

Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers

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The Committee of Detail, comprised of five delegates from the Constitutional Convention, produced the first draft of the Constitution. Yet most constitutional scholars have relegated any mention of the Committee to an historical footnote.¹ Though several have recognized individual contributions by the Committee,² none has identified either the full scope of the Committee's work regarding state or federal powers or its significance for the eventual balance of these powers in the Constitution.

The Constitutional Convention itself was a response to general dissatisfaction with the weakness of the central government.³ In a series of letters shortly before the Convention, James Madison wrote that all "men of reflection," even "the most orthodox republicans," were disturbed by "[t]he existing

1. See, e.g., R. BERNSTEIN, *ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION 181-82* (1987) (mentions only that Committee produced first draft of Constitution); Burger, *Tell the Story of Freedom*, A.B.A. J., May 1, 1986, at 56 (states only that Committee "had the task of preparing language true to the resolutions adopted"); see also R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987) (no mention of Committee).

2. A few studies have noted the Committee's enumeration of legislative powers. See, e.g., C. COLLIER & J. COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 252-53 (1986); L. LEVY & D. MAHONEY, *THE FRAMING AND RATIFICATION OF THE CONSTITUTION 15* (1987).

Two studies mention provisions that this Note identifies as states' rights clauses. See M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 130* (1913) (cites three provisions); C. MEE, *THE GENIUS OF THE PEOPLE 239* (1987) (names one provision also cited by Farrand).

Several studies have exhaustively discussed the Committee's introduction of concessions for the southern states. These provisions prohibited an export tax, disallowed taxes and duties that would interfere with slave trade, and required the assent of two-thirds of each house in order to pass navigation acts. See, e.g., C. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTION, MAY TO SEPTEMBER, 1787*, at 197-200 (1966); W. PETERS, *A MORE PERFECT UNION 136-39* (1987); C. ROSSITER, *1787: THE GRAND CONVENTION 206-10* (1966). This Note does not discuss these concessions because they concern the struggle for power among the states (northern and southern) rather than the status of power between the states and the federal government.

3. See generally G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 471-72 (1969) (citing Federalists and Antifederalists displeased with existing central government).

embarrassments and mortal diseases of the Confederacy."⁴ The Antifederalist "Centinel" also conceded that it was now "the universal wish of America to grant further powers" to Congress "so as to make the federal government adequate to the ends of its institution."⁵ True to these sentiments, the delegates to the Federal Convention, though often bitterly divided, consistently passed resolutions supporting a very powerful national government.⁶

After two months, the delegates voted to form a Committee of Detail with the mandate "to prepare & report a Constitution conformable" to "the proceedings of the Convention."⁷ This charge, other recorded comments, and the name of the Committee itself suggested that the delegates expected the Committee only to synthesize the resolutions and render them more explicit.⁸

This Note argues 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. Part I compares the drafts of the Committee with the resolutions submitted for its consideration to demonstrate that the Committee constrained the national powers through enumeration and consciously created states' rights that had not been suggested by the resolutions. Part II proposes that the weakened national powers and states' rights clauses resulted from the political orientation of the Committee members and not from the course of the preceding Convention debate. Part III suggests that pressures to complete the Convention's task successfully and quickly prompted the delegates to accept the provisions of the Committee's report as a rough approximation of their expectations for a strengthened national government. The Note concludes by sketching implications of these findings for the modern federalism debate.

I. THE REPORT OF THE COMMITTEE OF DETAIL

In the debate preceding the creation of the Committee of Detail, the Convention generated resolutions calling for a powerful central government. The delegates then instructed the Committee to produce a document that conformed to those resolutions. The Committee, however, proposed a federal government significantly weaker than that promised by the preceding debate by enumerating national powers and adding states' rights.

4. Letters from Madison to Edmund Pendleton (Mar. 18, 1787), to Thomas Jefferson (Mar. 18, 1787), and to his father (Apr. 1, 1787), 2 WRITINGS OF MADISON 318, 326, 335 (J. Hunt ed. 1900).

5. "Letters of Centinel" (Nov. 8, 1787), reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 594 (J. McMaster & F. Stone eds. 1888).

6. See *infra* notes 9-24 and accompanying text.

7. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (M. Farrand ed. 1966) [hereinafter RECORDS]. The Constitutional Convention was in session from May 25, 1787, to September 17, 1787. The Committee of Detail deliberated from July 26, 1787, to August 6, 1787, and published its final report on August 6, 1787.

8. See *infra* notes 25-32 and accompanying text.

A. Debate Preceding the Committee of Detail

The pre-Committee debate and voting patterns indicate that the Convention delegates intended the federal government to possess sweeping powers. In the first week of formal proceedings, the Convention resolved by a 6-1-1 vote (six states for, one state against, one state with delegates divided) “that a national Govern. ought to be established consisting of a supreme Legislative Executive & Judiciary.”⁹ The Convention likewise quickly voted both to abandon equal representation of the states in the legislature as ineffective and inimical to national purpose and to reject a subsequent compromise proposal to elect senators from those nominated by state legislatures.¹⁰ These votes came over the objections of delegates such as Pierce Butler of South Carolina, who argued that “the taking [of] 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.”¹¹

While embracing general grants, the Convention repeatedly rejected an enumeration of powers as an effective means of resolving the problems posed by the Articles of Confederation. The delegates voted 9-0-1 to confer “[l]egislative power in all cases to which the State Legislatures were individually incompetent,” despite calls from John Rutledge and Charles Pinckney to postpone the matter until a committee produced an “exact enumeration.”¹² After the delegates several weeks later rejected a motion to refer the same resolution to a committee for further consideration,¹³ Roger Sherman of Connecticut made a motion intended to encourage the delegates to enumerate powers rather than grant sweeping powers.¹⁴ His proposal failed 2-8.¹⁵

Gunning Bedford of Delaware immediately followed with a proposal for still broader powers: “[T]o legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation.”¹⁶ Only after this motion carried (6-4) did the delegates

9. 1 RECORDS, *supra* note 7, at 35. Quotations retain the spelling, abbreviations, and grammar of the original manuscripts, as reprinted by Farrand. See *id.* at xxv.

10. *Id.* at 35-38, 51-52.

11. *Id.* at 51.

12. *Id.* at 53-54.

13. *Id.* at 17.

14. Roger Sherman proposed

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 Govt. of such States only, and wherein the General welfare of the U. States is not concerned.

2 *id.* at 25. He later explained that his proposal described “an enumeration of powers.” *Id.* at 26.

15. *Id.* at 26.

16. *Id.* Edmund Randolph’s objection to this “formidable” clause on the grounds that it “violat[es] all the laws and constitutions of the States, and . . . intermeddl[es] with their police,” *id.*, contrasts with his own proposal for the federal government to legislate in all cases in which the states were separately incompetent, which he had argued did not “give indefinite powers to the national Legislature.” 1 *id.* at 53.

in a rare moment reject (3-7) yet another motion to enhance federal powers: “To negative all laws passed by the several States contravening in the opinion of the Nat: Legislature the articles of Union, or any treaties subsisting under the authority of ye Union.”¹⁷

Most resolutions to preserve states’ rights failed.¹⁸ The Convention’s repeated rejection of those motions calling for the involvement of state governmental entities in the operation of the national government—for the state legislatures to elect members of the House of Representatives,¹⁹ for the state legislatures to appoint electors to choose the federal executive,²⁰ and for the state executives to select the federal executive²¹—particularly served notice of the minor role envisioned for the states.²² Several of the rejected proposals, such as the suggestion that state legislatures pay the national legislators,²³ resembled in scope and significance those proposals later added by the Committee.²⁴

B. *The Charge of the Committee of Detail*

Members of the Committee of Detail received few instructions regarding the nature of their work. Convention proceedings and correspondence, however, reveal that the delegates expected the Committee to produce a draft of a Constitution with federal powers closely matching the strongly nationalist resolutions submitted for their consideration.

The Convention unanimously passed a motion “that the proceedings of the Convention . . . be referred to a Committee to prepare & report a Constitution

17. 2 *id.* at 27. This motion may have lost simply because it was superfluous given the passage of the prior proposals; indeed, two opponents labeled it unnecessary. *Id.*

18. 1 *id.* at 124-25 (resolved (8-2-1) that national legislature would appoint inferior tribunals, despite fears that states would not tolerate such encroachment); *id.* at 203-04 (resolved (6-5) that members of state governments must take oaths to observe national laws and Constitution, despite objections that motion was “unnecessarily intruding into the State jurisdictions”); *id.* at 358-60 (rejected (4-6-1) provision for House of Representatives to be elected in such manner as individual state legislatures might direct); *id.* at 371-74, 427-28 (rejected (4-5-2 and 5-6, respectively) motions to pay legislators from state rather than national treasury amidst fears of dependence on state legislature); *id.* at 428-29 (rejected (3-8) motion to strike ineligibility of senators for state office over pleas to “mak[e] the States as much as could be conveniently done a part of the Genl. Gov’t”); *id.* at 468 (passed (6-4-1) motion to base representation in first legislative branch on system other than equal representation); 2 *id.* at 88-93 (rejected (3-7) motion to refer Constitution to state legislatures instead of assemblies chosen by the people). *But see* 1 *id.* at 54 (postponed proposal to compel delinquent state payments); *cf.* 1 *id.* at 386, 390 (passed motion (8-3) to strike ineligibility of members of House of Representatives for offices created by states, but later resolved (8-2-1) for absolute disbarment during term of office); 2 *id.* at 15 (equal representation in senate passed (5-4-1) only with nationalist concessions).

19. 1 *id.* at 132-38 (rejected 3-8).

20. 2 *id.* at 32 (rejected 2-8).

21. 1 *id.* at 176 (rejected 0-9-1).

22. *But see id.* at 156 (voted (10-0) for state legislatures to elect Senate).

23. *Id.* at 215-16 (delegates prior to resolving for payment from national treasury (8-3) directly addressed and rejected payment from state treasuries).

24. *See infra* notes 47-65 and accompanying text.

conformable thereto."²⁵ The Convention elected the members by ballot and politely "referred" the largely ignored Pinckney²⁶ and Patterson²⁷ plans to the Committee.²⁸ The delegates subsequently referred to the committee as the "Committee of *detail*,"²⁹ a name suggesting that the delegates conceived the Committee to have a relatively small role.

Correspondence from several of the delegates reveals that they may have assumed that the Committee would not alter or add significantly to the Convention's resolutions. Hugh Williamson wrote that "the principles and outlines of a system . . . will . . . be referred to a small committee to be properly dressed."³⁰ George Washington described the Committee's purpose as "to arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States."³¹ Alexander Martin wrote to Governor Caswell of North Carolina that the Committee was "to detail or render more explicit the chief subjects of [the Convention's] Discussion."³²

C. *The Work of the Committee of Detail*

The members of the Committee of Detail penned nine documents, many of which appear to be successive drafts. The Committee's final report contained a preamble and twenty-three articles. Despite the delegates' apparent consensus on the Committee's charge, its final report strayed far beyond the scope of the resolutions by reducing broad grants of national power and by inserting states' rights.

1. *General Grants of Power Weakened*

The Convention's resolutions included many general grants of power for the federal government. The Committee weakened most of these grants by reducing them to bundles of discrete, enumerated powers.

The Convention's resolutions had given Congress the sweeping power "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legisla-

25. 2 RECORDS, *supra* note 7, at 95 (emphasis added).

26. Plan for the Constitution proposed by Charles Pinckney of South Carolina, in 3 *id.* at 595-609. The delegates never moved to consider any of the actual proposals from his plan.

27. Plan for the Constitution proposed by William Patterson of New Jersey, in *id.* at 611-15. The delegates briefly considered the Patterson Plan and then voted 10-0-1 to turn to other motions. 1 *id.* at 242-82.

28. 2 *id.* at 106.

29. *See id.* at 103, 106, 117, 121, 128 (emphasis added).

30. Letter from Hugh Williamson to James Iredell (July 22, 1787), reprinted in 3 *id.* at 61.

31. Diary of George Washington (July 27, 1787), reprinted in *id.* at 65.

32. Letter from Alexander Martin to Governor Caswell (Aug. 20, 1787), reprinted in *id.* at 72.

tion."³³ The Committee replaced the first part of this power, "to legislate in all Cases for the general Interests of the Union," with a list of enumerated powers.³⁴ The delegates understood that all powers not explicitly granted to the federal government were reserved to the states;³⁵ therefore, the enumeration of legislative powers resulted in a legislature weaker than that contemplated by the original resolution.

Nor could the Committee's addition of the necessary and proper clause fully compensate for the powers stripped by enumeration. Several delegates later attempted to add lists of powers that they must have believed were not encompassed by the necessary and proper clause.³⁶ The Convention subsequently incorporated some of these powers, such as the powers to grant patents and to grant letters of marque and reprisal, into the Constitution.³⁷ Though neither of the latter powers was originally enumerated by the Committee, both would have fallen within the scope of the federal government's "general interests."

The second part of the grant of power to Congress, "to legislate . . . in those Cases 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,"³⁸ appeared to grant the legislature discretion to determine the areas in which the states were incompetent. The Committee of Detail eliminated this discretion by enumerating prohibited state actions in Articles XII and XIII of its final report.³⁹ These specified prohibitions represented only a subset of the potential prohibitions possible under the original resolution.⁴⁰

The Committee similarly curtailed the judicial power. The Convention had resolved "[t]hat the Jurisdiction of the national Judiciary shall extend to Cases

33. 2 *id.* at 131-32.

34. These included, for example, powers "to lay and collect taxes, duties, imposts, and excises; To regulate commerce with foreign nations, and among the several States . . . To appoint a Treasurer by ballot; To constitute tribunals inferior to the Supreme Court . . . To make war . . . To build and equip fleets . . ."

Id. at 181-82.

35. *See, e.g., id.* at 308-10 (Congress has no power to generate paper money without explicit grant of power to "emit bills on the credit of the U. States"); *id.* at 588 (bill of rights unnecessary as state declarations of rights not repealed by Constitution).

36. *See, e.g., id.* at 324-26 (lists of powers submitted by James Madison and by Charles Pinckney).

37. *Id.* at 325-26.

38. *Id.* at 131-32.

39. Article XII: "No State shall coin money; nor grant letters of marque and reprisals; nor enter into any treaty, alliance, or confederation; nor grant any title of Nobility."

Article XIII:

No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make any thing but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another State, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of delay, until the Legislature of the United States can be consulted.

Id. at 187.

40. That delegates subsequently approved of still other prohibitions that fell within the scope of the Convention resolution—such as prohibiting states from passing "bills of attainder [or retrospective laws]"—demonstrated that those enumerated prohibitions forwarded by the Committee represented only some of the potential prohibitions conveyed by the resolution. *See id.* at 439-40.

arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony.”⁴¹ The Committee confined this broad grant by enumerating categories of jurisdiction. Though retaining the first clause of the grant, the Committee substituted several specifically defined areas of jurisdiction—such as jurisdiction over “cases affecting Ambassadors, other Public Ministers and Consuls,” and over cases involving “Admiralty and maritime jurisdiction”⁴²—that collectively conveyed less power than all those potentially bestowed by a jurisdiction to extend “to such other Questions as involve the national Peace and Harmony.”⁴³ By later adding jurisdiction over cases arising under the Constitution and over “treaties made or which shall be made [by the legislature],”⁴⁴ the Convention delegates provided jurisdiction not included in the enumerated categories but encompassed by the general grant.

The Committee of Detail offered no new general grants of power. Its only effort to enhance federal powers involved adding federal supremacy over state constitutions to the supremacy clause offered by the Convention.⁴⁵

The Convention repeatedly rejected calls for enumeration.⁴⁶ Nevertheless, the Committee might have concluded that its charge of “detailing” the submitted resolutions necessarily entailed enumeration and therefore a dilution of any general grants of power. Thus the Committee’s reduction of federal powers through enumeration might not independently demonstrate a pro-states’ rights orientation, particularly since the Committee strengthened the supremacy clause and provided a necessary and proper clause to partially offset the enumeration of federal powers. The Committee, however, further limited federal powers by creating specific provisions to enhance states’ rights.

2. *States’ Rights Created*

The Committee did not derive states’ rights provisions from prior resolutions as it had created enumerated powers from general grants of power.⁴⁷

41. *Id.* at 132-33.

42. *Id.* at 186.

43. The Committee also enumerated these categories of jurisdiction:

the trial of impeachments of Officers of the United States . . . controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or Citizens thereof and foreign States, citizens or subjects.

Id.

44. *Id.* at 431.

45. One scholar argues that supremacy over state constitutions represents a major shift in the balance of power because it repudiates the concept of 13 sovereign states and embraces the Constitution as the supreme law of one united country. Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1458 (1987).

46. See *supra* notes 12-15 and accompanying text.

47. These states’ rights also have few and abstract precedents. The Articles of Confederation, the Pinckney Plan and the Patterson Plan contained enumerated powers and thus may have served as resources for the Committee in its enumeration of federal powers. However, these documents contained no provisions similar to the states’ rights generated by the Committee. To find analogues for even two of the states’ rights,

Instead, on its own initiative it generated states' rights to check each branch of the federal government.⁴⁸ The Committee's strengthening of many of these rights through subsequent revisions strongly demonstrates its intent to bolster the independence of states under the Constitution.

Randolph's notes, in discussing what a preamble should not include, suggest that Committee members viewed the incorporation of states' rights as central to the design of a federal system of government: "A preamble seems proper not for the purpose of designating the ends of government and human polities—This *interwoven* with what we call the rights of states . . ." ⁴⁹ The term "interwoven," added to the preamble draft by Rutledge, foreshadows the Committee's careful placement of state checks against the central government.

Two of the Committee's additions provided states with significant means for checking a potentially overreaching central government. The Convention resolved "that each State shall be protected against foreign and domestic Violence."⁵⁰ The Committee instead assigned states the power to check the executive by allowing them to prevent the introduction of federal troops. While the federal government could introduce its troops "to protect each state against internal commotion [] and . . . against external invasion. . . this guarantee shall not operate in the last Case without an application from the legislature of a state."⁵¹ In subsequent drafts, the Committee shifted the states' veto power from cases of external invasion to those of domestic violence.⁵²

one must turn to provisions to protect the integrity of townships and counties in state constitutions. The right of each state legislature to determine the time, place, and manner of the elections of members of Congress, *see infra* note 56 and accompanying text, is very similar to the New York Constitution's county right, "[t]hat the said elections in the general counties ought to be had on such day, and at such place or places, as by the committee of each county respectively shall be determined." N.Y. CONST. of 1777, art. XL. The Committee's provision that anyone charged with treason, felony, or high misdemeanor be delivered to the state of original jurisdiction, *see infra* note 48, likewise conforms to the provisions in the Georgia Constitution for county jurisdiction over various types of disputes. *See GA. CONST. of 1777, arts. XXXVI-XXXVIII.*

48. The Committee also introduced two state rights coupled with state duties. The first provided that anyone charged with "Treason Felony or high Misdemeanor" was to be delivered to the state of original jurisdiction at the demand of the state executive. 2 RECORDS, *supra* note 7, at 174, 187-88. The second state right/duty declared: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State." *Id.* at 187-88. As the debate culminating in the Connecticut Compromise made clear, these provisions were significant in the calculus of federal-state powers because the federal government was widely feared as a potential vehicle by which coalitions might act against a single state or region of states.

49. *Id.* at 137 (emphasis added). Rutledge's changes to this preamble suggest that Randolph's notes were circulated among Committee members. *Id.* at 137-38.

50. *Id.* at 133.

51. *Id.* at 148.

52. *Id.* at 159, 174, 188; *see also id.* at 144 (Committee drafted similar provision permitting federal government to quash rebellions within states only at request of states).

The Committee also granted states a lesser executive check by holding the President at least nominally accountable to the states. The Committee in an early draft rejected a proposed national power "[t]o direct the executives of the states to call them or any part for the support of the national government." *Id.* at 145. James Wilson of the Committee subsequently reversed the obligation so that "[i]t shall be [the executive's] Duty . . . to correspond with the Executives of the several States." *Id.* at 158. The Committee incorporated this duty into subsequent drafts but then slightly weakened it in the final printed version to the "Executive *may* correspond." *Id.* at 185 (emphasis added).

The Committee's second major addition provided states with a powerful tool for restraining the legislature. Lacking specific guidance from the Convention, the Committee first assigned responsibility for establishing salary and for paying senators to the national government; pay for representatives went unmentioned.⁵³ In subsequent drafts, the Committee transferred this responsibility to the states.⁵⁴ States were to determine salary and to pay their representatives in both houses, a right perceived as giving states meaningful leverage over the federal legislature.⁵⁵

The Committee also delegated to states three other powers, which, together with the right to determine salary and to pay representatives, comprised a significant package of checks over the federal legislature: the power to set elector qualifications for congressmen, the right to participate in the determination of the time and manner of the election of their representatives,⁵⁶ and the right to make emergency appointments in the lower house.⁵⁷

The most important of these was the state power to set qualifications for electors of congressmen, which James Madison described as "very justly regarded as a fundamental article of republican government."⁵⁸ In its first extensive draft, the Committee rejected a proposal to create a uniform federal standard and instead established that "[t]he qualification of electors shall be the same . . . with that in the particular states unless the legislature shall hereafter" establish a uniform standard for all states.⁵⁹ The Committee subsequently weakened and then eliminated the national power to alter elector qualifications

53. *Id.* at 142.

54. *Id.* at 156, 166, 180.

55. *See id.* at 290-92.

56. *Id.* at 179 ("The times and places and the manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States."). Given that the delegates believed that state governments potentially could destroy the federal government if the states controlled federal elections, *see* THE FEDERALIST No. 59, at 363 (A. Hamilton) (C. Rossiter ed. 1961) (state governments could "at any moment annihilate [the central government] by neglecting to provide for the choice of persons to administer its affairs"), the Committee granted states a significant power by "submit[ing] the regulation of elections for the federal government, in the first instance, to the local administrations." *Id.*

57. 2 RECORDS, *supra* note 7, at 179 ("Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State, in the representation from which it shall happen."). Though this power might appear to the modern reader to derive from the normal state election power, such derivation was clearly less obvious to the Committee. In apparent conformity with the resolutions and the course of the preceding debate, the Committee had earlier assigned this appointment power to the central government. *Id.* at 139.

58. THE FEDERALIST No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961) (states would view this right as significant in balance of state and federal powers, "because it is comfortable to the standard already established, or which may be established, by the State itself," and because by operation it prohibited Congress from tinkering with right of suffrage).

59. 2 RECORDS, *supra* note 7, at 139.

as set by states,⁶⁰ and shifted the primary power from the state legislatures to the state citizenry via state constitutional amendments.⁶¹

Having already weakened the federal judiciary by enumerating its powers, the Committee further confined it by adding a requirement that federal crimes be tried before a jury in the state where they were committed.⁶² This provision created a check against potential overreaching by the federal judiciary both by guaranteeing that juries of state citizens would decide the ultimate fate of federal prosecutions,⁶³ and by limiting national discretion to establish venue for certain federal crimes.⁶⁴ This provision indeed was later acknowledged and approved by the delegates as one of several checks to the judiciary.⁶⁵

Despite the limitation of general grants of power and the inclusion of states' rights, the Committee provided the federal government with powers far greater than those of the Articles of Confederation. Yet it is difficult to discern any intent on behalf of the Committee to increase federal power. By enumerating federal powers and state prohibitions and by adding specific states' rights unmentioned in the resolutions, the Committee weakened the national powers contemplated by the Convention and thus produced a final document surprisingly protective of states' rights.

II. THE CONTRIBUTIONS OF THE COMMITTEE MEMBERS

The Convention elected five members to form the Committee of Detail: Oliver Ellsworth of Connecticut, John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, and Nathaniel Gorham of Massachusetts. Although other historians have hypothesized that the Committee members enumerated federal powers to address the delegates' fear of general grants of power,⁶⁶ historical evidence suggests that the members' particular political mix inspired their departure from the intent and letter of the submitted resolutions. A close analysis of the statements of the Committee members throughout the Convention reveals a much less nationalist orientation than previously thought.⁶⁷

60. Compare *id.* at 153 ("The Qualifications of the Electors shall be . . . prescribed by the Legislatures of the several States; but . . . may at any Time be altered and superseded by the Legislature of the United States.") with *id.* at 163-64 ("The Qualifications of the Electors shall be . . . the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.").

61. See THE FEDERALIST No. 52, at 325-26 (J. Madison) (C. Rossiter ed. 1961).

62. See 2 RECORDS, *supra* note 7, at 144, 173, 187.

63. See Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. __ (forthcoming 1991).

64. This state right to venue is also inextricably bound to an individual right to a local jury trial. See Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469-76 (1989) (Framers concerned about distances required for travel to single federal court).

65. See 2 RECORDS, *supra* note 7, at 438.

66. See J. COLLIER & C. COLLIER, *supra* note 2, at 169-73, 252; P. DONOVAN, MR. MADISON'S CONSTITUTION 68 (1965). Convention records and correspondence during this period, however, do not reveal either this fear on the part of the Convention or such an understanding on the part of Committee members.

67. See, e.g., C. ROSSITER, *supra* note 2, at 200 (Committee "forcefully nationalist" in orientation).

Ellsworth and Rutledge actively supported states' rights. While the other three members of the Committee pressed for a national government significantly stronger than that offered by the Articles of Confederation, Randolph and Wilson favored an enumerated scheme and desired limited but still significant roles for the states. Although Gorham consistently argued for greater national powers, he demonstrated a willingness to compromise and in any event was probably a minor participant.

Oliver Ellsworth of Connecticut feared a strong national government and acted consistently and frequently to bolster states' rights. Early in the convention he urged the delegates to amend rather than to discard the Articles of Confederation.⁶⁸ He believed that a national government could protect only general rights; a viable state government would be necessary to protect individual liberty and rights.⁶⁹ During debate over the election of the Senate by state legislatures, he pressed for states to retain a significant continuing role in the national government.⁷⁰ Ellsworth later moved for equal representation in the Senate, arguing that "[t]he power of self-defence was essential to the small States."⁷¹

Ellsworth advocated proposals similar in scope to the pro-state provisions later generated by the Committee of Detail. He argued that states rather than the national government should fund and determine the salary of national legislators.⁷² Shortly before the Committee convened, he moved to strike executive appointment by the national legislature and to replace it with appointment by electors chosen by state legislators.⁷³

John Rutledge of South Carolina, an active member of the Committee,⁷⁴ consistently warned against general grants of power to the federal government and promoted states' rights.⁷⁵ Rutledge twice objected to the vagueness of a motion that assigned the national legislature power "in all cases to which the State Legislatures were individually incompetent,"⁷⁶ and he demanded that "incompetent" be precisely defined.⁷⁷ He violently rejected a proposal for a national legislative power to void state law: "If nothing else, this alone would damn and ought to damn the Constitution."⁷⁸

Consistent with his desire for a circumscribed central government, Rutledge supported the inclusion of specific states' rights in the Constitution. Moving

68. 1 RECORDS, *supra* note 7, at 335.

69. *Id.* at 492.

70. *Id.* at 406.

71. *Id.* at 469.

72. *Id.* at 371.

73. 2 *id.* at 57.

74. *See id.* at 137-50, 163-75 (his many amendments to Committee drafts are clearly evident in extant handwritten copies).

75. *But cf. id.* at 57 (opposes appointment of executive by any body other than national legislature).

76. *See* 1 *id.* at 53; 2 *id.* at 17.

77. 2 *id.* at 17.

78. 2 *id.* at 391; *see also* 1 *id.* at 119, 124 (favored limited national judiciary with supreme tribunal but not inferior courts).

to strike the national power to alter the time, place, and manner of federal elections as set by state legislatures, he argued that “[t]he States . . . could & must be relied on in such cases.”⁷⁹ He believed that the states rather than Congress should also possess the right to establish property qualifications for their respective delegates.⁸⁰

Edmund Randolph of Virginia, the Chairman and an active participant in the Committee,⁸¹ favored a strong national government but one without general grants of power and one that retained significant powers for states.⁸² Though he observed that the national government under the Articles of Confederation was impotent and impermissibly allowed states to encroach upon its jurisdiction,⁸³ he generally recommended only modest national remedies. He argued that requiring members of state governments to take oaths to support the national Constitution and laws was necessary to garner support for the Constitution and to avoid competition between the state and national governments.⁸⁴ He opposed election of the national executive by the state executives⁸⁵ and payment for the legislators from the state treasuries.⁸⁶ In his view, designating the state legislatures as ratification conventions would subject the Constitution to “mischievous” efforts.⁸⁷

Yet Randolph opposed vast federal powers. He argued that Bedford’s motion for a general grant of power would violate state laws and constitutions and possibly disrupt police functions.⁸⁸ Another proposal he criticized as “so loose as to give it opportunities of usurping all the State powers.”⁸⁹

He moreover often supported specific states’ rights. He thought states should be free to offer amendments in a second federal convention,⁹⁰ and opposed a potentially unlimited standing army.⁹¹ Randolph ultimately refused to sign the Constitution because it failed to include several states’ rights provisions.⁹²

79. 2 *id.* at 240.

80. *Id.* at 251.

81. *See id.* at 137-50 (Committee’s first comprehensive draft of Constitution was in Randolph’s hand).

82. His willingness to compromise complemented his moderate position. Randolph’s “Suggestion for Conciliating the Small States,” for instance, offered three compromises including a nascent supremacy clause weaker than that finally approved by the Convention. 3 *id.* at 55-56; *see also* 2 *id.* at 17-18, 278-79 (desired compromise on representation in Senate and on congressional powers to determine money matters).

83. *See, e.g.,* 1 *id.* at 256 (“A provision for harmony among the States, as in trade, naturalization & c.—for crushing rebellion whenever it may rear its crest—and for certain other general benefits, must be made.”).

84. *Id.* at 203.

85. *Id.* at 176.

86. *Id.* at 372.

87. 2 *id.* at 89.

88. *Id.* at 26.

89. *Id.* at 488-89 (the motion proposed that “the Legislature shall by general laws prescribe the manner in which [state] acts, records, and proceedings shall be proved, and the effect thereof.”).

90. *Id.* at 479, 561.

91. *Id.* at 563; *see also id.* at 317 (desired federal power to intervene during domestic crises only at request of states).

92. *Id.* at 563-64, 631.

James Wilson of Pennsylvania, one of the most active members of the Convention and author of most of the Committee's drafts, wanted the Constitution to create a powerful national government with enumerated powers while simultaneously delegating discrete powers to the states. His model closely paralleled that of the Committee's final report. Although he supported several general grants of power such as the power to negative state laws,⁹³ he believed that enumerated powers "better express[ed] the general principle" of legislative discretion.⁹⁴

Fearing that states would continue to encroach upon federal powers and thus thwart the will of the people, Wilson fought vigorously to limit state involvement in the federal government.⁹⁵ He argued that making the executive removable by Congress at the request of a majority of states, for instance, would threaten the integrity of the government by potentially allowing small states to cripple the national government.⁹⁶

Yet he repeatedly assured the delegates that his desire for restraint did not extend to the elimination of the role of states in the national government.⁹⁷ States were "absolutely necessary for certain purposes which the [central government] could not reach."⁹⁸

Nathaniel Gorham of Massachusetts spoke infrequently during the Convention but consistently supported measures for a stronger national government. He urged national legislation "in all cases to which the separate States are incompetent."⁹⁹ Gorham would have partitioned the states to reduce their political strength and thus their ability to encroach upon the authority of the central government.¹⁰⁰ He wanted the national government rather than the states to compensate members of Congress.¹⁰¹

Yet Gorham was willing to accommodate opposing positions. He supported Ellsworth's motion to replace the word "national" in the Constitution with the title "United States,"¹⁰² a proposal by which Ellsworth intended both to cast the efforts of the Convention as merely amendments to the Articles of Confederation and to retain state legislatures as ratifiers.¹⁰³ He later openly supported a compromise on representation in the legislature.¹⁰⁴

With the possible exception of Gorham, therefore, the Committee members would have accepted and probably preferred the Committee's report over

93. See 1 *id.* at 166; 2 *id.* at 391.

94. 2 *id.* at 26.

95. See 1 *id.* at 49, 52, 68, 69, 344, 355, 359, 393, 413, 434.

96. *Id.* at 86.

97. See, e.g., *id.* at 137, 153, 355.

98. *Id.* at 322-23.

99. 2 *id.* at 17.

100. 1 *id.* at 540.

101. *Id.* at 372.

102. *Id.* at 335.

103. *Id.*

104. *Id.* at 404-05.

options suggested by either the submitted resolutions or the course of the preceding debate. Despite the fact that the Convention delegates in general favored neither enumeration nor a significant number of discrete states' rights, at least four Committee members who feared a national government with potentially unlimited powers and too little state involvement structured their report to reflect their shared concerns.

III. ACCEPTANCE OF THE REPORT OF THE COMMITTEE OF DETAIL

The Committee of Detail produced a report that generally conformed to the submitted resolutions but which offered states significantly enhanced powers over those contemplated by the delegates in the prior proceedings. The delegates, however, embraced most of the report with little debate. They approved of the Committee's scheme of enumeration with only the addition of several powers.¹⁰⁵ Except for the provision for states to determine and to pay the salaries of congressmen,¹⁰⁶ and the less significant clause recommending that the executive correspond with state executives,¹⁰⁷ the delegates primarily made only stylistic changes before incorporating the Committee's states' rights into the final draft of the Constitution.¹⁰⁸

With August upon them, the delegates became increasingly concerned about the duration of the Convention and the prospects for its success. Procedurally, the delegates reacted by increasingly utilizing committees to overcome impasses in deliberations. Substantively, they appear to have averted lengthy standoffs by accepting the report as a "middle ground" between those who advocated a government with broad powers and those who wished to concede many signifi-

105. The Convention added the following legislative powers: to regulate commerce "with the Indian tribes"; to establish uniform bankruptcy laws; to "promote the Progress of Science and useful Arts"; to provide for punishment for counterfeiting securities and coin of the United States; to grant letters of marque and reprisal; to make rules for government and regulation of land and naval forces; to provide for organizing, arming and training militia; to create a district for the seat of the government. *Compare 2 id.* at 181-82 with U.S. CONST. art. I, § 8.

It also added the following areas of federal court jurisdiction: all cases arising under the Constitution and treaties of the United States; cases in which the United States is a party; cases "between Citizens of the same State claiming Lands under Grants of different States." *Compare 2 id.* at 186 with U.S. CONST. art. III, § 2.

106. 2 RECORDS, *supra* note 7, at 290-92 (federal, not state government to determine and pay salaries of legislators); *see infra* note 118.

107. *Id.* at 185 (delegates eliminate provision); *see infra* note 118.

108. (1) *Compare id.* at 179 with U.S. CONST. art. I, § 2 (stylistic changes only); (2) *compare 2 RECORDS, supra* note 7, at 187 with U.S. CONST. art. III, § 2 (stylistic changes only); (3) *compare 2 RECORDS, supra* note 7, at 185 with U.S. CONST. art. I, § 2 (stylistic changes only); (4) *compare 2 RECORDS, supra* note 7, at 179 with U.S. CONST. art. I, § 4 (stylistic changes with limit on federal power of revision "as to the Place of Chusing Senators"); (5) *compare 2 RECORDS, supra* note 7, at 188 with U.S. CONST. art. I, § 4 (stylistic change only); (6) *compare 2 RECORDS, supra* note 7, at 187-88 with U.S. CONST. art. IV, § 2 (stylistic change only); (7) *compare 2 RECORDS, supra* note 7, at 188 with U.S. CONST. art. IV, § 1 (provision weakened with introduction of a federal interpretive power: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

cant powers to the states. The delegates continued to reject the vast majority of new motions for states' rights while accepting most of the states' rights provisions contained in the Committee report. They similarly accepted all broader grants of power included in the report, but reversed their earlier position by accepting the report's enumerated powers and rejecting new proposals for sweeping national powers.

A. *Pressures for Conciliation*

Pressures to end the Convention quickly and successfully compelled the delegates to compromise. The public's expectation of success created a strong pressure that increased dramatically during the final weeks of the Convention.¹⁰⁹ Near the close of the Convention, Madison wrote Jefferson: "Nothing can exceed the universal anxiety for the event of the meeting here. Reports and conjectures abound concerning the nature of the plan which is to be proposed."¹¹⁰

Though the press was generally sanguine in its forecasts for the success of the Convention,¹¹¹ it clearly conveyed the public's ever-heightening concerns: "Many letters have been written to the members of the foederal convention . . . respecting the reports idly circulating, that it is intended to establish a monarchical government, to send for the bishop of Osnaburgh, &c., &c."¹¹²

The delegates' frustrations with the circular nature of debate and with the length of the Convention may have created additional pressures to accommodate. In the final weeks of the Convention, many delegates shared Gorham's disgust at the meandering sessions: "[There was] no end to these difficulties and postponements. Some could not agree to the form of Government before

109. See Letter from James Madison to Thomas Jefferson (June 6, 1787), reprinted in 3 RECORDS, *supra* note 7, at 36 ("The whole Community is big with expectation."); Letter from Alexander Hamilton to George Washington (July 3, 1787), *id.* at 53 ("I have taken particular pains to discover the public sentiment and am more and more convinced that this is the critical opportunity for establishing the prosperity of this country on a solid foundation . . ."); Letter from Nathan Dane to Rufus King (July 5, 1787), *id.* at 54-55 ("You know the general opinion is, that our Federal Constitution must be mended; and if the Convention do not agree at least in some amendments, a universal despair of our keeping together, will take place."); Letter from Joseph Jones to James Madison (Sept. 13, 1787), *id.* at 80 ("The continuance of your session and some stories I have heard since my return and on my visit to Alexandria, make me apprehensive . . .").

110. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *id.* at 77-78.

111. See, e.g., Pennsylvania Packet and Daily Advertiser, July 19, 1787, *id.* at 60 & n.3 ("So great is the unanimity, we hear, that prevails in the Convention, upon all great federal subjects, that it has been proposed to call the room in which they assemble—Unanimity Hall." This item also appeared in several other newspapers.); Pennsylvania Packet and Daily Advertiser, Aug. 23, 1787, *id.* at 75 ("[T]he members of the Convention . . . are entitled to the universal confidence of the people of America. Such a body of enlightened and honest men perhaps never before met for political purposes in any country upon the face of the earth.").

112. *Id.* at 73-74.

the powers were defined. Others could not agree to the powers till it was seen how the Government was to be formed.”¹¹³

By August of 1787 the delegates were eager to leave; the Convention had stretched well beyond their expectations, and in many cases, their endurance.¹¹⁴ By the end of the month, eleven of the original fifty-five Convention delegates had left.¹¹⁵

B. *The Committee Report as Middle Ground*

The delegates responded to these pressures by attempting to expedite deliberations. That they resorted to committees to resolve issues three times as often in the last month as they did in the first three months of the Convention provides perhaps the most dramatic and objective evidence of their efforts to hasten the sessions. Between May 25th and August 17th, the Convention in its slow-paced, democratic deliberations delegated difficulties to the more efficient but less participatory committees only three times;¹¹⁶ between August 18th—shortly after the release of the Committee’s report on August 6th—and September 17th, it shifted responsibility to committees nine times.¹¹⁷

Rushed deliberations forced clashing delegates to find middle ground. They now acquiesced to state powers contained in the report but rejected proposals for additional similar state powers; they accepted and enlarged the enumeration of legislative and judicial powers but rejected new broad federal powers comparable to those that had been routinely proposed and approved in their relatively unharried pre-Committee sessions.

The delegates accepted all but two of the specific states’ rights clauses contained in the Committee’s report.¹¹⁸ Though the delegates extensively

113. 2 *id.* at 300; *see also, e.g., id.* at 479 (a frustrated Mason desired “to see some points not yet decided brought to a decision . . . Should these points be improperly settled, his wish would then be to bring the whole subject before another general Convention.”); *id.* at 301 (after motion to postpone, Rutledge objected and complained of “tediousness of the proceedings”).

114. *See, e.g., id.* at 301 (troubled by postponements, Ellsworth stated, “[i]f we do not decide soon, we shall be unable to come to any decision.”); *id.* at 328 (Rutledge distressed over duration of convention “and the extreme anxiety of many members of the Convention to bring the business to an end”); Letter from George Washington to Henry Knox (Aug. 19, 1787), *reprinted in 3 id.* at 70 (“By slow, I wish I could add, and sure movements, the business of the Convention progresses but to say when it will end, or what will be the result, is more than I dare venture to do . . .”) (emphasis in original).

115. C. BOWEN, *supra* note 2, at 225.

116. Committees were appointed to consider proportional representation, *see 1 RECORDS, supra* note 7, at 541-42, to reconsider proportional representation, *id.* at 562, and to prepare a draft of the Constitution (Committee of Detail), 2 *id.* at 95.

117. Committees were appointed to consider additional legislative powers, *see 2 id.* at 324-25, 340-42, to debate the assumption of the state debt and the regulation of the state militia, *id.* at 328-29, to consider provisions concerning slave trade, *id.* at 369-75, to reevaluate Article IX, section 1, *id.* at 394, to ascertain ports for duty collection, *id.* at 418, to consider the force of state acts, *id.* at 448, to debate postponed motions, *id.* at 481, to determine apportionment in the lower house, *id.* at 553, and to prepare the final draft of the Constitution from prior drafts and resolutions, *id.* at 564.

118. *See id.* at 419 (that Executive may correspond with state executives lost on grounds that clause was unnecessary and that it implied he could not correspond with others); *id.* at 290-92 (delegates approved federal rather than state government to pay national legislators, as states would otherwise retain excessive

debated several clauses, they approved the Committee's provisions with ample majorities.¹¹⁹

Yet they rejected the vast majority of post-Committee motions for new states' rights and consistently approved measures to limit state powers.¹²⁰ Moreover, many of these proposed powers, such as the motion to grant states a greater administrative role over the militia and the proposal to permit states to execute a nationally planned and organized militia, were similar in scope and significance to those recommended by the Committee's report and passed by the Convention.¹²¹ The delegates' rare act to increase states' rights normally came as a quid pro quo for a more significant national power.¹²²

Consonant with their pre-Committee voting pattern, the delegates unanimously accepted the report's broader grants of national power such as the necessary and proper clause¹²³ and the supremacy clause.¹²⁴ They nevertheless rejected the only other broad central power proposed and not included in the final report: "[t]o negative all laws passed by the several States interfering in the opinion of the Legislature with the General interests and harmony of the Union."¹²⁵ This proposal would have given the legislature the same discretionary power to displace state law as the earlier motion approved and submitted to the Committee of Detail, "to legislate in all Cases for the general Interests

leverage over federal government.)

119. *See id.* at 201 n.14, 201-06 ("The qualifications of the electors shall be the same . . . as those of the electors in the several States." The motion to strike failed, 1-7-1.); *id.* at 231 ("Vacancies in the House of Representatives shall be supplied by writs of election . . ." This was carried without dissent.); *id.* at 231 ("[Senate] vacancies may be supplied by the Executive until the next meeting of the Legislature." The motion to strike failed, 1-8-1.); *id.* at 239-42 ("The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State . . ." This passed without vote and with minor amendment.); *id.* at 438 ("The trial of all crimes . . . shall be held in the State where the said crimes shall have been committed' . . ." It passed without dissent after being amended to provide for offenses committed outside states.); *id.* at 466-67 ("and shall protect each State . . . on the application of its Legislature, against domestic violence." The provision was approved 9-2 with only minor amendment.)

120. *See, e.g., id.* at 330 (unanimously rejected proposal to place limit on size of army in time of peace); *id.* at 359 (rejected (1-8-1) motion for direct taxation only in time of necessity); *id.* at 406 (rejected without count proposal to reduce executive power to make appointments "except where by law the appointment shall be vested in the Legislatures or Executives of the several States."); *id.* at 418-19 (rejected (3-6-1) proposal to refer appointments by general legislature to state executives); *id.* at 631-33 (unanimously rejected motion to empower state ratification conventions to amend Constitution); *id.* at 625-26 (passed (6-4-1) motion to prohibit states from laying duty or tonnage without consent of Congress).

121. *See id.* at 385-86.

122. *See, e.g., id.* at 624 (compromise struck between wholly allowing and entirely prohibiting states from laying imposts/duties on exports/imports without consent of Congress); *id.* at 629-31 (states' fear of oppressive action from other states failed to carry motion (3-8) "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate"; delegates unanimously passed subsequent motion to guarantee each state equal suffrage in Senate). *But c.f. id.* at 615-16 (rejected (3-8) on several grounds "'to grant charters of incorporation [for building canals] where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent.'").

123. *Id.* at 344-45.

124. *Id.* at 389.

125. *Id.* at 390.

of the Union, and also in those Cases to which the States are separately incompetent."¹²⁶

The delegates approved the enumeration of legislative and judicial powers despite their earlier explicit rejection of enumeration.¹²⁷ The Convention no longer discussed the propriety of enumeration itself, but instead focused on the scope of specific enumerated powers.¹²⁸

IV. CONCLUSION

The Committee of Detail altered the course of the Convention and ultimately the balance of state and federal powers in the Constitution. Reflecting its particular political orientation, the Committee introduced enumerated federal powers and created states' rights not suggested by either the preceding debate or the resolutions that had been passed. Convention delegates, in turn, acceding to pressures to complete their sessions quickly and successfully, largely adopted the report of the Committee as the middle ground of compromise.

The Committee's significant role in promoting states' rights and the nature by which the delegates chose this balance has implications for our modern federalism debate. Much contemporary discussion either explicitly portrays the Framers as having clearly and deliberately designed the balance of state and federal powers finally incorporated into the Constitution,¹²⁹ or assumes such design by equating Framers' *intent* with constitutional *result*.¹³⁰ However, it was the stronger national model as reflected in the Convention's resolutions that was the first choice of the Convention as a whole. The weaker federal

126. See *supra* notes 33-40 and accompanying text. Before the Committee sessions, the delegates twice rejected a motion to grant Congress a narrower veto power over state laws. 1 RECORDS, *supra* note 7, at 164-68; 2 *id.* at 27-28. However, they rejected this proposal only after accepting other broad grants of power, particularly the resolution "to legislate in all Cases for the general interests of the Union, and also in those Cases to which the States are separately incompetent," that appeared to render the motion "unnecessary." See *supra* note 17 and accompanying text.

127. See generally 2 RECORDS, *supra* note 7, at 305-45 (approval of enumerated legislative powers); *id.* at 430-38 (approval of enumerated judicial powers).

128. See, e.g., *id.* at 316 (delegates in debating power to "declare law and punishment of piracies and felonies" deleted "punishment," then enlarged motion beyond original scope).

129. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) ("composition of the Federal Government was *designed* in large part to protect the States from overreaching by Congress") (emphasis added); Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV., 1141, 1152-53 (1988) (fundamental to modern federalist model is that Framers "view[ed] the states as important—indeed in many ways as the primary—entities of government. The Federalist model emphasizes that the framers delegated only an enumerated set of functions to the national government.") (footnotes omitted); Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J., 1317, 1320 (1982) (Justice Rehnquist's federalism theory relies heavily on Framers' intent: "[T]he constitutional first principle *intended* by the Framers was the maintenance of the federal system and of the dignity and autonomy of the states.") (emphasis added).

130. See, e.g., *Garcia*, 469 U.S. at 551-52 (1985) (citing Federalist papers that discuss effect and consequence of constitutional structure in order to support notion of original intent); *id.* at 570-72 (Powell, J., dissenting) (citing sources concerning constitutional effect to support argument regarding Framers' intent).

model represented by the Constitution was the preference of the Committee of Detail, but was the Convention's second choice.

The Framers voted for and thus, in a legal sense, plausibly intended all provisions of the Constitution. Judicial opinions and scholarly writings that describe or imply clear intent regarding federalism therefore remain viable. Yet, the foregoing historical analysis reveals that only five of the delegates forged the structure and much of the language dictating the constitutional balance of state and national powers, and that the Convention delegates accepted the Committee's provisions as compromise measures. The delegates' acceptance of the final constitutional balance of state and central powers thus appears less participatory and more pressured than previously considered in modern debate. To invoke the full meaning of Framers' intent with regard to federalism, therefore, scholars and judges should redefine intent to include consideration of the Committee's dominant role and the way in which the delegates adopted its recommendations.

