
Volume 33
Issue 1 *Symposium: Federal Preemption of
State Tort Law: The Problem of Medical Drugs
and Devices*

Article 2

12-15-2005

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Recommended Citation

Edward J. Larson *Building a Nation from Thirteen States: The Constitutional Convention and Preemption*, 33 Pepp. L. Rev. Iss. 1 (2006)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol33/iss1/2>

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Building a Nation from Thirteen States: The Constitutional Convention and Preemption

by Edward J. Larson*

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I. INTRODUCTION¹

Then as now, Philadelphia summers were notorious for their heat and humidity. By 1787, the colonial capital originally laid out by William Penn over a century earlier had blossomed into the nation's largest city and one of its busiest ports. Although progressive by standards of the day with broad leafy streets and handsome brick buildings, the city lacked modern sanitation facilities and epidemics were a reoccurring threat. A stench often hung over the place during the dog days of July and August. No wonder many sophisticated Americans of that era preferred country life over city dwelling, especially in summer.

During the summer of 1787, Philadelphians had some highly distinguished visitors to share their misery: fifty-five delegates to a convention meeting in the Philadelphia State House, where the Declaration of Independence had been signed. The Convention was called to revise the terms of the federal union for the United States. Those delegates comprised

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1. This section is drawn from EDWARD J. LARSON & MICHAEL J. WINSHIP, *THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON* (forthcoming 2005).

an impressive group of political leaders and nation builders. Thirty-nine had already served in Congress, while seven had been state governors. Eight had signed the Declaration of Independence, and fifteen had helped to draft the innovative constitutions of the states. Over half were college graduates, and over three-fifths had trained as lawyers. The delegates came from as far away as Georgia and New Hampshire. They included plantation owners, farmers, and merchants; nineteen of them owned slaves. Their average age was forty-two years. The youngest delegate was only twenty-six years old, while the oldest was the legendary Benjamin Franklin, perhaps the most famous of all Americans, eighty-one and in failing health.

The Convention was supposed to have started on May 14, but none but the most eager and well prepared delegates had arrived by that time. One who had was James Madison, a thirty-six-year-old delegate from Virginia and ardent student of political history and theory. He had played a large role in bringing the Convention about. Like all of the delegates who would eventually show up, Madison was in Philadelphia because he believed that the United States had a government woefully inadequate to address the grave dangers that it faced.

Following their declaration of independence from Britain in 1776, the thirteen states had formed a “firm league”² of “perpetual [u]nion”³ under the Articles of Confederation. However, it was a union in which, as the Articles guaranteed, each state kept its own “sovereignty, freedom, and independence.”⁴ The document took effect in 1781, after the thirteenth state finally ratified it. Under the Articles, the United States government was little more than a planning and execution board of foreign policy for a federation of thirteen otherwise independent republics. Congress could make treaties and declare war; and it was nominally in charge of the Northwest Territory, stretching from present-day Ohio to Minnesota, but which was in fact controlled by Indians. It could not impose taxes, tariffs, or other revenue devices, nor could it maintain an army of its own. This arrangement initially made perfect sense to the states. When they ratified the Articles, they were in the process of collectively fighting for their independence from an oppressive, powerful monarchy, and their leaders had no desire to place themselves under another overbearing government. However, it quickly became evident to nearly everyone that the Articles of Confederation were an inadequate vehicle for guiding the fast-growing United States and its over three million people through a treacherous world. Foreign countries slapped restrictions on American shipping and the United States could not retaliate. Spain encroached on territory in the American South, while Britain continued to occupy forts in the old Northwest. Some desperate settlers in the rapidly expanding trans-Appalachian West hinted at forming their own states outside the union or joining Spain. Although the Articles left the national interest of the United States heavily dependent on

2. ARTS. OF CONFEDERATION art. III.

3. *Id.* at pmbl.

4. *Id.* at art. II.

state goodwill, the states conducted themselves by narrow standards of self-interest. They regularly ignored federal treaties, including provisions of the peace treaty with Britain, and built trade barriers against products from other states. Struggling to pay off huge war-bond obligations, the states increasingly ignored the Confederation's urgent pleas for money.

Almost as soon as the new government was formed, it became widely acknowledged that the Confederation Congress needed at least the ability to raise money and regulate commerce in some form. The states, however, fiercely jealous of their independence, had written into the Articles that any changes to them required the agreement of all thirteen states. Even so necessary a revenue measure as a retaliatory impost on imported goods floundered on the refusal of a single state, Rhode Island, to go along. The Articles did not work, and they provided no viable method for self-adjustment. That year, the Confederation Congress endorsed a call, initiated by Alexander Hamilton, for the states to send delegates to Philadelphia in 1787 to devise revisions for the Articles.

Among the delegates to the Constitutional Convention, there was a consensus that the United States government could not function or even survive simply on the goodwill of the states. But Madison, as he considered the disarray of the America union and what was needed to remedy it, reached a far more sweeping conclusion. The problem was not just that selfish states threatened the survival of the confederation. As he saw it, these states threatened the very purpose of the American Revolution. Internally, the states exhibited the same selfishness and pettiness they displayed on the national scale. Madison had served in the Virginia legislature through much of the 1780s, and what he found there were not selfless patriots, but narrow-minded politicians, concerned mainly with log rolling, deal making, and satisfying their local constituencies. Madison's plans to reform the state court system got nowhere, and his effort to reduce British control of the state's shipping was gutted by local special interests.

As he contemplated the upcoming Constitutional Convention during the winter of 1786-87, Madison concluded that the United States, in order to survive, needed to be more than a federation of states, with a "federal" government (as it was then called), but a true nation, with a national government that could break the power of the states and issue laws that directly bound all American citizens. The diversity of local interests would be submerged in such a large government, Madison believed, and petty local tyrants would be too obscure to get elected. Instead, he hoped that national lawmakers would unite around a broad understanding of the common good, which included the protection of the rights of property.

While Madison waited for enough delegates to show up in Philadelphia to make a quorum, with the aid of other Virginia delegates, he solidified his ideas on the ideal republican government into fifteen succinct resolutions. Together, these resolutions became known as the Virginia Plan.

By May 25, 1787, enough state delegations had arrived in Philadelphia to begin the Convention. Four days later, the governor of Virginia, Edmund Randolph, formally introduced the Virginia Plan as a starting point for the Convention's deliberations. It was a bold stroke – a complete break from the Articles of Confederation by a Convention charged merely with proposing amendments to that document. The delegates listening to him were men of the world, and they knew the United States needed to be able to defend itself and its interests. They were also men of property, and they knew that they would benefit from a government capable of spurring the country's economic growth and honoring its financial obligations. Moreover, they feared the swelling tides of popular hostility to their class that had penetrated the elected legislatures of many states. Finally, they were patriots; one third of them had served in the Revolutionary Army. They wished to preserve liberty and a republican government from the manifold threats they perceived to it, both from within and without.

Yet the delegates were also riven with mutual suspicions, conflicting economic interests, fierce state loyalties, and fears that the Virginia Plan would unleash a monster that could destroy the very liberty it was intended to preserve. Madison understood that if the Convention finally approved a constitution with any resemblance to his fifteen resolutions, it could mark the beginning of an extraordinary, unprecedented experiment in large-scale republican government. Inspired by a keen sense of history-in-the-making, he decided to keep detailed notes of the entire proceedings.

Thanks to Madison's genius, we not only have the finest Constitution ever devised by mortals, but we also have a record of how those very mortal delegates in Philadelphia succeeded against all odds in drafting that document. In the time that I have left, permit me to share with you some of what Madison's notes tells us about the deliberations at the Convention regarding the national preemption of state laws. As you probably know, the deliberations that summer in Philadelphia were as hot as the weather – and they threatened to break down altogether over slavery, presidential power, and the structure of the legislative branch. Fixing the proper balance between state and national authority certainly stood out as one of the delegates' major concerns, and is well worth our time as we consider the thorny issue of preemption at this symposium.

II. FROM MADISON'S NOTES TO THE CONSTITUTIONAL CONVENTION⁵

On May 29, the aristocratic, thirty-five-year-old governor of Virginia, Edmund Randolph, took the floor to attack the Articles of Confederation and introduce the Virginia Plan for a new and truly national government.⁶

5. In this section, everything in block quotations is taken from delegates' notes of the Constitutional Convention as arranged and edited in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., rev. ed. 1937). Page citations for each excerpt are in specific footnotes.

6. LARSON & WINSHIP, *supra* note 1 (manuscript at 14, on file with authors).

The government would consist of a national legislature, judiciary, and executive – each with the ability to check each other’s power.⁷ The legislature would have two houses, with the larger one (the future House of Representatives) elected by the people and a smaller one (the future Senate) elected by the larger one.⁸ The national legislature could veto state laws it deemed to violate the national Constitution, and it would choose the chief executive, who could veto the legislature’s laws with the aid of a Council of Revision drawn from the judiciary.⁹ In a nutshell, this was Madison’s scheme.

Mr. [Edmund] Randolph. . . .

1. The character of such a governme[nt] ought to secure 1. against foreign invasion: 2. against dissensions between members of the Union, or seditions in particular states: 3. to p[ro]cure to the several States various blessings, of which an isolated situation was i[n]capable: 4. to be able to defend itself against [e]ncroachment [from the states]: [and] 5. to be paramount to the state constitutions.

2. In speaking of the defects of the confederation he proceeded to enumerate [five] defects:

4. that the f[e]deral government could not defend itself against the [e]ncroachments from the states:

5. that it was not even paramount to the state constitutions¹⁰

On June 4, the delegates had agreed on the proposition that there should be a national judiciary with a single supreme court.¹¹ In changing the language of the Virginia Plan from “one or more supreme tribunals, and of inferior tribunals,” to “one supreme tribunal, and of one or more inferior tribunals,” they had too rashly (for some) agreed to having lower national courts in addition to a supreme court.¹² A supreme court was needed for uniform national laws, all agreed, but many delegates disagreed with the

7. *Id.*

8. *Id.*

9. *Id.*

10. James Madison, Convention Notes (May 29), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-19 (Max Farrand ed., rev. ed. 1937).

11. LARSON & WINSHIP, *supra* note 1 (manuscript at 25).

12. *Id.*

Virginia Plan's proposition that the national legislature should choose the judges, and some delegates feared that lower national courts intruded on the state judiciaries.¹³ That issue took center stage on Tuesday, June 5.

<The Clause> ¹⁴ — “that the national Judiciary be <chosen> by the National Legislature”, <being under consideration.>

Mr. [James] Wilson opposed the appointment <of Judges by the> national Legis[ature]: Experience sh[o]wed the impropriety of such appointm[en]ts[] by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.

Mr. [John] Rutledge was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy. He was against establishing any national tribunal except a single supreme one. The State Tribunals <are most proper> to decide in all cases in the first instance.¹⁵

Mr. [James] Madison disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies. It was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment. On the other hand [h]e was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous eno[ugh] 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 deliberate judgments. He hinted this only and moved that the *appointment by the Legislature* might be struck out, [and] a blank left to be hereafter filled on maturer reflection. Mr. Wilson seconds it.¹⁶

13. *Id.*

14. The <> marks indicate where Madison made changes to his own notes, apparently after the Journal of the Federal Convention of 1787 was published in 1819. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at xv-xix.

15. James Madison, Convention Notes (June 5), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 119 (footnotes omitted).

16. *Id.* at 120 (footnotes omitted).

On the question for striking out, MA, NY, NJ, PA, DL, MD, VA, NC, GA, aye 9; CT, SC, no 2.¹⁷

Mr. Rutledge hav[*in*]g obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause <*in propos[ition]* [nine]> should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgm[en]ts: that it was making an unnecessary encroachment on the jurisdiction <of the States,> and creating unnecessary obstacles to their adoption of the new system. - <Mr. [Roger] Sherman [second]ded the motion.>

Mr. <Madison> observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho[ugh] ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive [and] Judiciary would be the mere trunk of a body without arms or legs to act or move.¹⁸

Mr. [John] Dickinson. The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the States altogether, would degrade the Councils of our Country, would be impracticable, would be ruinous. He compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits.¹⁹

17. *Id.*

18. *Id.* at 124.

19. James Madison, Convention Notes (June 7), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 152-53 (footnote omitted).

Col. [George] Mason. [W]hatever power may be necessary for the Nat[iona]l Gov[ernmen]t a certain portion must necessarily be left in the States. It is impossible for one power to pervade the extreme parts of the U. S. [sic] so as to carry equal justice to them. The State Legislatures also ought to have some means of defending themselves ag[ain]st encroachments of the Nat[iona]l Gov[ernmen]t. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Nat[iona]l Establishment[?]²⁰

On Mr. Dickinson's motion for an appointment of the Senate by the State-Legislatures.²¹

MA, CT, NY, PA, DL, MD, VA, NC, SC, GA, aye 10.²²

On Friday, June 8, the delegates debated whether the national legislature should have the power to veto state laws.²³ Madison strongly supported the proposal, but this effort to radically curtail the power of the states was decisively rejected, just as his effort to prevent the state legislatures from electing senators was defeated the day before.²⁴

As debate on Governor Randolph's Virginia Plan for a strong national government continued, some delegates (particularly those from smaller states) began to worry that the emerging document was giving too much power to the central government at the expense of the states. On Friday, June 15, William Patterson of New Jersey, acting on behalf of his state's delegation and with the support of other delegates, introduced an alternative plan that would strengthen the confederation while retaining significant power in the state.²⁵ His plan became known as the New Jersey Plan. Debate on the two plans began in earnest on June 16.²⁶ That debate reveals the extent of national power assumed under the Virginia Plan, which ultimately prevailed over the New Jersey Plan as the basis for the Constitution.

Mr. [Stephen] Lansing called for the reading of the [first] resolution of each plan, which he considered as involving principles directly in contrast; that of Mr. Patterson says he sustains the sovereignty of

20. *Id.* at 155-56.

21. *Id.* at 156.

22. *Id.*

23. LARSON & WINSHIP, *supra* note 1 (manuscript at 31).

24. *Id.*

25. *Id.* (manuscript at 36).

26. *Id.*

the respective States, that of Mr. Randolph destroys it: the latter requires a negative on all the laws of the particular States; the former, only certain general powers for the general good. The plan of Mr. R[andolph] in short absorbs all power except what may be exercised in the little local matters of the States which are not objects worthy of the supreme cognizance. He grounded his preference of Mr. P[aterson]'s plan, chiefly on two objections ag[ain]st that of Mr. R[andolph] 1. want of power in the Convention to discuss [and] propose it. 2[.] the improbability of its being adopted.²⁷

Although the convention voted to proceed with framing a constitution using the Virginia Plan as its basis, the delegates repeatedly returned to the issue of the status of the states within the proposed constitutional union. Some of their comments follow.

Mr. [Alexander] Hamilton But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition[?] Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been s[ai]d that if the smaller States renounce their *equality*, they renounce at the same time their liberty. The truth is it is a contest for power, not for *liberty*.²⁸

Some of the consequences of a dissolution of the Union, and the establishment of partial confederacies, had been pointed out. He would add another of a most serious nature. Alliances will immediately be formed with different rival [and] hostile nations of Europe[], who will foment disturbances among ourselves and make us parties to all their own quarrels. Foreign nations having American dominions are [and] must be jealous of us. Their representatives betray the utmost anxiety for our fate, [and] for the result of this meeting, which must have an essential influence on it.— It had been said that respectability in the eyes of foreign Nations was not the object at which we aimed; that the proper object of republican Government was domestic tranquillity [and] happiness. This was an ideal distinction. No Governm[en]t could

27. James Madison, Convention Notes (June 16), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 249.

28. James Madison, Convention Notes (June 29), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 465-66.

give us tranquillity [and] happiness at home, which did not possess sufficient stability and strength to make us respectable abroad. This was the critical moment for forming such a government.²⁹

Mr. [William] Pierce. The great difficulty in [the Confederation] congress arose from the mode of voting. Members spoke on the floor as state advocates, and were bias[ed] by local advantages.—What is federal? No more than a compact between states; and the one heretofore formed is insufficient. We are now met to remedy its defects, and our difficulties are great, but not, I hope, insurmountable. State distinctions must be sacrificed so far as the general government shall render it necessary—without, however, destroying them altogether. Although I am here as a representative from a small state, I consider myself as a citizen of the United States, whose general interest I will always support.³⁰

Mr. [Elbridge] Gerry, urged that we never were independent States, were not such now, [and] never could be even on the principles of the Confederation. The States [and] the advocates for them were intoxicated with the idea of their *sovereignty*. He was a member of [the Continental] Congress at the time the federal articles were formed. The injustice of allowing each State an equal vote was long insisted on. He voted for it, but it was ag[ain]st his Judgment, and under the pressure of public danger, and the obstinacy of the lesser States. The present confederation he considered as dissolving. The fate of the Union will be decided by the Convention. If they do not agree on something, few delegates will probably be appointed to [the Confederation] Cong[re]s[s]. If they do Cong[re]s[s] will probably be kept up till the new System should be adopted — He lamented that instead of coming here like a band of brothers, belonging to the same family, we seemed to have brought with us the spirit of political nego[t]iators.³¹

On Tuesday, July 17, the Convention gave Congress broad discretionary legislative powers, but Madison's proposal that it have the power to review and veto state laws went down again in crashing defeat, with only three states (MA, VA, and NC) voting for it.³² In its place, Luther Martin proposed what would eventually become the Constitution's supremacy

29. *Id.* at 466-67.

30. Robert Yates, Convention Notes (June 29), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 474.

31. James Madison, Convention Notes (June 29), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 467.

32. LARSON & WINSHIP, *supra* note 1 (manuscript at 70).

clause.³³ Martin's resolution, taken from the New Jersey Plan, affirmed that all laws and treaties passed by Congress would be the "supreme law of the respective states" and that state courts were obliged to follow them in their rulings, regardless of state laws.³⁴ It passed without any dissent.³⁵ Meanwhile, on July 18, the delegates moved on to the issue of inferior national courts.³⁶ Although this issue had proved contentious earlier and divisions over it remained, the Convention quickly accepted the compromise fashioned by the Committee of the Whole to authorize (rather than mandate) the creation of such courts.³⁷

12. Resol[ution]: "that Nat[iona]l <Legislature> be empowered to appoint inferior tribunals[.]"

Mr. [Pierce] Butler could see no necessity for such tribunals. The State Tribunals might do the business.

Mr. [Luther] Martin concurred. They will create jealousies [and] oppositions in the State tribunals, with the jurisdiction of which they will interfere.

Mr. [Nathaniel] Ghorum. . . . Inferior tribunals are essential to render the authority of the Nat[iona]l Legislature effectual[.]

Mr. Randolph observed that the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General [and] local policy at variance.

Mr. G[ouverneur] Morris urged also the necessity of such a provision.

Mr. Sherman was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done[.] with safety to the general interest.

33. *Id.*

34. *Id.*; James Madison, Convention Notes (July 17), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28-29 (Max Farrand ed., rev. ed. 1937).

35. LARSON & WINSHIP, *supra* note 1 (manuscript at 70); James Madison, Convention Notes (July 17), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 29.

36. LARSON & WINSHIP, *supra* note 1 (manuscript at 73).

37. *Id.*

Col. Mason thought many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary.

On question for agreeing to 12. Resol[ution]: <empowering the National Legislature to appoint> “inferior tribunals[.]” Ag[ree]d to nem. con.³⁸

After working though the Virginia Plan, the Convention sent the various resolutions as amended to a Committee of Detail, which fashioned those resolutions into twenty-three articles.³⁹ The Convention then worked through these articles. On August 23 it came to Article VIII: a supremacy clause based on the one approved by the Convention on July 17.⁴⁰ The Committee of Detail strengthened this clause slightly.⁴¹ Where Martin’s version followed the New Jersey Plan by instructing state judges that Congressional acts were “the supreme law of the several states” and preempted state laws, the new version stated that acts passed by Congress also preempted state constitutions.⁴² John Rutledge proposed adding “This Constitution” to the beginning of the article, making it clear that the Constitution itself (as well as Congressional acts) preempted state laws and constitutions, and that state judges were bound to comply.⁴³ Rutledge’s motion was approved.⁴⁴ When this clause reached the final draft of the Constitution as Article VI, Section 2, “supreme law of the several states”⁴⁵ became the “supreme [l]aw of the [l]and,”⁴⁶ to underscore that the United States was now a nation, not a confederacy.⁴⁷

On their last working day (Saturday, September 15) the delegates made a variety of corrections and changes to the Constitution.⁴⁸ Incorporating provisions approved by the Convention, the Constitution gave Congress the power “to lay and collect taxes, duties, imposts and excises,” and “to regulate commerce with foreign nations.”⁴⁹ It specifically barred states from

38. James Madison, Convention Notes (July 18), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 45-46 (footnotes omitted).

39. LARSON & WINSHIP, *supra* note 1 (manuscript at 81).

40. *Id.* (manuscript at 101).

41. *Id.*

42. *Id.*

43. *Id.*; James Madison, Convention Notes (Aug. 23), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 389.

44. James Madison, Convention Notes (Aug. 23), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 389.

45. *Id.*

46. U.S. CONST. art. VI, § 2.

47. LARSON & WINSHIP, *supra* note 1 (manuscript at 101).

48. *Id.* (manuscript at 113).

49. *Id.*; U.S. CONST. art. I, § 8, cl. 1.

laying duties on imports or exports without Congressional consent.⁵⁰ A proposal to qualify this restriction led to a brief exchange between Gouverneur Morris and James Madison on the negative reach of Congressional power to regulate commerce.⁵¹ The extent of that power would become a significant and much litigated issue in American constitutional law.⁵²

Mr. [William] McHenry [and] Mr. [John] Carroll moved that “no State shall be restrained from laying duties of tonnage for the purpose of clearing [harbors] and erecting light-houses[.]”

Col. Mason in support of this explained and urged the situation of the Chesapeake which peculiarly required [expenses] of this sort.

Mr. Govr. Morris. The States are not restrained from laying tonnage as the Constitution now [s]tands. The exception proposed will imply the [c]ontrary, and will put the States in a worse condition than the gentleman (Col[.] Mason) wishes.

Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power “to regulate commerce[.]” These terms are vague but seem to exclude this power of the States— They may certainly be restrained by Treaty. He observed that there were other objects for tonnage Duties as the support of Seamen &c. He was more [and] more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.

Mr. Sherman. The power of the U[nited] States to regulate trade being supreme can [control] interferences of the State regulations <when> such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.

50. LARSON & WINSHIP, *supra* note 1 (manuscript at 113).

51. *Id.*

52. *Id.*

Mr. [Stephen] Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion “that no [‘]State shall lay any duty on tonnage without the Consent[‘] of Congress.”⁵³

NH, MA, NJ, DL, MD, SC, aye 6; PA, VA, NC, GA, no 4; CT divided.⁵⁴

As the Convention moved toward adopting the Constitution, several delegates led by Governor Edmund Randolph, who had originally offered the Virginia Plan, rose to state their objections to the document. Several of those objections speak to the broad powers envisioned for the new national government over the states.

Mr. Randolph animadverting on the indefinite and dangerous power given by the Constitution to Congress, expressing the pain he felt at differing from the body of the Convention, on the close of the great [and] awful subject of their [labors], and anxiously wishing for some accommodating expedient which would relieve him from his embarrassments, made a motion importing “that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by another general Convention.” Should this proposition be disregarded, it would he said be impossible for him to put his name to the instrument. Whether he should oppose it afterwards he would not then decide but he would not deprive himself of the freedom to do so in his own State, if that course should be prescribed by his final judgment —

Col: Mason [second]ded [and] followed Mr. Randolph in animadversions on the dangerous power and structure of the Government, concluding that it would end either in monarchy, or a tyrannical aristocracy; which, he was in doubt[,] but one or other, he was sure. This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it. It was improper to say to the people, take this or nothing. As the Constitution now stands, he could neither give it his support or vote in Virginia; and he could not sign here what he could not support there. With the expedient of another Convention as proposed, he could sign.

Mr. [Charles] Pinkney. These declarations from members so respectable at the close of this important scene, give a peculiar solemnity to the present moment. He descanted on the consequences of calling forth the deliberations [and] amendments of

53. James Madison, Convention Notes (Sept. 15), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 625 (footnote omitted).

54. *Id.* at 625-26.

the different States on the subject of Government at large. Nothing but confusion [and] contrariety could spring from the experiment. The States will never agree in their plans—And the Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not to be repeated— He was not without objections as well as others to the plan. He objected to the contemptible weakness [and] dependence of the Executive. He objected to the power of a majority only of Cong[re]s[s] over Commerce. But apprehending the danger of a general confusion, and an ultimate decision by the Sword, he should give the plan his support.

Mr. Gerry, stated the objections which determined him to withhold his name from the Constitution. 1. the duration and re-eligibility of the Senate. 2. the power of the House of Representatives to conceal their journals. 3[.]— the power of Congress over the places of election. 4[.] the unlimited power of Congress over their own compensations. 5[.] Massachusetts has not a due share of Representatives allotted to her. 6. 3/5 of the Blacks are to be represented as if they were freemen[.] 7. *Under* the power over commerce, monopolies may be established. 8. The vice president being made head of the Senate. He could however he said get over all these, if the rights of the Citizens were not rendered insecure[.] 1. by the general power of the Legislature to make what laws they may please to call necessary and proper. 2. raise armies and money without limit. 3. to establish a tribunal without juries, which will be a Star-chamber as to Civil cases. Under such a view of the Constitution, the best that could be done he conceived was to provide for a second general Convention.

On the question on the proposition of Mr. Randolph. All the States answered— no.

On the question to agree to the Constitution[] as amended. All the States ay.

The Constitution was then ordered to be engrossed.

And the House adjourned.⁵⁵

III. CONCLUSION

The framers' words at the Constitutional Convention have never controlled the subsequent interpretation of the Constitution, nor should they.⁵⁶ The delegates voted to keep their deliberations secret at the time.⁵⁷ No official transcript of the debates exists.⁵⁸ Madison kept his own notes private until his death in 1836, the last of the delegates to die.⁵⁹ These notes summarize what the delegates said behind the closed doors of the Pennsylvania State House during the summer of 1787, but probably contain less than ten percent of their words.⁶⁰ Although scholars view Madison's notes as highly accurate, they do not provide a perfect record of the event.⁶¹ Further, even if a complete transcript existed, the Constitution gained legal significance by being ratified, not by being drafted, which suggests that ratifiers' intentions should outweigh those of the framers in Constitutional interpretation, especially because the ratifiers did not have access to a record of the Convention debates.⁶²

Nevertheless, the Constitutional Convention brought together a remarkable assemblage of delegates to frame the document that became the fundamental law of the United States. Although their intentions for the nation varied greatly even among such critical participants as James Madison, Gouverneur Morris, James Wilson, and Roger Sherman, the clear majority of delegates shared a vision for a strong national government that held the power to oversee the country's commerce. For example, near the conclusion of the deliberations, Madison asserted with respect to the negative reach of the commerce clause, "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to

55. *Id.* at 631-33 (footnotes omitted).

56. See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 GEORGETOWN L. REV. 1113, 1125 (2003) ("Most scholars would (hopefully) agree that the secret drafting history of the Constitution should never trump the 'plain meaning' of its text."). For a general discussion of the interpretive force of Madison's notes, see *id.* at 1124-48, and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

57. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at xi, 15.

58. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 33 (1986).

59. *Id.* at 24.

60. *Id.* at 34.

61. See Kesavan & Paulsen, *supra* note 55, at 1191-96; see also Hutson, *supra* note 57, at 27-35.

62. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 288 (1987). Here Amar quotes James Madison's 1796 comments on the relative significance of the ratifiers' and framers' intent as follows:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State [Ratifying] Conventions.

Id.; see also Kesavan & Paulsen, *supra* note 55, at 1138-39.

regulate commerce.’ These terms are vague but seem to exclude this power of the States.”⁶³ This is preemption writ large. To this assertion, even so vocal a proponent of states rights as Roger Sherman merely replied, “The power of the U[nited] States to regulate trade being supreme can [control] interferences of the State regulations <when> such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.”⁶⁴ This is preemption writ small, but preemption none the less.

By the end of the Convention’s deliberations, the nation had grown so strong at the expense of the states in the draft Constitution that the Virginia Plan’s original proponent, Edmund Randolph, held back from signing the document.⁶⁵ The Constitution would create something new under the sun: A large-scale republican government that would ultimately span the continent and bring the states under its firm control.⁶⁶ The words spoken at the Constitutional Convention, while not conclusive on any issue of constitutional interpretation, surely can help to frame the debate for further discussion. They are offered here in that spirit – to help frame the debate for the articles that follow in this symposium issue of the *Pepperdine Law Review*.

63. James Madison, Convention Notes (Sept. 15), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 625.

64. *Id.*

65. *Id.* at 631.

66. The sense of the Constitution creating something new under the sun is captured in the title of a book on the topic, FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985). This Latin phrase, translated as “Something New Under the Sun,” appears on the Great Seal of the United States, reproduced on the back of every one-dollar bill.

