"PARTLY FEDERAL, PARTLY NATIONAL": THE FOUNDERS' MIDDLE COURSE

MICHAEL MCCONNELL*

INTRODUCTION

I'd like to begin with a comment on Professor John Mikhail being here, because I think many of you in the room probably don't know him. He's not one of us—I think that's fair to say—but he is one of the five or six scholars around the country with the most comprehensive knowledge of the Founding. I've attended conferences with Professor Mikhail, especially the originalism conference in San Diego, for several years now. I invariably learned enormous amounts from him, even when I didn't necessarily agree with the conclusions that he reached. I open this way for two reasons that I think are actually important.

The first is that this says something about originalism: that originalism is a method for determining truths about the Constitution. It is not an ideology, and it is not merely a tool for lawyers to get to the results that they want. That Professor Mikhail can be as erudite and thoughtful a scholar in the originalist mode as he is, and be as far from many of us in the room as he is, is evidence of that, and I think that's a wonderful thing. The second, which might be more important, is that we live in a time when people are not talking to each other. There are significant scholars in law schools who ought to be ashamed of themselves, because they would not come to this room, and they have given up on the idea that one

* Richard and Frances Mallery Professor and Director of the Constitutional Law Center, Stanford Law School; Senior Fellow, Hoover Institution; Judge, United States Court of Appeals for the Tenth Circuit, 2002–2009.

should engage those with whom one disagrees on a scholarly plain. So, I am very happy to be able to be here on a platform with Professor Mikhail, who exemplifies an older spirit of scholarship.

I. THE FEDERALISTS AND THEIR OPPONENTS

Now, a slight criticism about the panel: I actually think we need to have three people up here because there really were three positions at the time of the Framing. There were the consolidationists, perhaps including James Wilson and Gouverneur Morris, with whom Professor Mikhail associates himself.[1] There were also the confederationists: those who wanted almost all serious power to be in the state level and for the national government not to be national in character really at all. Their ideal was to have some kind of souped-up version of the Articles of Confederation.[2] The federalists, though, rejected both of those extreme alternatives.

We would need a confederationist here to have the full range of alternatives, because I'm not going to defend that position. There are people today who believe that the confederationists prevailed

---

1. *See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 23–24 (2003) ("The perils of extreme decentralization, coupled with the understandable influence of British precedents, help explain why the first instinct of convention leaders was to propose a 'consolidated' rather than a 'federal' union."); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 424 (Jonathan Elliot ed., 1836) (consolidationist remarks of Rep. James Wilson); *see also* Kurt T. Lash, *Resolution VI: The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2154 n.148 (2013) (citing JACK M. BALKIN, LIVING ORIGINALISM 146 n.27 (2011)); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (consolidationist remarks of Gouverneur Morris).

2. *See* 1 FARRAND'S RECORDS, *supra* note 1, at 245 (James Madison recording the New Jersey Plan); *id.* at 27 (William Paterson on enlarging the Articles of Confederation); 3 FARRAND'S RECORDS, *supra* note 1, at 337 (letter of John Lansing Jr. on the goal of the convention); *id.* at 244 (letter of Robert Yates on the goal of revising the Articles of Confederation); *id.* at 179–80. (Luther Martin speech to the Maryland House of Representatives on his understanding of the purpose of the convention).

in their pursuit of a very strong states' rights position.[3] The confederationist argument is heard infrequently in law schools, but it certainly is something that one hears around the country. It's a real, serious position, but it is no more true than the consolidationist position that the federalists also rejected.

The truth, according to Madison, is that our Founders charted a middle course, creating a constitution that was partly national and partly federal.[4] Now, it wasn't just a silly, compromised, mushy-middle thing. They had a coherent theory of government, which did create a very powerful national government, but it was not one of—to quote the debate topic today—plenary power. The Constitution did not impart to the new national government what Professor Mikhail persistently refers to as a general welfare power. That was specifically rejected,[5] and the fact that the supporters and ratifiers of the Constitution went to the people and defended it on this ground–which Professor Mikhail concedes—is not something that we should dismiss. The Constitution gets its authority not from the men who designed it in Philadelphia, but from the people who ratified it in the thirteen states.[6]

Therefore, it really matters what the people thought and what they were told. Consequently, I believe that the Constitution creates

---

3. *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987).

4. THE FEDERALIST NO. 39, at 242–43 (James Madison) (Clinton Rossiter ed., 2003) ("The proposed Constitution" is "neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national.").

5. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

6. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) ("I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood….What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

a partially federal, partially national government. The way Madison described it was, "the powers delegated by the proposed Constitution to the federal government are few and defined," and those left to the state governments are "numerous and indefinite."[7] Professor Mikhail takes a position along with the consolidationists: that the powers delegated to the federal government are unlimited and undefined,[8] and those left to the states are whatever pittance is left when the federal government exercises its unlimited plenary authority.

To be more specific, again quoting from Madison, the federal powers "will be exercised principally on external objects, as war, peace, negotiation," foreign commerce and taxation.[9] Madison then says, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[10] That means ordinary administration of justice, criminal law, property and contract law, tort, family law, and the basic infrastructure of ordinary life.

Most Americans in the early years of the republic would never have occasion to encounter an officer of the federal government outside the port cities, where international commerce was taking place. The federal courts were the only institution of the national government that truly penetrated the interior.[11] Now, that is not how it eventually turned out. Look around; that is not the republic

7. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

8. *See generally* John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015) (arguing that the Constitution, especially the Necessary and Proper Clause, gives the national government implied powers to fulfill its purpose); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1055 (2014).

9. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

10. *Id.*

11. *See* Erwin C. Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 215–16 (1963) (outlining the structure and location of Federal Courts during the early years of the United States).

that we have today. Today, the United States resembles the consolidated union that the Anti-Federalists warned about, although I don't think we're all the way there.

When you look at what States do today, their continuing importance to the political dynamic of the United States is apparent—our national structure continues to have substantial federal, nonnational elements.[12] Still, we're a lot closer to a consolidated republic than we were at the beginning. Now, why has that happened? I think a fair summary of Professor Mikhail's position is that plenary federal authority was intentionally baked into the cake from the beginning and then sold to the American people with false advertising. But I don't think that's how it happened. I think it happened because of a series of changes between the Founding and today.

II. CAUSES OF THE MOVE TOWARD A CONSOLIDATIONIST CONSTITUTION

Most importantly, the people made a deliberate decision to eliminate the key protection of State interests in the original Constitution: the Seventeenth Amendment.[13] The original idea was that each branch, including the States, had a check on all the others. The State's check on the federal government was the Senate because the State legislatures chose the Senators.[14] The federal government could not enact any law without the agreement of a majority vote of the Representatives of the State legislatures.[15]

---

12. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1509 (1987).

13. U.S. CONST. amend. XVII. *See also* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

14. THE FEDERALIST NO. 62 (James Madison). *See* 2 FARRAND'S RECORDS, *supra* note 1, at 150–56.

15. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 180–81 (1997) (explaining the Senate's original role as an anti-democratic institution). *See* THE FEDERALIST NO. 62, at 375 (James Madison) (Clinton Rossiter ed., 2003)

It's difficult to think of a more effective way to protect the interests of the States against a consolidated national government. But we, the people, in our wisdom, eliminated that check. Consequently, our Constitution is without a mechanism or enforcement device to prevent the accretion of power at the national level. I'm much more of a constitutionalist than an Anti-Federalist or Federalist; regardless of whether we like these changes or not, we have to live with them because that's what the people decided, and that is our Constitution today.

Today, the only protection States have against the usurpations of the federal government are the federal courts.[16] And last time I looked, federal judges are employees of the federal government. They're part of the apparatus. That is not a sensible way to maintain a federal and state balance. That wasn't what the founders did;[17] that's what we, the people, did with the Seventeenth Amendment.

And that's not the only thing. The people also amended the Constitution in other ways which augmented federal power at the expense of the States. The Sixteenth Amendment authorized the federal government to collect an income tax.[18] Prior to that, the federal government had to rely upon tariffs, which today are just a tiny proportion of its revenue.[19] But the income tax is not just about

16. Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 469, 471
(2018).

17. *See generally* THE FEDERALIST NO. 62 (James Madison).

18. U.S. CONST. amend. XVI.

19. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW 2 (2022) ("Over the past 70 years, tariffs have never accounted for much more than 2% of total federal revenue."); OFF. OF MGMT. & BUDGET, EXEC. OFF OF THE PRESIDENT, HISTORICAL TABLES, TABLE 2.2—PERCENTAGE COMPOSITION OF RECEIPTS BY SOURCE: 1934–2027, https://www.whitehouse.gov/omb/budget/historical-tables/ [https://perma.cc/CL9J-E3PN].

money coming out of our pocketbooks. It gave the national government a claim on the entire wealth of the United States.[20] And he who has the money has the power.

Now the federal government has all the money and the states come begging to the federal government for assistance.[21] Because the federal government can attach conditions to outlays of money,[22] the stage is set for a powerful national government. Don't blame that on the Founders if you don't like it: blame it on the people for adopting the Sixteenth Amendment. My point is not that these amendments are good or bad, but simply that they exist, and a constitutionalist must embrace them. They are part of the Constitution, just as much as the original Constitution of 1787 is. And a constitution with the Sixteenth and Seventeenth Amendments is far closer to being a consolidationist constitution than the one that the Framers created.[23]

---

20. *See* MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RSCH. SERV., R45145, OVERVIEW OF THE FEDERAL TAX SYSTEM IN 2022 2 (2022) ("For FY2021, $2.0 trillion, or 50.5% of the federal government's revenue, was collected from the individual income tax."); Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1736-37 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989)).

21. *See* U.S. CENSUS BUREAU, 2020 ANNUAL SURVEY OF STATE GOVERNMENT FINANCES (2020), STATE GOVERNMENT FINANCE TABLE: 2020, https://www.census.gov/data/tables/2020/econ/state/historical-tables.html [https://perma.cc/CRS6-8ATZ].

22. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'").

23. *See* George Mason, Speech to the Virginia Ratification Convention (June 4, 1788) *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 29 (Jonathan Elliot ed., 1836) ("The assumption of this power of laying direct taxes does, of itself, entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it. The very idea of converting what was formerly a confederation to a consolidated government, is totally subversive of every principle which has hitherto governed us. This power is calculated to annihilate totally the state governments.").

The original idea of the Framers—not Madison, but a majority of them—was that the States were the safest repository of our liberties.[24] State governments were closer to the people and therefore less likely to become tyrannical and disregard the will of the people.[25] The national government was scary because the people's representatives would go off to the distant federal city where they might lose touch and become part of something like a deep state.[26] That's the danger the Framers worried about.

The Framers thought liberty would be protected at the State level. That's why the Bill of Rights only applied to the national government.[27] That belief turned out to be wrong, and I agree with almost everything Professor Mikhail said about the importance of slavery to interpreting the shifting allocation of power between States and the federal government.

An important part of it is that in the States where slavery existed, the slaveocracy was not just about the enslaved peoples. It was an entire totalitarian system designed to prop up the institution of slavery.[28] Freedom of speech, freedom of religion, freedom of movement, freedom of the press, freedom of petition especially: the

---

24. *See Amendments to the Constiution, [8 June] 1789, in* 12 THE PAPERS OF JAMES MADISON 196–210 (Charles F. Hobson and Robert A. Rutland eds., 1979) (Madison proposing an amendment to the Constitution that read "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."

25. McConnell, *supra* note 12, at 1500, 1506.

26. *Cf.* Brutus, No. 1 (1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 124 (Philip B. Kurland & Ralph Lerner eds., 1986) (voicing concern that ambitious and designing men would entrench themselves in the great, executive offices of the nation to "gratify their own interest and ambition" without being called to account for their abuses of power).

27. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

28. *Id.* at 843–44 (Thomas, J., concurring in part and dissenting in part) ("In the contentious years leading up to the Civil War, those who sought to retain the institution of slavery found that to do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. . . . The measures they used were ruthless [and] repressed virtually every right recognized in the Constitution."); *see also* KERI LEIGH MERRITT, MASTERLESS MEN: POOR WHITES AND SLAVERY IN THE ANTEBELLUM SOUTH 2–5 (2017); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 L. & CONTEMP. PROBS. 175, 192 (2004).

States trampled on all of these freedoms.[29] It turned out that the States, far from being the safest repositories of our freedoms, became tyrannical slave regimes.[30] It took a civil war to end that, and the Fourteenth Amendment is the constitutional embodiment of the end of that war. And what does the Fourteenth Amendment do? It nationalizes individual rights and gives Congress the power to enforce that nationalization of individual rights.[31] This was another huge step away from the Founders' conception of the balance between States and the national government and toward a consolidated national government.

Even the Eighteenth Amendment, which enacted Prohibition,[32] was not just about booze. For the first time, the United States government directly exercised a police power that affected individual people and individual businesses in the heartland.[33] We needed, for

29. *See* MERRITT, *supra* note 28, at 2 (discussing the banning of a book critical of the slaveholding class); Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. OF LEGAL HIST. 237, 237, 245 (2007) (stating that southern states restricted the religious liberty of slave); Epps, *supra* note 28, at 192 (discussing limitations or attempted limitations placed upon the freedoms of petition and speech of people in the northern states by slaveholders).

30. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 128 (1872) (Swayne, J., dissenting) ("These amendments are all consequences of the late civil war. . . . The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.").

31. U.S. CONST. amend. XIV, § 5; *Ex parte* Virginia, 100 U.S. 339, 345–46, (1879) ("[The Thirteenth and Fourteenth Amendments] were intended to be what they really are—limitations of the power of the States and enlargements of the power of Congress . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

32. *See* U.S. CONST. amend. XVIII, § 1.

33. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1161–62 (1995); WESLEY M. OLIVER, THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION 15 (2018).

the first time, a national police force to enforce a national criminal prohibition.[34]

This is why the Fourth Amendment first becomes contested—it applied only to the national government.[35] Before Prohibition, the national government wasn't running around breaking into people's houses (other than those of merchants on the coast, to enforce tariffs).[36] With Prohibition, you had Eliot Ness and The Untouchables running around, violating . . . well, not necessarily violating the Fourth Amendment, but often coming close.[37] It's the first time that a national police force penetrated into the interior of the country.[38]

The Civil War itself also encouraged a step in the direction of a consolidated national government. The Civil War not only changed the Constitution with the Thirteenth, Fourteenth, and Fifteenth Amendments, but also changed the way people thought about nationhood.[39] That's an important matter too. Prior to the Civil War, most of the time the phrase "the United States" was treated as a

---

34. Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 158 (Mark H. Moore & Dean R. Gerstein eds., 1981).

35. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 496 (2018) ("[T]he Fourth Amendment was understood to regulate only the federal government.").

36. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 504 (2011) ("Before the Prohibition era, federal law enforcement was in its infancy.").

37. *See* OLIVER, *supra* note 33, at 39*; see also Nathanson v. United States*, 290 U.S. 41, 44–46 (1933) (holding that officers violated a defendant's Fourth Amendment rights while enforcing Prohibition).

38. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 841–42 (2004) ("[T]he Federal government brought only a few thousand criminal cases nationwide per year" before Prohibition."). "Prohibition created a then-unprecedented federal role for law enforcement in chasing after bootleggers. The federal Prohibition Office was created, and federal agents began trying to uncover illegal alcohol that was being transported in violation of the Volstead Act." *Id.* at 504; *see also id.* at 842–44 (detailing federal law enforcement's Prohibition-enforcement activities across the country).

39. *See* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 4–5, 39–40 (1977).

plural noun: "the United States *are*".[40] After the Civil War, people generally treated the United States as a singular noun: "the United States *is*".[41] And if that's true—it's maybe too good to check—but assuming that it's true, as a matter of language, as a matter of the actual mores and sensibilities of the people, the United States becomes something more like a nation. It is no longer a group of states, but a singular entity, and that makes a difference as well.[42]

Another important factor is the rise of an integrated national economy. This isn't something that was done to us by courts, or legislatures, or anything else—it's just a fact of economic life. This is the main reason the Commerce Clause looks different today than it did at the Founding.[43] It is true the Supreme Court has gone a

---

40. *See* GEOFFREY C. WARD WITH RIC BURNS AND KEN BURNS, THE CIVIL WAR: AN ILLUSTRATED HISTORY 273 (1990) (quoting Shelby Foote as saying, "Before the war, it was said, "The United States are . . . "); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 489 (2007) ("'United States' was often matched with a plural verb in 1787 and consistently matched with a singular verb after the Civil War.").

41. GEOFFREY C. WARD WITH RIC BURNS AND KEN BURNS, *supra* note 40 ("Before the war, it was said, 'The United States are . . . ' Grammatically it was spoken that way and thought of as a collection of independent states. After the war, it was always 'the United States *is*…'—as we say today without being self-conscious at all. And that sums up what the war accomplished. It made us an 'is.'"). *But see* Minor Myers, *Supreme Court Usage & the Making of an 'Is'*, 11 GREEN BAG 2D 457, 458, 460 (2009) (surveying usage of "United States are" and "United States is" in Supreme Court opinions from 1790 to 1919 and finding that "the plural usage was the predominant usage" several decades after the Civil War).

42. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 831 (2000) ("However, the Civil War decisively transformed the political geography of the nation. For the first time since its independence from Great Britain, the union was greater than the sum of the individual states, and the federal government became the point of convergence of power."). *But see* Treanor, *supra* note 40, at 489–90 ("[O]ne cannot conclude simply from this change in grammatical practice that the dominant political theory changed—the same verb shift occurred for the word news, and there was no reconceptualization of news.").

43. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting) ("Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national econ-

little far with it—I don't disagree with that, and I would criticize some of its decisions.[44] Still, the main reason the Commerce Clause looks different is because the world has changed. When you ask the same question—about the federal power to regulate commerce among the States—in the context of an economy that is national in character, where major companies operate in all fifty states, and even around the world, you get a different answer. It's the same Constitution, the same principle. But as applied to the modern, national, integrated economy, the results look mightily different. The same point can be made with respect to globalization; the world now being on our doorstep creates the need for an enormous national army. We have border problems.[45] World affairs is a big thing now.

It was these changes, I submit—not any notion of "plenary power" in the original Constitution of 1787—that accounts for the degree of centralization of government in the United States of today.

III. CONTRA PROFESSOR MIKHAIL ON THE HISTORICAL EVIDENCE

I also want to say that I respectfully disagree with many of Professor Mikhail's specific points about what happened in 1787. I'm going to mention only one, because I think it is quite important. He says that Resolution 6 from the Virginia Plan, as amended and made even more nationalistic via an amendment by Gunning Bedford of Delaware, was adopted by the Convention.[46] Resolution 6 basically provided that the national government will have a general

---

omy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers.")

44. *See* McConnell, *supra* note 12, at 1487–88, 1490.

45. *See* Priscilla Alvarez, *Record-Breaking Surge of Migrants Anticipated at the US-Mexico Border, Border Patrol Chief Says*, CNN (last updated Mar. 25, 2022), https://edition.cnn.com/2022/03/25/politics/border-surge-immigration/index.html [https://perma.cc/M2GH-F42D].

46. *See* Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2138 (2012).

welfare power.[47] Many people have said that it was adopted, but I think it is just not so.[48]

Immediately after Bedford's motion was provisionally adopted, John Rutledge of South Carolina, the leading critic of a general welfare power, proposed an alternative, that the powers of the federal government be specifically enumerated.[49] That motion was voted down by an equal vote of 5–5,[50] but as chair of the Committee of Detail, Rutledge went ahead and enumerated powers in what is now our Article I, Section 8, scrapping the language of Bedford's motion.[51]

A lot of people say, "Well, no, actually the enumeration of powers is just an elaboration of what was meant by Resolution 6 as amended by Bedford. There's really no change, and these are just two ways of saying the same thing."[52] But when you look at the votes, every single state (with the exception of Maryland) that voted for Rutledge's motion to enumerate voted against Bedford's motion, and every state that voted in favor of Bedford's motion voted against Rutledge's motion to enumerate.[53] Again, with the exception of the Maryland delegation, which was deeply divided among themselves and often inconsistent. I think it is quite clear from the record that the enumeration of powers was presented as an alternative to the general welfare provision. The Committee of Detail simply disregarded the equally-divided vote against enumeration and acted as if Rutledge's motion had been adopted.

Also, contrary to Professor Mikhail's contention, James Wilson the consolidationist did not dominate the Committee of Detail. He

---

47. 2 FARRAND'S RECORDS, *supra* note 1, at 131–32 .

48. *See, e.g.*, Lash, *supra* note 46, at 2138–39, 2141 (stating that the convention approved Bedford's motion before it was subsequently overlooked).

49. *See* 2 FARRAND'S RECORDS, *supra* note 1, at 17 (Madison's notes); *see also* Lash, *supra* note 46, at 2136.

50. 2 FARRAND'S RECORDS, *supra* note 1, at 17.

51. U.S. CONST. art. I, § 8; *see* 2 FARRAND'S RECORDS, *supra* note 1, at 177, 181–85.

52. *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 12 (2010).

53. *Compare* 2 FARRAND'S RECORDS, *supra* note 1, at 17 (Madison's notes), *with id*. at 27.

was on the Committee of Detail and worked on it, but Rutledge was the chair.[54] Wilson may have been cancelled out by Ellsworth, who was a leading confederationist, or he may have been persuaded by Rutledge of the advantages of enumerating powers.[55] The other two members, Randolph and Gorham, were moderate nationalists, who would naturally be supportive of the Rutledge position as long as the enumeration included sufficient power to carry out national objectives.[56]

The Committee of Detail produced exactly what Rutledge wanted: an enumeration of powers as an alternative to a general welfare provision. This choice was specifically made to ensure that this would not be one confederated national government. And although it conflicted with the prior vote of the Convention, it was well received by the delegates and adopted with minor changes, by overwhelming votes.[57]

54. 1 FARRAND'S RECORDS, *supra* note 1, at xxii (Committee of Detail).

55. *See* John Patrick Coby, *The Proportional Representation Debate at the Constitutional Convention: Why the Nationalists Lost*, 7 AM. POL. THOUGHT 216, 226 n.14 (2018).

56. *See id.* at 218 n.4. (identifying Randolph as a moderate nationalist).

57. *See generally* 2 FARRAND'S RECORDS, *supra* note 1.