermore,

> The States must be kept in due subordination to the nation; that if the States were left to act of themselves . . . it wd. be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means.

Madison seconded Pinckney's motion.

> [A]n indefinite power to negative legislative acts of the States . . . [was] absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. . . . Should no such precaution be engrafted, the only reme-

50. Ibid., 318. Emphasis in original. Jefferson, it should be noted, objected to the veto proposal: "It fails in an essential character, that the hole & the patch should be commensurate. But this proposes to mend a small hole by covering the whole garment" (ibid., 10:64 [June 20, 1787]). In place of a legislative veto, Jefferson suggested a federal judicial veto for controlling unconstitutional state legislation: "Would not an appeal from the state judicatures to a federal court, in all cases where the act of Confederation controuled the question, be as effectual a remedy, & exactly commensurate to the defect."

51. Ibid., 9:383–84. Emphasis in original. See also Madison's letter to Randolph, April 8, 1787, ibid., 368–71.

52. During discussion of the legislative veto at the Convention, Madison described its operation as follows: "The negative {on the State laws} proposed, will make it [the national legislature] an essential branch of the State Legislatures" (Farrand, *Records,* 1:447). Charles F. Hobson, the author of a pathbreaking article on the subject, has said: "Madison proposed nothing less than an organic union of the general and state governments" ("The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," *William and Mary Quarterly,* 3rd ser., 36 [1979]: 219).

53. Farrand, *Records,* 1:318, 447; 2:440, 589.

54. Ibid., 1:47, 54. At the suggestion of Benjamin Franklin, the legislative veto was extended to also cover state laws violating treaties (ibid.).

55. Ibid., 164. In this regard, it might be noted that an outline of what has been described as the Pinckney Plan, submitted to the Convention on May 29, contained the following clause: "No Bill of the Legislature of any State shall become a law till it shall have been laid before S. & H.D. in C. assembled and received their Approbation" (ibid., 2:135, 3:607).

> dy wd. lie in an appeal to coercion. . . . The negative wd. render the use of force unnecessary. The States cd. of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other. . . . In a word, to recur to the illustrations borrowed from the planetary System. This prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.[56]

The Pinckney-Madison proposal for a comprehensive legislative veto was vigorously attacked. "The Natl. Legislature with such a power," declared Elbridge Gerry of Massachusetts, "may enslave the States. Such an idea as this will never be acceded to."[57] Gunning Bedford of Delaware voiced the fears of the smaller states:

> [He] would refer . . . to the smallness of his own State which may be injured at pleasure without redress. It was meant . . . to strip the small States of their equal right of suffrage. In this case Delaware would have about 1/90 {for its} share in the General Councils, whilst Pa. & Va. would possess 1/3 of the whole. Is there no difference of interests, no rivalship of commerce, of manufactures? Will not these large States crush the small ones whenever they stand in the way of their ambitions or interested views. This shows the impossibility of adopting such a system as that on the table. . . . It seems as if Pa. & Va. by the conduct of their deputies wished to provide a system in which they would have an enormous & monstrous influence.[58]

Bedford also raised those practical considerations he considered insuperable:

> Are the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be incapable of Judging them? Is the National Legislature too to sit continually in order to revise the laws of the States?[59]

Madison attempted to resolve the practical difficulties by suggesting procedures for implementing the comprehensive negative,[60] but his scheme was dismissed by Mr. Pierce Butler of South Carolina "as cutting off all hope of equal justice to the distant States." "The people there," he was sure, "would not . . . [even] give it a hearing."[61] The suggestion to broaden the national legislative veto was voted down by a 3 to 7 majority (with one abstention).[62] The Report of the Committee of the Whole adhered to the pattern of the Virginia Plan in limiting the legislative veto to instances of unconstitutional state action.[63]

The issue of the national legislative veto was taken up again on July 17, immediately after the question of the composition of the second house was settled. The right of the national legislature to nullify state laws that, in its view, violated the constitution, was vigorously criticized.[64] Gouverneur Morris, a foremost nationalist, opposed the power "as likely to be terrible to the States, and not necessary, if sufficient Legislative authority should be given to the Genl. Government." Roger Sherman of Connecticut "thought it unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union." Luther Martin of Maryland "considered the power as improper & inadmissable." "Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?" he asked.

This criticism prompted Madison once again to expound on the essentiality of the veto "to the efficacy & security of the Genl. Govt." "A power of negativing the improper laws of the States" he said, "is at once the most mild & certain means of preserving the harmony of the system." He adverted to the British example where "harmony & subordination of the various parts of the empire" were maintained thanks to "the prerogative by which means the Crown, stifles in the birth every Act of every part tending to discord or encroachment."[65]

As the debate wore on, Gouverneur Morris indicated that he was "more & more opposed to the negative." It would, he declared, "disgust all the States. A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law."[66] The opposition to the legislative veto was sufficiently strong to lead to its complete elimination from the draft constitution by a vote of 7 to 3.[67] The three states voting in favor of the legislative veto were Massachusetts, Virginia, and North Carolina, all large, or relatively large states. Each of the smaller states voted with the majority to eliminate the legislative veto entirely.

Not surprisingly, with the elimination of any authority qualified to umpire federal-state relations, Maryland's Luther Martin moved the adoption of a supremacy clause binding "the Judiciaries of the several States" to treat federal legislation as "the

56. Ibid., 1:164–65.
57. Ibid., 165–66.
58. Ibid., 167.
59. Ibid., 167–68.
60. Ibid., 168. For the purpose of affirming urgent state legislation, Madison suggested the possibility of "some emanation of the power from the Natl. Govt. into each State so far as to give a temporary assent at least."
61. Ibid.
62. Ibid., 162–63, 168.
63. Ibid., 225, 229.
64. Ibid., 2:27–28.
65. Ibid., 27–28.
66. Ibid., 28.
67. Ibid.

supreme law of the respective States . . . any thing in the respective laws of the individual States to the contrary notwithstanding." Later, the clause was revised to include a reference to the Constitution itself, so as to make it and the laws of the United States "the supreme Law of the Land" – and not merely of the states. This clause, derived, as noted earlier, from the New Jersey Plan, was intended to substitute the court for the legislature in ensuring that national laws were not disregarded by the states (as they had been under the Articles of Confederation) and that in the event of a federal-state clash, the laws of the federal government would take precedence in its area of jurisdiction. The supremacy clause was thus the basis for the judicial review of state legislation, without which, as Justice Holmes declared, "the Union would be imperiled."[68] (In *Marbury v. Madison,* Chief Justice Marshall, of course, invoked this clause to justify establishing the principle of judicial review over federal legislation as well.)

Even as the Convention was drawing to a close, a last-minute attempt was made to institute some form of national legislative veto. On August 23, Pinckney moved that Congress, by a vote of two-thirds of both houses, be empowered to cancel state laws that interfered "with the general interests and harmony of the Union." Pinckney stressed that the smaller states would not be disadvantaged by this form of the legislative veto. "The objection drawn from the predominance of the large {States} had been removed by the equality established in the Senate."[69] Wilson supported the proposal "as the key-stone wanted to compleat the wide arch of Government" being raised. "The power of self-defence had been urged as necessary for the State Governments – It was equally necessary for the General Government."[70]

Emphasizing the practical difficulties of administering such a veto, George Mason queried: "Is no road nor bridge to be established without the Sanction of the General Legislature? Is this to sit constantly in order to receive & revise the State Laws?"[71] John Rutledge, Pinckney's fellow delegate from South Carolina who had served as chairman of the Committee of Detail, was apparently outraged by the proposal. "If nothing else, this alone would damn and ought to damn the Constitution," he said, adding: "Will any State ever agree to be bound hand & foot in this manner?"[72] Ellsworth condemned the proposal as possibly implying that "the State Executives should be appointed by the Genl. Government, and have a controul over the State laws."[73] John Langdon of New Hampshire highlighted the matter at issue. It was "resolvable," he said, "into the question whether the extent of the National Constitution was to be judged of by the Genl. or the State Governments."[74] In this, he differed from Roger Sherman of Connecticut who thought the motion "unnecessary; the laws of the General Government being Supreme & paramount to the State laws."[75] Though Pinckney's proposal represented a significant concession to the smaller states by requiring a two-thirds majority in both houses, it failed, by a 5 to 6 vote, to be sent to committee.[76]

The foregoing review confirms that, while the Convention was determined to establish federal supremacy, it was equally determined to carefully confine this supremacy to the requirements of the Union. These requirements were spelled out in the Constitution in both positive and negative terms – in the enumeration of federal powers in Article 1, Section 8, and in the imposition of prohibitions on the states in Article 1, Section 10. The purpose of both provisions was to restrict federal power to the national sphere while excluding state encroachment on that sphere. Matters deemed inherently national were completely removed from state competence so as to avoid any cause for friction. Thus coinage, for example, was listed as a federal power and was also explicitly denied to the states. At the same time, the Convention deemed ongoing federal involvement in the exclusively internal affairs of the states to be neither warranted nor sanctioned. As summed up by Gouverneur Morris: "Within the State itself a majority must rule, whatever may be the mischief done among themselves."[77]

The debate had underscored the extreme divergence between Madison, who campaigned vigorously for a blanket legislative veto, and the majority, who opposed any legislative role in disallowing state laws, even those deemed manifestly unconstitutional. That task would be handled by the courts, not by the national legislature. State sovereignty was to be preserved even while the Union was strengthened.

The Convention's handling of the entire subject of national powers and a legislative veto is neatly summarized by Madison in his letter of October 24, 1787, to Jefferson:

> The second object, the due partition of power, between the General & local Governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; some for indefinite power of Legislation in the Congress, with a negative on the laws of the States: some for such a power without a negative: some for a limited power of legislation, with such a negative: the majority finally for a limited power without the negative.[78]

68. Oliver W. Holmes, "Law and the Court," *Collected Legal Papers* (New York: Harcourt Brace, 1921), 295.
69. Farrand, *Records,* 2:390.
70. Ibid., 391.
71. Ibid., 390.
72. Ibid., 391.
73. Ibid. Interestingly enough, Pinckney, in reply, indeed recommended that "State Executives ought to be so appointed" (Ibid.).
74. Ibid.
75. Ibid., 390.
76. Ibid., 382, 391.
77. Ibid., 439.
78. *Madison Papers,* 10:209.

Madison, of course, had favored the second proposition: "indefinite power of Legislation in the Congress, with a negative on the laws of the States"; but the majority endorsed "limited power without the negative."[79] In short, Madison's scheme for open-ended heads of power for the national legislature, as outlined in the Virginia Plan, was rejected in favor of a list of defined powers carefully enumerated, following the pattern of the Articles of Confederation and the New Jersey Plan. And even the qualified legislative veto of the Virginia Plan was totally abandoned. Federal powers were to be enhanced, but not at the expense of every semblance of state autonomy.

The consequences of abandoning Article 6 of the Virginia Plan in favor of the New Jersey Plan's format on powers were far-reaching and impressive. In place of an all-powerful legislature, the United States received a Congress of limited, defined powers directed strictly to the fulfillment of national needs, with no authority to intervene in state affairs on an ongoing basis or to meddle in strictly state concerns. And the states, rather than being totally submerged and subordinated components of the national government, survived as independent political entities, exercising governmental control at the local level. Perhaps most significantly, the courts emerged as the umpire of federal-state relations. A constitutional system in which Congress would have possessed practically unlimited power and a legislative veto over state legislation would not likely have included, within its compass, the practice of judicial review as we know it – whether in respect of state or federal laws. It is safe to conclude, therefore, that judicial review may be deemed a direct by-product of the replacement of the Virginia Plan's clause on powers with the format of the New Jersey Plan, coupled with the necessary introduction of the supremacy clause, as a natural concomitant of the abandonment of legislative supervision of the federal-state constitutional nexus.

SENATE ADVICE AND CONSENT

Two topics are encompassed under this heading: appointments and treaties. Article 2, Section 2, Clause 2 of the Constitution reads:

> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Offices, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Several facets of this provision call for explanation: (1) why treaties and appointments require the joint operation of two branches of government, both President and Senate "in unique combination," for entry into force; (2) why the House of Representatives is denied a role with respect to both matters; and (3) why there is a difference in the size of the stipulated Senate majority, with treaties requiring a two-thirds vote and appointments a simple majority.[80]

In order to trace the formulation of the provision at the Constitutional Convention it is first necessary to examine the relevant provision in the Articles of Confederation. Under the Articles, both functions, the treaty power and the power to appoint ambassadors, resided in "the united states in congress assembled." Appointments required a majority vote, while treaties needed the approval of nine out of the thirteen states.[81] The Virginia Plan, presented to the Convention on May 29, made no reference to either treaties or appointments, except for the appointment of judges "by the National Legislature."[82] In effect, then, both matters would continue to devolve on the Congress, as under the Articles of Confederation.[83]

In debate, on June 5, Madison objected to the election of judges by the whole legislature "or any numerous body." "Besides the danger of intrigue and partiality," he said, "many of the members were not judges of the requisite qualifications." Nor did he favor lodging the appointment of judges in the executive:

> He rather inclined to give it to the Senatorial branch, as numerous eno' to be confided in – as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberative judgments.[84]

On June 13, Madison's formal proposal for lodging the appointment of judges in the Senate was carried unanimously.[85] At this point, the Senate to which Madison and the Convention referred was that outlined in the Virginia Plan (essentially drafted by Madison) in which representation would be proportional to population, as in the lower house.[86]

79. For Madison's initial concept of the role of the states in relation to the national government, see his letter to Randolph, cited above in text at n.2.

80. Louis Henkin, *Foreign Affairs and the Constitution* (New York: Norton, 1975), 127.

81. Art. IX of the Articles of Confederation.

82. Resolution 9, Farrand, *Records,* 1:21.

83. See Resolution 6 in Report of the Committee of the Whole on the Virginia Plan on June 13 (ibid., 236).

In debate, Madison moved that the executive be empowered "to appoint to offices in cases not otherwise provided for" (ibid., 67). His motion was accepted, and the provision appeared in that form in the Report of the Committee of the Whole (ibid., 236).

84. Ibid., 120.

85. Ibid., 232–33.

86. At the time, Hamilton made a proposal that was little noticed. (There is no reference to it in Madison's minutes. It is noted

The New Jersey Plan, first presented to the plenum on June 15, provided for the appointment of judges to the Supreme Court by the executive acting alone.[87] This may ring strange in a plan devoted to according the states, and particularly the smaller states, a greater role in the operation of the federal government. However, two things should be borne in mind. First, the New Jersey Plan endorsed a plural executive; and second, the national executive was subject to the control of state executives who could apply to Congress for his removal.[88] Consequently, a restraining feature was built into the appointment process, and there was no need for additional restraint by another branch of government. The New Jersey Plan made no reference to the adoption of treaties, and presumably under its scheme, the power to make treaties would continue to reside in the one-House, state-controlled Congress that operated under the Articles of Confederation.

On June 19, the Convention opted for the Virginia Plan in preference to the New Jersey Plan.[89] This, of course, did not put an end to small-state agitation for equality in at least one house of the national legislature.[90] The matter was only resolved with finality when the Connecticut Compromise was adopted on July 16 granting all states equality in the Senate.[91] The previously adopted formula, according to which the Senate alone made judicial appointments, was now significantly weighted in favor of the smaller states. This fact was not lost on the delegates of the larger states when the judicial appointments provision was once again taken up for debate on July 18.

Randolph was quite candid in noting the objections raised against leaving appointments in the new Senate. "It is true," he said, "that when the appt. of the Judges was vested in the 2d. branch an equality of votes had not been given to it." Nonetheless, he preferred leaving that power in the Senate rather than transferring it to the executive as other delegates desired.[92] Among the latter was James Wilson, who made a formal proposal to that effect.[93] Gunning Bedford of Delaware demurred since "it would put it in his [the executive's] power to gain over the larger States, by gratifying them with a preference of their Citizens."[94] Nathaniel Gorham of Massachusetts submitted a motion to accept the formula practiced in his own state, according to which the executive appointed with the advice and consent of the second branch of the legislature.[95] Neither the Wilson nor Gorham suggestion was accepted by the Convention.[96]

Although Madison had been instrumental in getting the Convention to lodge the appointment power in the Senate exclusively, following the change in circumstances he moved to have that formula revised.[97] His first suggestion was for appointment by the executive "with the concurrence of {⅓ at least} of the 2d. branch." "This," he said, "would unite the advantage of responsibility in the Executive with the security afforded in the 2d. branch agst. any incautious or corrupt nomination." The failure of Gorham's proposal to be accepted led Madison to move that judges be nominated by the executive, which appointments should enter into force unless "disagreed to within —— days by ⅔ of the 2d. branch."[98] The negative formulation and stipulation of a high percentage for disapproval would, of course, preclude a veto by the smaller states.

Madison candidly revealed the considerations that led him to make his proposal:

> As the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their [sic] shd. be a concurrence of two authorities, in one of which the people, in the other states, should be represented. The Executive Magistrate wd be considered as a national officer, acting for and equally sympathising with every part of the U. States.[99]
>
> If the 2d branch alone should have this power, [of appointment], the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States; and as it would moreover throw the appointments entirely into the hands of ye Nthern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.[100]

only in Pierce's record.) Hamilton suggested that the executive nominate and the Senate have "the right of rejecting or approving" appointments (ibid., 128). When Hamilton, in a major address, presented his own Plan to the Convention on June 18, he proposed that the executive have the power to make all treaties "with the advice and approbation of the Senate"; "to have the sole appointment of the heads or chief officers of the departments of Finance, War, and Foreign Affairs"; and to nominate all other officers, including ambassadors, "subject to the approbation or rejection of the Senate" (ibid., 292).

87. Ibid., 244. The New Jersey Plan also empowered "the [national] Executives . . . to appoint all federal officers not otherwise provided for."

88. Ibid.

89. Ibid., 313, 322.

90. See, for example, Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, KS: University Press of Kansas, 1985), 227–33; McLaughlin, *Constitutional History,* 168–76.

91. Farrand, *Records,* 2:14, 15.

92. Ibid., 43.

93. Ibid., 37, 41.

94. Ibid., 43.

95. Ibid., 38, 41, 44.

96. Ibid., 37, 38, 44.

97. Ibid., 42–43.

98. Ibid., 38, 44.

99. Ibid., 80–81.

100. Ibid., 81.

Concerned with the implications of the proposal for the status of the states, Elbridge Gerry of Massachusetts objected to Madison's proposal.[101] "The appointment of the Judges like every other part of the Constitution shd. be so modeled as to give satisfaction both to the people and to the States"; but "the mode under consideration will give satisfaction to neither." He also disagreed with the suggestion that a two-thirds vote in the Senate be required to reject a nomination. Whereupon Madison revised his proposal to allow Senate disapproval by simple majority.[102] Even with this revision, however, Madison's motion failed, by a vote of 3 to 6.[103]

It is noteworthy that the only states favoring Madison's proposal were the three large states – Massachusetts, Pennsylvania, and Virginia. In a separate vote, with the same three large states opposed, the Convention immediately confirmed that judges were to be appointed by the Senate alone.[104] This formula on judicial appointments became part of the clause on Senate powers incorporated in the outline of a constitution prepared by the Committee of Detail. In the meantime, several delegates were becoming alarmed at the inordinate concentration of powers in the Senate. Thus, in a discussion on August 15, George Mason strongly protested the fact that the treaty power was lodged in the Senate alone. "The Senate by means of [a] treaty might alienate territory &c. without legislative sanction. . . . [It] might by treaty dismember the Union."[105]

On August 23, the Convention considered the draft provision on Senate powers which read: "The Senate of the United States shall have power to make treaties,and to appoint Ambassadors, and Judges of the supreme Court."[106] Gouverneur Morris argued against Senate appointment of officials. "He considered the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility."[107] He was supported in this stand by his colleague from Pennsylvania, James Wilson.

Madison spoke out against granting the Senate exclusive control over treaty-making. "The Senate represented the States alone," he said, "and . . . for this as well as other obvious reasons it was proper that the President should be an agent in Treaties."[108] Madison's comment reflected both a more "national" perspective on the foreign-affairs power and the dissatisfaction of the larger states with the disproportionate influence the smaller states would now be wielding in the Senate. Hence his suggestion that the President, the only truly national figure in the structure of government, be brought into the picture.

Gouverneur Morris was skeptical about according the Senate any role in treaty-making but, as a minimum, he suggested that no treaty bind the United States unless "ratified by a law."[109] This meant that the House of Representatives, the repository of large-state influence, would be involved in the treaty-making process. The implications of the Morris amendment were spelled out by Mr. Dickinson of Delaware. He "concurred in the amendment, as most safe and proper, tho' he was sensible it was unfavorable to the little States; which would otherwise have an *equal* share in making Treaties."[110] Gouverneur Morris's motion, however, was rejected, with only his own state, Pennsylvania, voting in favor.[111] Obviously, the states, and particularly the smaller states, were not disposed to share the foreign-affairs power with the lower house of the national legislature, in which the larger states would exercise predominant influence.[112]

At this point, therefore, the treaty power remained lodged in the Senate exclusively. Madison, however, had reservations regarding this arrangement and "hinted for consideration, whether a distinction might not be made between different sorts of Treaties – Allowing the President and Senate to make Treaties eventual and of Alliance for limited terms – and requiring the concurrence of the whole Legislature in other Treaties."[113] Many delegates were apparently not fully satisfied with the treaty provision as it stood, and the whole draft provision on Senate powers was therefore unanimously conveyed to the Brearley Committee on Postponed Parts.

All draft items not yet finally formulated were referred to this Committee, named after its chairman, and composed of one representative from each state.[114] Both Madison and Gouverneur Morris served on the Committee which introduced significant changes in the draft clause. For one thing, Madison's suggestion for presidential involvement in the treaty-making process was accepted, as was a presidential role in appointments. Senate approval of both treaties and appointments was stipulated, but the Senate was no longer the referent; it was the President. Both by formulation and location – in Article

101. Ibid., 82.
102. Ibid., 71–72, 82.
103. Ibid., 72, 83.
104. Ibid., 72, 83.
105. Ibid., 297–98.
106. Ibid., 183, 389 n.8. The Committee of Detail had apparently, on its own, added the appointment of ambassadors to the powers of the Senate.
107. Ibid., 389.
108. Ibid., 392.
109. Ibid.
110. Ibid., 393 (emphasis in original).
111. Ibid., 382–83, 394. However, the term "and other public ministers" was inserted after the word "ambassadors."
112. No doubt other factors, including the transient nature of House membership resulting from biannual elections, and the larger size of the body, in which secrets would be preserved with difficulty, also militated against giving the House of Representatives a role in the adoption of treaties. See, in this regard, John Jay, *Federalist* No. 64. But the debate makes clear that for the smaller states the crucial factor was the desire to retain the treaty power in the chamber in which they had secured an advantage in terms of representation.
113. Farrand, *Records,* 2:394.
114. Ibid., 473, 481.

2 – the powers were confirmed as essentially presidential in nature. And finally, the vote required for Senate approval for treaties was raised to two-thirds. The clause now read:

> The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U—— S—— whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the members present.[115]

The Committee of Style and Arrangement reformulated the provision, without introducing any substantive change, into its present form in the Constitution.

Clearly, tension between the large and small states contributed significantly to the formulation of the provision on treaties and appointments. As happened in the compromise on the composition of the national legislature, both groups of states gained a measure of control and some of their desiderata; and the small-state gains were significant. The small states strove to have treaties and appointments lodged in the Senate alone, where they had gained a privileged position, while the larger states fought for the involvement of the President, representative of the national will and more beholden to the wishes of the larger states.[116] The House of Representatives was excluded from the whole process, not only because it was more numerous, and therefore less guarded in relation to secret affairs, but because its involvement would dilute the dominant influence which the smaller states sought to exercise through the Senate.

The remarks of Jonathan Davie in the North Carolina Ratifying Convention testify to the tenacity of the smaller states in these matters. The power of making treaties, he noted, had in all countries been placed in the executive department, and the United States constitution would also have followed this practice. The President, "being elected by the people . . . at large, will have their general interest at heart," he said. However,

> the extreme jealousy of the little states, and between the commercial states and the non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or ratifying, treaties. . . . The small states would not consent to confederate without an equal voice in the formation of treaties. Without the equality, they apprehended that their interest would be neglected or sacrificed in negotiations. This difficulty could not be got over. . . . [Because] of the inflexibility of the little states in this point it . . . became necessary to give them an absolute equality in making treaties. . . . The necessity of their interfering in the appointment of officers resulted from the same reason. . . . The small states would not agree that the House of Representatives should have a voice in the appointment to offices; and the extreme jealousy of all the states would not give it to the President alone.[117]

Explaining the roots of Senate involvement does not, however, tell the full story. Why was a special majority deemed necessary for approving treaties? The considerations which prompted the Brearley Committee to raise the vote required in the Senate to two-thirds are not readily apparent, since that Committee's deliberations were not preserved, and the Convention itself approved the revised treaty clause "with surprising unanimity and surprisingly little debate."[118] It would seem, however, that sectional interests, that other perennial factor at the Convention, influenced the delegates to raise the vote required for treaties from simple majority to two-thirds.[119] The size of the majority required for Senate advice and consent for treaties became caught up in one of the more famous compromise settlements of the Convention.[120]

115. Ibid., 495, 498–99. The provision was affirmed in the Convention on September 7, with the word "consuls" being added to the appointments clause (ibid., 533, 539–40).

116. Arthur Bestor, in a lengthy article, "Respective Roles of Senate and President in the Making and Abrogation of Treaties – The Original Intent of the Framers of the Constitution Historically Examined," *Washington Law Review* 55 (1979): 1–135, contends that the introduction of the executive into the treaty-making process was only intended to make the president the "agent" of the Senate, not to endow him with independent, initiating powers in the sphere of foreign relations. Jack N. Rakove takes issue with this assumption both in an article, "Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study," *Perspectives in American History,* new Ser., 1 (1984): 233–81, and in his Pulitzer prize-winning book, *Original Meanings,* 240–42, 250–51, 266–67. The fact that the treatymaking power was lodged in Article 2, coupled with the comment of Gouverneur Morris in reference to treaties, that the president represented "the general guardian of the National interests," [Farrand, *Records,* 2:540–41] would seem to confirm that the president was to serve as more than merely a "Senate agent" in this connection.

117. Jonathan Elliot, ed., *The Debates of the Several State Conventions on the Adoption of the Federal Constitution in 1787,* 5 vols. (Philadelphia: Lippincott, 1836), 4:119–22.

118. Farrand, *Framing of Constitution,* 171.

119. The background to the two-thirds requirement for treaties is traced in a short article by R. Earl McClendon, "Origin of the Two-Thirds Rule in Senate Action Upon Treaties," *American Historical Review* 36 (1931): 768–72. The present discussion is based largely on McClendon's note except that McClendon does not discuss navigation laws. See also Solomon Slonim, "Congressional–Executive Agreements," *Columbia Journal of Transnational Law* 14 (1975): 434–50. Strangely enough, neither Bestor nor Rakove cite the McClendon article in discussing the two-thirds requirement for treaties.

120. Andrew C. McLaughlin, *The Confederation and the Constitution, 1783–1789* (New York: MacMillan, 1905), 84–86, 260–62;

Throughout the Convention, the adoption of navigation laws had been made dependent on a qualified majority of two-thirds in Congress.[121] This reflected southern concerns that the North might promote legislation restricting the shipment of goods to American ships, thus disadvantaging the South by making the importation of goods and the exportation of staples more expensive than if a free choice of available ships were allowed.[122] As the end of the Convention approached, North-South differences over the issue of navigation laws[123] and two other issues – the right of the South (really the Deep South) to continue the importation of slaves[124] and a ban on export taxes[125] – became the subject of a compromise. In return for abolishing the two-thirds requirement for navigation laws, the North relented on the importation of slaves for a further twelve (ultimately twenty) years, and all export taxes were banned.[126] In conjunction with that compromise, the majority required for Senate advice and consent for treaties was raised to two-thirds. While navigation laws affected the southern staple states only, the treaty power bore both on the South as well as on the fishing rights of the North. Confirmation for this interpretation of the turn of events is provided by the remarks of George Mason at the Virginia Ratifying Convention:

> Mr. Chairman – With respect to commerce and navigation . . . I will give you, to the best of my recollection, the history of that affair. This business was discussed at Philadelphia for four months, during which time the subject of commerce and navigation was often under consideration; and I assert, that eight states out of twelve, for more than three months, voted for requiring two-thirds of the members present in each House to pass commercial and navigation laws. True it is, that afterwards it was carried by a majority, as it stands. If I am right, there was a great majority for requiring two-thirds of the States in this business, till a compromise took place between the Northern and Southern States; the Northern States agreeing to the temporary importation of slaves, and the Southern States conceding, in return, that navigation and commercial laws should be on the footing on which they now stand. . . . The Newfoundland fisheries will require that kind of security which we are now in want of: The Eastern States therefore agreed at length, that treaties should require the consent of two-thirds of the members present in the senate.[127]

Thus, the mutual fear of both East and South regarding possible adverse effects of commercial treaties on their respective interests had prompted raising the vote required for treaties from simple majority to two-thirds.

Attempts by Madison to except peace treaties from the two-thirds requirement and permit their endorsement by simple majority were initially accepted[128] but then rejected, once it became clear to the delegates that peace treaties could serve as a means of the United States conceding shipping, fishing, and other rights to foreign countries.[129] The memory of Jay's recent attempt under the Continental Congress to bargain away U.S. rights of passage on the Mississippi to Spain for a period of twenty-five years in return for certain commercial rights that would benefit the North spurred the southern delegates to insist that all treaties, peace treaties included, be made subject to the advice and consent of a two-thirds vote in the Senate.[130]

When the treaty-making clause came up for discussion in the Convention on September 7 and 8, the delegates overwhelmingly rejected two proposals submitted by James Wilson to modify the details of the treaty provision. The first would have included the House in the treaty-making process,[131] and the

Farrand, *Framing of Constitution,* 147–52; and Warren, *Making of Constitution,* 579–86.

121. See Committee of Detail, Farrand, *Records,* 2:169, 183.

122. See Farrand, *Framing of Constitution,* 147–48. Interestingly, during the course of the debate it apparently occurred to George Mason that Senate adoption of treaties by majority vote posed as much danger to the interests of the South as did the adoption of navigation laws by Congress. There was need, therefore, to require a two-thirds vote in both cases (Farrand, *Records,* 4:52–53). Mason does not seem to have submitted any formal proposal to this effect. It is ironic to note that, in the end, treaties gained the security of a special majority while navigation laws lost it. In the one case, the issue of fisheries was also involved, in the other it was not.

123. See Farrand, *Records,* 2:374–75.

124. Ibid., 364–65, 369–74.

125. See ibid., 359–64.

126. Ibid., 396, 400; and see 449–53.

127. John P. Kaminski and Gaspare J. Saladino, eds. (Merrill Jensen, founding editor), *Documentary History of the Ratification of the Constitution: Virginia,* 18 vols. (1993), 10:1488. Repr. in Farrand, *Records,* 3:334–35, and cited in McClendon, "Origin of Two-Thirds Rule," 772. See also Warren, *Making of Constitution,* 584, for a statement made subsequently by Mason to Jefferson summarizing his remarks at the Virginia Convention.

128. Farrand, *Records,* 2:533, 540.

129. See ibid., 534, 543, 544, 547, 548–49.

Madison also moved to empower two-thirds of the Senate "to make treaties of peace without the concurrence of the President." The president, Madison argued, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace" (ibid.). His proposal was seconded by Butler of South Carolina, who "was strenuous for the motion, as a necessary security against ambitious & corrupt Presidents" (ibid., 541). The motion was rejected by a vote of 3 to 8 (ibid., 533, 541).

130. For further discussion of this episode, known as the Jay-Gardoqui negotiations, see Samuel Flagg Bemis, *Pinckney's Treaty* (Baltimore: Johns Hopkins, 1926); Bemis, *A Diplomatic History of the United States,* 5th ed. (New York: Holt, Rinehart and Winston, 1965), 78–80; McLaughlin, *Confederation and Constitution,* 94–101; Frank Monhaghan, *John Jay: Defender of Liberty* (New York: Bobbs-Merrill, 1935), 255–61; Warren, *Making of Constitution,* 24–30; Rakove, "Solving a Constitutional Puzzle," 272–74; and Banning, *Sacred Fire of Liberty,* 66–70.

131. Farrand, *Records,* 2:532, 538. Wilson contended that the need for secrecy was not sufficient reason to exclude the House from sharing in the treaty-making power. "As treaties . . . are to have the operation of laws, they ought to have the sanction of laws also."

second would have eliminated the two-thirds requirement.[132] Thus, the power to approve treaties remained the prerogative of the Senate, the bastion of the states, and the two-thirds requirement was sacrosanct, serving as it did to protect sectional interests.

The significance of the Mississippi episode in prompting the South to institute the two-thirds requirement is highlighted by the following account of the Convention discussions given by Hugh Williamson, delegate of North Carolina, in a letter to Madison:

> It is said that some antifed in Maryland on the last Winter fastened on the Ear of Genl Wilkinson who was accidentally there and persuaded him that in case of a new Govt. the Navigation of the Mississippi would infallibly by given up. Your Recollection must certainly enable you to say that there is a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate or of the States which is considered as the same thing from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making Treaties and if the southern states attend to their Duty, this will imply ⅔. of the States in the Union together with the President, a security rather better than the present 9 States especially as Vermont & the Province of Main may be added to the Eastern Interest and you may recollect that when a Member, Mr. Willson objected to this Proviso, saying that in all Govts. the Majority should govern it was replyed that the Navigation of the Mississippi after what had already happened in Congress was not to be risqued in the Hands of a meer Majority and the Objection was withdrawn.[133]

It might also be noted that consideration of the treaty-making clause in the state ratifying conventions evoked criticism, as Charles Warren has noted, primarily because of the ease with which treaties could be adopted and the vulnerability of critical sectional interests.[134] Several states proposed amendments to tighten the treaty-making procedure. The following draft amendment, submitted by the Virginia Ratifying Convention for adoption by the first Congress, embraced all the specific interests noted above – commercial interests, territorial rights, fishing, and navigation of the Mississippi. It also called for a qualified majority in *both* Houses in certain instances.

> That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the Members of the Senate; and no treaty, ceding, contracting, restraining or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the Members of both Houses respectively.[135]

The considerations of the Convention in its drafting of the treaty provision is also noted by President Washington in his message to the House of Representatives in relation to the Jay Treaty.[136] Explaining his refusal to convey the background papers to the House, Washington stressed that the function of advice and consent for treaties had been vested exclusively in the Senate, because in that body large and small states had equal representation. "For, on the equal participation of those powers [of the Senate], the sovereignty and political safety of the smaller States were deemed essentially to depend."[137] A proposal to include the House in the treaty-making process was explicitly rejected by the Convention, Washington noted.

* * *

In sum, formulation of the treaty-making clause at the Constitutional Convention proceeded through three stages. With the establishment of the Senate as the repository of state power, the smaller states, intent on ensuring an equal role, restricted the treaty-making power to the Senate, the counterpart of the Congress under the Confederation. For their part, representatives of the larger states, the dissatisfied nationalists, succeeded in reserving for the President – the only truly national figure in government – a central role in the process. Finally, sectional interests, from both the Northeast and the South, operated to raise the voting requirement from simple majority to two-thirds. The influence of each of these three groups – small states, nationalists, and sectional interests – is reflected in the composite compromise that was the final product of the Constitutional Convention in its formulation of the treaty-making power.

THE ELECTORAL COLLEGE

The adoption of the electoral college clause at the Convention is a further illustration of the pervasive

In response, Sherman of Connecticut argued that "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature" (ibid., 538). The vote was 1 to 10 with only Pennsylvania, Wilson's own state, voting in favor.

132. "Mr. Wilson thought it objectionable to require the concurrence of ⅔ which puts it in the power of a minority to controul the will of the majority" (ibid., 540). Of course, this is precisely what these states wanted to achieve. The vote was 1 to 9 with one state divided (ibid., 549).

133. Ibid., 3:306–7. The letter, dated June 2, 1788, is also quoted in McClendon, "Origin of Two-Thirds Rule," 771–72, and Warren, *Making of Constitution,* 657–58.

134. Ibid., 658 and 773–74.

135. Elliot, Debates 3:660; repr. in Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), 1029–30.

136. *Annals of Congress,* 5:760 [1789–1824].

137. Ibid., 761.

influence of the smaller states in the drafting of the provisions of the Constitution. For many years it was commonly held, in accordance with Charles Beard's economic interpretation of the Constitution, that the indirect method of choosing a president by means of the Electoral College was a reflection of the Founders' deep distrust of the influence of the masses in the selection of a chief executive.[138] In this sense, the College was regarded as a device invented by the Founding Fathers for insulating the choice of a president from popular pressures. Alternatively, as John Roche explained it, the College was in fact a jerry-rigged contraption devised in a last-minute compromise to enable the delegates to wind up their business and return home.[139] In fact, however, the evidence points more persuasively to the conclusion that the electoral college scheme constituted an ingenious device for satisfying state demands for equality in the selection of a President. This is borne out by tracing the manner in which the Electoral College system evolved at the Constitutional Convention.[140]

Both the Virginia and New Jersey Plans called for election of the executive by the legislature, but the legislature in each case was, of course, composed quite differently.[141] As noted earlier, unlike the Virginia Plan's popularly elected congress, the New Jersey Plan's legislature would have remained, as under the Articles of Confederation, the representative body of the states, with each state entitled to one vote. However, lodging the choice of executive in the national legislature, whatever its composition, was problematic. For one thing, it violated the principle of the separation of powers which called for independent means of electing each branch of government. Secondly, there was a danger of the executive conspiring with members of the legislature to ensure his reelection. Consequently, if the choice was to be made by the legislature, the executive would have to be limited to one term of office, preferably a longer one. Thus initially, when only the Virginia Plan lay before the delegates, the Convention resolved that the executive be elected by the legislature for a lengthy term of seven years and be ineligible for reelection.[142] But this formula was deficient because it eliminated a vital incentive for effective administration, namely, the right to stand for reelection. As Gouverneur Morris said, ineligibility "tended to destroy the great motive to good behavior, the hope of being rewarded by a reappointment."[143] Consequently, even though the delegates returned time and again to the Virginia formula in their search for a suitable procedure for electing a chief executive, they just as often abandoned this arrangement on the grounds that it penalized a successful executive by barring his reelection.

In the course of the debate, John Dickinson of Delaware moved that the executive be removable "by the National Legislature on the request of a majority of the Legislatures of individual States." "He had no idea of abolishing the State Governments," he said, "as some gentlemen seemed inclined to do. . . . He hoped that each State would retain an equal voice at least in one branch of the National Legislature."[144] Madison and Wilson opposed Dickinson's motion on the ground, *inter alia,* that "it would leave an equality of agency in the small with the great States."[145]

This dialogue foreshadowed the critical debate that would engage the Convention for three weeks over the composition of the upper house in the legislature, ultimately resolved on July 7 with acceptance of the Connecticut Compromise.[146] But the equality granted the states in the upper chamber meant that the smaller states would now exercise a disproportionate influence in the selection of an executive. It is not surprising, therefore, that upon acceptance of the Compromise, representatives of the larger states moved that the choice of executive be moved from the legislature to the public at large. As explained by Wilson, this would "prevent in a great degree" the "intrigue & cabal" that could arise in election by the legislature.[147] Pinckney of South Carolina opposed the motion on the ground that "the most populous States by combining in favor of the same individual will be able to carry their points." Similarly, Sherman of Connecticut feared that the people "will generally vote for some man in their own State and the largest State will have the best chance for the appointment."[148] Obviously, the smaller states were not inclined to accept large-state domination of the choice of executive, any more than they had been prepared to surrender control of the legislature to those states.

Hugh Williamson of North Carolina injected a novel point in stressing that "the largest state will be sure to succede." "This will not be Virga. however. Her slaves will have no suffrage."[149] Williamson was hinting at the voting increment which the slave states presently enjoyed in the lower house as a result of the three-fifths rule. This advantage, based on the number of slaves in a state, only accrued to a state's representation in the legislature; it would have no bearing in a straight-out vote by the white populace

138. Beard, *Economic Interpretation,* 161–62.

139. John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review* 55 (1961): 799–816, esp. 810–11.

140. For a more comprehensive analysis of this topic, see Shlomo Slonim, "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President," *Journal of American History* 73 (1986): 35–58. The present discussion does not depart from the conclusions reached in that article.

141. Farrand, *Records,* 1:20–22, 242–45.

142. Ibid., 1:68–69, 77–79, 81, 88.

143. Ibid., 2:33.

144. Ibid., 1:85.

145. Ibid., 86.

146. Ibid., 242–45, 549–51.

147. Ibid., 2:22, 29.

148. Ibid., 29–30.

149. Ibid., 32.

in a popular election. In effect, both the small states and slave states preferred to keep the choice in the legislature where each group enjoyed an advantage in one of the two houses.

Madison objected to granting the legislature any role in the selection of an executive since it would "establish an improper connection between the departments," and thus violate the principle of the separation of powers. In his opinion, "the people at large was . . . the fittest in itself." There was, however, "one difficulty of a serious nature attending an immediate choice by the people."

> The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.[150]

The use of electors, since states would be graded from one to three electors, would attenuate the loss which the smaller states and slave states would suffer by moving the choice out of the legislature. The difference between small and large state would be no more than 1:3, rather than the actual population ratio which could be as much as 1:10.

As the work of the convention proceeded, the delegates were still in a quandary about a suitable method for electing a president. This prompted Madison to deliver a lengthy address on the subject. "There are objections agst. every mode that has been, or perhaps can be proposed. The election must be made either by some existing authority under the Natil. or State Constitutions – or by some special authority derived from the people – or by the people themselves." The legislature, he declared, was "liable to insuperable objections." Election by the people, "with all its imperfections," was the method "he liked best." He recognized, however, that there were two serious difficulties with this method. "The first arose from the disposition in the people to prefer a Citizen of their own State, and the disadvantage this wd. throw on the smaller States." The second difficulty arose "from the disproportion of {qualified voters} in the N. & S. States, and the disadvantage which this mode would throw on the latter."[151]

Madison's comment highlighted the considerations which would dispose the delegates from the smaller and slave states to oppose conveying the choice to the people in direct elections. Ellsworth confirmed these considerations by stating: "The Citizens of the largest States would invariably prefer the Candidate within the State; and the largest States wd. invariably have the man."[152] It was Williamson who suggested a means of avoiding the preponderant influence of a large state in the selection process. Each person would be required to vote for three candidates, two of whom would be from states other than his own "and as probably of a small as a large one."[153] The idea appealed to Gouverneur Morris and Madison who moved an amendment to Williamson's popular-election proposal, to the effect that each person be required to vote for two candidates, one of whom was to be from a state other than his own. The outcome, Madison said, was that "the second best man in this case would probably be the first, in fact."[154] However, Williamson's proposal (as amended) was defeated by the narrow margin of 5 to 6.[155]

Thereupon, the Convention, at the suggestion of George Mason, restored the original formula of election by the national legislature for a term of seven years, without right of reelection.[156] Yet this was not the last word. When the convention took up for consideration the steps necessary for putting the government into operation, it became clear that the delegates were still not settled on a definite formula for the selection of an executive.[157] This unresolved issue, together with other like matters, was conveyed to the Brearley Committee on Unfinished Parts for resolution.[158]

After four days of deliberation, the Committee presented its solution to the convention – the Electoral College.[159] It was remarkable for having combined the good points of all the proposals that had surfaced on the subject, while overcoming their deficiencies. It removed the choice from Congress and conveyed it instead to a body that, in its composition, was the exact replica of Congress. Each state received the same representation in the Electoral College as it was entitled to in Congress, so that the smaller states and slave states had no cause to object. The independence of the President was assured, and his reelection freed from congressional interference. Since the electors met but once, in their respective state capitals, there was no danger of cabal or corruption.[160]

150. Ibid., 34, 56–57.
151. Ibid., 107–11.
152. Ibid., 111.
153. Ibid., 113.
154. Ibid., 113–14.
155. Ibid., 115.
156. Ibid., 120.
157. See Slonim, "Electoral College," 49–50.
158. Farrand, *Records,* 2:480–81.
159. Ibid., 493–94, 497–98.
160. The indirect method of electing a president also overcame the objections of other delegates, including George Mason, who maintained that the "extent of the Country" precluded an informed choice by the public at large. "He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people as it would to refer a trial of colours to a blind man" (ibid., 31). Selection of a president by electors appointed by the state legislatures would provide that information which Mason felt was necessary for an informed choice. Mason, it should be noted, was one of the leading liberals at the Convention, and his comment by no means reflected opposition to the spirit of democracy. National elections, he claimed, would in fact be a denial of democracy, since the people could not be expected to be acquainted with the qualifications of the candidates. The Electoral College scheme remedied the deficiency. The popularly elected

And with each elector voting for two candidates, one of whom had to be from a state other than his own, there was no fear that the larger states would overwhelm the process.[161]

The whole scheme was a reflection of concern for statal influence, as such, and, in particular, for small-state influence. As noted, the advantages which the smaller states and slave states had secured in the real Congress were now faithfully preserved in the congress away from home, the Electoral College. Furthermore, electors would be selected as the state legislatures prescribed. This meant that a state legislature could, if it wished, itself select the electors. And the final concessions to state influence were reflected in the contingency arrangements. In the event that no candidate received a majority in the Electoral College, the Senate – in the final version, the House of Representatives, voting as states – would make the choice from the top five. The designation of top five was deliberately designed to offer greater opportunity to a candidate from a smaller state to be selected.[162] And the requirement that voting in the House take place by state, rather than by individual representatives, meant that the last word, and not merely the first, was reserved for the states in the selection of a chief executive for the United States.

The evolution of the electoral college system at Philadelphia revealed how tenacious the smaller states were in securing an effective role for themselves in the process to be instituted for choosing a President. They not only demanded a say in the choice but insisted on a system which would enable a candidate from a smaller state to realistically compete for the office of President. The Electoral College was assuredly an ingenious device for satisfying state demands for equality in the selection of a President.

STATES' INTERESTS AND THEIR CONSTITUTIONAL IMPRINT REDUX

The preceding analysis of four critical issues at the Constitutional Convention demonstrates the degree to which the three groups – the smaller states, the slave states, and those intent generally on securing states' interests at Philadelphia – contributed directly to the formulation of key parts of the Constitution. In the twin matters of powers and representation, pro-state forces played a major role in the drafting of the various provisions. The enumeration of federal powers, the elimination of a national legislative veto, the advice and consent of the Senate to treaties and appointments, and the creation of the Electoral College – all reflected the determination of states-minded delegates to ensure a role for the states in the operation of the national government.

These delegates opposed every attempt to engulf the states in a tidal wave of national authority. Thus, they worked to eliminate the legislative veto and insisted that the powers of Congress be defined and enumerated. These steps helped preserve state sovereignty but were deemed inadequate by the smaller states and their allies, who demanded a voice also in the actual running of the national government. This was attained through lodgement of the appointment and treaty powers in the Senate, the repository of state influence in the national legislature. Furthermore, the procedure for choosing a chief executive was designed to accord the smaller states and the slave states a disproportionate say in the selection process and to enhance the prospect that one of their own candidates would succeed in being chosen.

The emphasis on state interests in the formulation of the provisions of the Constitution highlighted the truism underlying the Tenth Amendment – that "all is retained which has not been surrendered" – even before the Amendment was adopted.[163] Additionally, a most important by-product of the states' struggle for equality was the appointment of the court as the designated umpire of federal-state differences in interpreting and applying the Constitution. This, in turn, led to the evolution of judicial review, whereby the courts assumed the power to declare even the actions of co-ordinate branches of the federal government unconstitutional.

Given the pervasiveness of state demands at Philadelphia, it is quite clear that Pinckney's assertion that conceding state equality in the Senate would put an end to small-state discontent was quite inaccurate.[164] In fact, every provision became a fresh battleground for establishing a statal interest, and therewith the interests particularly of the smaller states, in the functioning of the federal government. The Virginia Plan, it is true, furnished the basic blueprint upon which every change and every revision was recorded, but the contribution of states-minded delegates to the ultimate shape of the Constitution was far from negligible. As Senator Jonathan Dayton, who had served in the Constitutional Convention as a delegate from New Jersey, subsequently said, with perhaps a slight measure of exaggeration: "Look through that instrument from beginning to end, and you will not find an article which is not founded on the presumption of a clashing of interests."[165]

state legislatures would provide the democratic input, while the use of electors to make the selection would supply the required information.

161. The position of vice president resulted, of course, from the need to vote for two candidates.

162. When George Mason moved that the choice be made from the top three rather than the top five, the smaller states objected, and Sherman said he "would sooner give up the plan" (ibid., 500).

163. See *United States v. Darby,* 312 U.S. 100, 124 (1941).

164. See text accompanying n.7, above.

165. Farrand, *Records,* 3:400.