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CONSTITUTIONAL COMPROMISE AND THE SUPREMACY CLAUSE

*Bradford R. Clark**

INTRODUCTION

All laws are the product of compromise. In some cases, compromise leads to ambiguity and imprecision. On these occasions, courts may be unable to ascertain and enforce the underlying compromise with precision.¹ In other cases, compromise produces relatively clear and precise provisions that establish specific powers, procedures, or restrictions.² On these occasions, courts pursuing interpretive fidelity should strive to uphold the specific compromises incorporated into enacted legal texts, especially the Constitution. By design, the procedures governing the adoption and amendment of the Constitution give political minorities extraordinary power to block constitutional change and exact compromise as the price of assent.³ At the Constitutional Convention, the smaller states convinced the larger states to

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1 The open-ended provisions of the Fourteenth Amendment arguably provide an example. See U.S. CONST. amend. XIV.

2 The detailed provisions of Article II, Section 1 governing the election of the President and specifying precise eligibility requirements illustrate the point. See U.S. CONST. art. II, § 1.

3 See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1713–22 (2004) (examining the procedures for adopting and amending the Constitution and their implications for the interpretation of precise constitutional texts); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125 (1996) (“Article V

incorporate several precise provisions designed to enable the former to protect their interests in the new federal government. These provisions guarantee all states—regardless of size or population—equal suffrage in the Senate, and give the Senate or the states power to veto all forms of “the supreme Law of the Land.” These precise provisions reflect and implement “the Great Compromise” hammered out between the large and small states at the Constitutional Convention. Respect for the rights of minorities in this process requires courts to uphold the underlying compromise by adhering closely to the Constitution’s finely wrought provisions governing federal lawmaking and supremacy.

In the article prompting this Symposium, I argued that the Supremacy Clause safeguards federalism by conditioning supremacy on adherence to constitutionally prescribed lawmaking procedures.⁴ These procedures were designed to preserve the governance prerogatives of the states both by making federal law relatively difficult to adopt and by assigning this task solely to actors subject to the political safeguards of federalism.⁵ The Supremacy Clause recognizes only three sources of law as “the supreme Law of the Land”—the “Constitution,” “Laws,” and “Treaties” of the United States.⁶ Elsewhere, the Constitution prescribes precise procedures to govern the adoption of each of these sources of law.⁷ All of these procedures specifically require the participation and assent of the Senate.⁸ Originally, these procedures functioned to safeguard federalism in two ways: (1) by giving the states a role in the new federal government, and (2) by ensur-

was designed to permit a very small number of states (currently thirteen) containing but a fraction of the total national population to block constitutional change.”).

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

5 The “political safeguards of federalism” refer to the role of the states “in the composition and selection of the central government.” Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Elizabeth Garrett also profitably reminds us that “[n]o analysis of the ‘finely wrought’ procedures of lawmaking is complete without an assessment of [the] additional requirements” imposed by “the internal rules of each [house of Congress], adopted pursuant to Article I, Section 5 of the Constitution.” Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1495–96 (2008).

6 U.S. CONST. art. VI, cl. 2.

7 See, e.g., *id.* art. I, § 7; *id.* art. II, § 2; *id.* art. V.

8 The only potential exception involves the possibility that, on the application of two-thirds of the state legislatures, Congress will “call a convention for proposing Amendments” rather than propose them itself. See *id.* art. V. This procedure has never been used and, in any event, arguably gives the states an even greater opportunity to influence the amendment process.

ing that small states would have disproportionate influence in adopting “the supreme Law of the Land.”⁹ Although I recognized the second method in my original article,¹⁰ I perhaps did not sufficiently emphasize the entrenchment of the small states’ influence. That entrenchment not only sheds light on the exclusivity of the lawmaking procedures prescribed by the original Constitution, but also continues to have functional relevance today.

The procedural safeguards of federalism were an integral part of the compromise reached between small and large states at the Constitutional Convention over the shape of the new Constitution.¹¹ Although the Convention rejected the small states’ overall plan, it ultimately made several specific concessions in order to prevent the small states from opposing the Constitution. These concessions included giving the states equal suffrage (as opposed to proportional representation) in the Senate and employing the Supremacy Clause and Article III (rather than a congressional negative) to secure the supremacy of federal law. These concessions are significant because—in conjunction with constitutionally prescribed lawmaking procedures—they give the small states (acting through the Senate) disproportionate and perpetual power to veto all forms of “the supreme Law of the Land.” This veto power not only enables the small states’ representatives in the Senate to block lawmaking by the federal government, but also to exact compromise as the price of assent (just as the small states did at the Convention). This Article describes the origins and mechanics of the procedural safeguards of federalism and suggests that courts pur-

9 *Id.* art. VI, cl. 2.

10 See Clark, *supra* note 4, at 1371 (explaining that Article V’s exemption of the states’ equal suffrage in the Senate from ordinary amendment “guarantees small states—acting through their Senators—disproportionate and perpetual power to block proposed provisions of the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States”).

11 I agree with Carlos Vázquez that, strictly speaking, federal lawmaking procedures safeguard the status quo rather than federalism by constraining both the adoption and the repeal of federal law. Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604–08 (2008); see Clark, *supra* note 4, at 1340 & n.90; *infra* notes 105–09 and accompanying text. The Founders recognized this dynamic, but thought that Congress could draft around it if necessary. See James Madison, Notes on the Constitutional Convention (Sept. 12, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585, 587 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND’S RECORDS] (“As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws so as to require renewal instead of repeal.”). For my specific responses to Professor Vázquez’s other points, and those raised by Professor Strauss, see Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681 (2008).

suing interpretive fidelity should respect such safeguards as crucial and enduring compromises built into the constitutional structure.

I. CONSTITUTIONAL COMPROMISE AND THE SUPREMACY CLAUSE

Federal lawmaking procedures are designed to prevent any individual, group, or faction from becoming too powerful and capturing the legislative process. To that end, the Constitution starts by establishing a multimember legislature.¹² As Jeremy Waldron has explained, legal texts will almost always reflect compromise when they are “the product of a multi-member assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.”¹³ Lawmaking power is further diffused—and the need for compromise further enhanced—by splitting the legislature into two distinct bodies. In order to take action, the members of each house must compromise not only with each other, but with members of the other chamber as well. Giving the President a veto adds another participant, necessitating further compromise. When legislative compromise results in the adoption of a clear legal text, courts should adhere to its provisions in order to respect the lawmaking process. If courts were free to disregard clear statutes produced through compromise, they could defeat the purpose (and benefits) of a multi-member, multihouse legislature checked by the executive.

The same is true of constitutional lawmaking and interpretation, especially in a federal system. According to Vicki Jackson, “federal constitutional arrangements are typically put together as a specific ‘compromise’ among existing power holders and . . . these arrangements are typically part of a set of interrelated arrangements (a ‘package deal’).”¹⁴ Our Constitution is best understood in just these terms. As John Manning has explained: “The constitutional lawmaking processes prescribed by Articles V and VII reflect a conscious design to give political (or at least geographical) minorities extraordinary power to block constitutional change. Such political minorities, therefore, also have extraordinary power to insist upon compromise as the price of assent.”¹⁵ Although such compromise sometimes results in the adoption of relatively open-ended phrases like “unreasonable searches and seizures,”¹⁶ it sometimes produces relatively

12 See U.S. CONST. art. I, §§ 2–3.

13 JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999).

14 Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT’L. J. CONST. L. 91, 110 (2004).

15 Manning, *supra* note 3, at 1665.

16 U.S. CONST. amend. IV.

clear and precise texts designed to work together to implement compromise among constitutional stakeholders.¹⁷

Several interrelated provisions of the original Constitution illustrate the latter category. These provisions give the states equal suffrage in the Senate;¹⁸ spell out precise procedures involving the Senate to govern adoption of the "Constitution,"¹⁹ "Laws,"²⁰ and "Treaties"²¹ of the United States; and confer supremacy only on these three sources of law.²² Courts seeking to interpret the Constitution faithfully "should adhere strictly to clear and rule-like constitutional texts" like these.²³ Failure to do so would ignore crucial compromises built into the Constitution and necessary to secure its adoption. Ignoring these compromises, moreover, would undermine the constitutional legitimacy of judicial decisionmaking.

A. *The Great Compromise*

The stakes were high when the Constitutional Convention met in Philadelphia in 1787. The Articles of Confederation had failed to establish a workable government. If a new Constitution could not be adopted, the union of states was in danger of breaking apart from within or being conquered from abroad.²⁴ Each state was entitled to one vote at the Convention,²⁵ and the delegates anticipated that the proposed Constitution would take effect only if ratified by a supermajority of states.²⁶ This meant that the smaller states—representing a minority of the population—could block proposals favored by the larger states—representing a majority of the population. The standard account of the Convention is that it essentially adopted the Virginia Plan (favored by the larger states) and rejected the New

17 See Manning, *supra* note 3, at 1735 ("Given the heightened consensus requirements imposed by Article V, when an amendment speaks with exceptional specificity, interpreters must be sensitive to the possibility that the drafters were willing to go or realistically could go only so far and no farther with their policy.").

18 U.S. CONST. art. I, § 3, cl. 1.

19 *Id.* arts. V, VII.

20 *Id.* art. I, § 7, cl. 2.

21 *Id.* art. II, § 2, cl. 2.

22 *Id.* art. VI, cl. 2.

23 Manning, *supra* note 3, at 1719.

24 See THE FEDERALIST NO. 15, at 105–07 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

25 See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 57 (1913).

26 See JACK N. RAKOVE, ORIGINAL MEANINGS 91, 102–08 (1996).

Jersey Plan (favored by the smaller states).²⁷ On several key issues affecting the overall structure and operation of the Constitution, however, delegates from large states were forced to compromise and incorporate specific proposals favored by small states. These issues included the basis for representation in the Senate and the mechanism for ensuring the supremacy of federal law.²⁸ Making concessions on these matters was the price that the large states had to pay in order to secure the small states' support for the new Constitution.²⁹

Edmund Randolph "opened the main business" of the Convention by introducing a series of resolutions commonly known as the

27 See, e.g., *New York v. United States*, 505 U.S. 144, 164–65 (1992). For a more nuanced account of the Convention's consideration of the Virginia and New Jersey Plans, with emphasis on the alternative measures debated for ensuring the supremacy of federal law, see James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705–73 (1998).

28 See Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 996–97 (2000) (observing that "even the most basic structural decisions of the 1787 Convention were . . . compromises—as in the 'Great Compromise' establishing the 'principle' . . . that only one house of the national legislature is apportioned by population while the other is apportioned by state").

29 A few words about methodology seem appropriate. One could try and unearth a specific original intent regarding the exclusivity of federal lawmaking procedures and the role of the Senate, but one would encounter all of the standard problems associated with collective intent and incomplete records. See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1308–10 (1998) (arguing that to the extent these difficulties apply to divining legislative intent from historical materials, they should apply a fortiori to discerning the Founders' intent); see also Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 214 (1980) (observing that "there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent"). My argument here, by contrast, is based primarily on text and structure. To be sure, what we know about specific proposals and choices made at the Convention helps us to put the text and structure in context, but it is not essential to recognizing the compromise between large and small states reflected in the composition of the Senate, the Supremacy Clause, and federal lawmaking procedures. With respect to the exclusivity of federal lawmaking procedures, evidence from the Convention of the actual compromise between small and large states serves only to confirm the strong inferences to the same effect derived from the text and structure of several interlocking provisions of the Constitution. Cf. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1354–62 (1998) (arguing that constitutional interpreters may consult background sources such as *The Federalist* as a source of persuasion rather than as authoritative evidence of meaning).

Virginia Plan.³⁰ This Plan preserved the states, but proposed the establishment of a new, fully functioning federal government with its own bicameral legislature, executive, and judiciary.³¹ Two sticking points quickly emerged—the proper means of securing the supremacy of federal law and the basis for representation in the Senate. On the first issue, the Convention initially approved Randolph's proposal that "the National Legislature ought to be empowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union."³² The Virginia Plan did not initially address the second question. Rather, it merely specified the method of selecting senators by proposing that "the members of the first branch of the National Legislature ought to be elected by the people of the several States," and that "the members of the second branch . . . ought to be elected by those of the first."³³ The Convention rejected this proposal and decided unanimously that "the members of the second branch of the national Legislature ought to be chosen by the individual Legislatures."³⁴

The basis for representation in the Senate proved much more contentious than the method of selection. The Convention initially rejected a proposal "that each State have one vote," and approved a proposal that "the right of suffrage in the second branch . . . ought to be according to the rule established for the first."³⁵ These votes surprised and alarmed delegates from smaller states.³⁶ William Paterson went so far as to declare that

30 See James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 17, 18–23.

31 See *id.* at 20–22.

32 *Id.* at 21. Conflict between large and small states later emerged when Mr. Pinckney moved to expand the negative to empower the national legislature to negative "all [state] Laws which they shd. judge to be improper." James Madison, Notes on the Constitutional Convention (June 8, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 164, 164. The Convention rejected this proposal to expand the negative. See *id.* at 168.

33 Madison, *supra* note 30, at 20.

34 Journal of the Constitutional Convention (June 7, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 148, 149.

35 Journal of the Constitutional Convention (June 11, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 192, 193. The vote on both motions was six states to five. *Id.*

36 See James Madison, Notes on the Constitutional Convention (June 9, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 175, 176–77 (recounting David Brearley's comments that "[w]hen the proposition for destroying the equality of votes came forward, he was astonished, he was alarmed").

N. Jersey will never confederate on the plan before the Committee. She would be swallowed up. He had rather submit to a monarch, to a despot, than to such a fate. He would not only oppose the plan here but on his return home do everything in his power to defeat it there.³⁷

James Wilson responded that “[i]f the small States will not confederate on this plan, Pena. & he presumed some other States, would not confederate on any other.”³⁸ In the wake of this impasse, small state delegates sought and obtained further time “to contemplate the plan reported from the Committee of the Whole” and to formulate an alternative.³⁹

The next day, William Paterson introduced the New Jersey Plan as a comprehensive alternative to the Virginia Plan. According to Madison, “this plan had been concerted among the deputations or members thereof, from Cont. N.Y. N.J. Del. and perhaps Mr. Martin from Maryland.”⁴⁰ Paterson’s Plan would have retained the equality of the United States in Congress, but would have “revised, corrected & enlarged” the Articles of Confederation to make them more effective.⁴¹ In addition, in place of the congressional negative, the New Jersey Plan proposed to make federal acts and treaties “the supreme law of the respective States.”⁴² Although the Convention voted to reject the New Jersey Plan and re-report the Virginia Plan,⁴³ this did not end the debate over the composition of the Senate or the congressional negative. Thus, shortly after the vote, Luther Martin declared that the states “entered into the confederation on the footing of equality; that they met now to . . . amend it on the same footing, and that he could never accede to a plan that would introduce inequality and lay 10 States at the mercy of Va. Massts. and Penna.”⁴⁴

When the Convention again took up the basis for representation in the Senate, Martin began the debate with a speech that lasted “more than three hours” and insisted that “an equal vote in each State

³⁷ *Id.* at 179.

³⁸ *Id.* at 180.

³⁹ James Madison, Notes on the Constitutional Convention (June 14, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 240, 240.

⁴⁰ James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 242, 242 n.*.

⁴¹ *Id.* at 242.

⁴² *Id.* at 245.

⁴³ James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 312, 322.

⁴⁴ *Id.* at 324.

was essential to the federal idea.”⁴⁵ He concluded his remarks the next day with “considerable vehemence” and proclaimed that “he had rather see partial Confederacies take place, than the plan on the table.”⁴⁶ Large state delegates were just as adamant in favor of proportional representation, insisting that they “never could listen to an equality of votes” in the Senate.⁴⁷ In a remarkable response, Gunning Bedford warned that the “Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.”⁴⁸ The Convention was now deadlocked on the question.⁴⁹

Seeking to prevent the Convention from “break[ing] up without doing something,”⁵⁰ the delegates appointed a Grand Committee to seek a compromise.⁵¹ Several days later, the Committee revealed its report. The report proposed giving each state “an equal Vote” in the Senate, and granting the House the right to originate “all Bills for raising or appropriating money.”⁵² Madison did not regard the proposal “as any concession on the side of the small States.”⁵³ Elbridge Gerry, a member of the Committee, explained that he shared Madison’s concerns on the merits, but “assented to the Report” because the delegates were “in a peculiar situation”⁵⁴ owing to the small states’ refusal to support the Constitution without equal suffrage in the Senate. “If no compromise should take place,” the consequence would be secession, “the result [of which] no man could foresee.”⁵⁵

Underscoring Gerry’s point, Paterson insisted that equal suffrage was necessary to enable the small states to defend themselves: “There was no other ground of accommodation. His resolution was fixt. He

45 James Madison, Notes on the Constitutional Convention (June 27, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 436, 437–38.

46 James Madison, Notes on the Constitutional Convention (June 28, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 444, 444–45.

47 James Madison, Notes on the Constitutional Convention (June 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 481, 490.

48 *Id.* at 492.

49 See James Madison, Notes on the Constitutional Convention (July 2, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 510, 510.

50 *Id.* at 511.

51 See *id.* at 516.

52 Journal of the Constitutional Convention (July 5, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 524, 524.

53 James Madison, Notes on the Constitutional Convention (July 5, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 526, 527.

54 *Id.* at 532.

55 *Id.*

would meet the large States on that Ground and no other.”⁵⁶ When the Pennsylvania delegates continued to resist the report, Martin responded that “[h]e was for letting a separation take place if [the large States] desired it. He had rather there should be two Confederacies, than one founded on any other principle than an equality of votes in the 2d branch at least.”⁵⁷ The small states’ willingness to block the Constitution had its intended effect. In the end, the Convention voted five states to four to establish equal suffrage in the Senate.⁵⁸ As Jack Rakove has observed, the resolution of “the prolonged dispute over the Senate[] is usually regarded as the great turning point of the Convention.”⁵⁹

The next day, the Convention reconsidered and rejected the congressional negative, the other aspect of the Virginia Plan that had divided large and small states. Perhaps encouraged by recent events, delegates from smaller states now openly denounced giving Congress even a limited power to negative state law. For example, Madison reports that “Mr. Govr. Morris was more & more opposed to the negative. The proposal of it would disgust all the States.”⁶⁰ Despite Madison’s efforts to save the negative,⁶¹ the Convention rejected the proposal by a vote of seven states to three.⁶² In place of the negative, the Convention unanimously approved Luther Martin’s proposal to adopt the Supremacy Clause (originally proposed as part of the New Jersey Plan).⁶³ Finally, at the end of the Convention, the small states

⁵⁶ James Madison, Notes on the Constitutional Convention (July 7, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 549, 551.

⁵⁷ James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 FARRAND’S RECORDS, *supra* note 11, at 2, 4.

⁵⁸ See James Madison, Notes on the Constitutional Convention (July 16, 1787), in 2 FARRAND’S RECORDS, *supra* note 11, at 15, 15.

⁵⁹ RAKOVE, *supra* note 26, at 58.

⁶⁰ James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 11, at 25, 28.

⁶¹ See *id.*

⁶² *Id.*

⁶³ *Id.* at 28–29; see Journal of the Constitutional Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 11, at 21, 22. The Clause, as proposed by Martin and unanimously accepted by the delegates, provided

that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

further entrenched their gains by exempting the states' equal suffrage in the Senate from future amendment by ordinary means.⁶⁴

As discussed below, the combined effect of these concessions—in conjunction with carefully crafted federal lawmaking procedures—was to give small states (acting through the Senate) disproportionate and perpetual power under the Constitution to block or reshape all future proposals to adopt “the supreme Law of the Land.”⁶⁵ Both sides understood this consequence to be the price of obtaining the small states' assent to the Constitution. Thus, during the ratification debates, the Federalists described the “equality of representation in the Senate” as “evidently the result of compromise between the opposite pretensions of the large and the small States.”⁶⁶ They also frankly acknowledged that “[a] government founded on principles more consonant to the wishes of the larger States is not likely to be obtained from the smaller States.”⁶⁷

B. *Compromise and Federal Lawmaking*

Although the Convention rejected the New Jersey Plan, it ultimately satisfied the small states' demands by incorporating two of that Plan's most salient features—equal suffrage in the Senate and the Supremacy Clause—into the Virginia Plan. The combined effect of these decisions was to give the small states disproportionate influence over a wide array of important decisions assigned to the new federal government. The Senate, of course, was designed to be the means of such influence. The Constitution assigns the Senate a wide variety of important functions. For example, the Senate tries impeachments⁶⁸

Id. The Clause was later modified slightly by the Committee of Detail. See James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND'S RECORDS, *supra* note 11, at 177, 183 (referring to “[t]he Acts of the Legislature of the United States made in pursuance of this Constitution”). The Committee's chairman, John Rutledge, proposed two further alterations that were adopted without debate or dissent. See James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 11, at 384, 389 (proposing a revised version adding “This Constitution” to the beginning of the Clause and replacing the phrase, “[t]he Acts of the Legislature of the United States made in pursuance of this Constitution,” with the phrase, “the laws of the U.S. made in pursuance thereof”).

64 See James Madison, Notes on the Constitutional Convention (Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 11, at 622, 631 (altering Article V to provide “that no State, without its consent shall be deprived of its equal suffrage in the Senate”) (quoting Morris' proposed amendment to Article V)).

65 See *infra* Part I.B.

66 THE FEDERALIST NO. 62 (James Madison), *supra* note 24, at 377.

67 *Id.*

68 See U.S. CONST. art. I, § 3, cl. 6.

and must consent to the appointment of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."⁶⁹ More importantly for our purposes, constitutionally prescribed lawmaking procedures call upon the Senate to propose constitutional amendments (with the House of Representatives),⁷⁰ to enact laws (with the House and the President),⁷¹ and to make treaties (with the President).⁷²

The Supremacy Clause magnifies the significance of the Senate to the federal-state balance by conferring the status of "the supreme Law of the Land" only on sources of law adopted with the participation and assent of the Senate or the states themselves—that is, the "Constitution," "Laws," and "Treaties" of the United States.⁷³ Luther Martin—"perhaps the Convention's most committed confederationist"⁷⁴—moved to adopt the Supremacy Clause only after the small states had secured equal suffrage in the Senate and after it appeared likely that the Senate would have an essential role in adopting both laws and treaties.⁷⁵ By granting the states equal suffrage in the Senate and simultaneously restricting supremacy to sources of law adopted by

69 *Id.* art. II, § 2, cl. 2.

70 *See id.* art. V.

71 *See id.* art. I, § 7, cl. 2.

72 *See id.* art. II, § 2, cl. 2.

73 *Id.* art. VI, cl. 2.

74 Liebman & Ryan, *supra* note 27, at 730.

75 Martin moved to adopt the Supremacy Clause on July 17, 1787, just one day after the Convention voted to give the states equal suffrage in the Senate. *See supra* notes 58, 63 and accompanying text. The Virginia Plan originally proposed that a "National Legislature," composed of two branches, enact laws subject to disapproval by "a council of revision." *See* Madison, *supra* note 30, at 21. Although the Virginia Plan was silent regarding treaties, Alexander Hamilton proposed that "the Executive . . . have with the advice and approbation of the Senate the power of making all treaties." *See* James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra* note 11, at 282, 292; *see also* Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 590 (1974) (explaining that Hamilton took care "[t]o make sure that the role of the Senate would not be overlooked or downgraded"). The Committee of Detail's draft vested the Senate with sole power to make treaties. *See* Madison, Notes on the Constitutional Convention (Aug. 6, 1787), *supra* note 63, at 183. In August, the delegates debated whether to add the House of Representatives, the President, or both to the treaty-making process. *See* Bestor, *supra*, at 630–38. The Treaty Clause was later revised to include the President in addition to the Senate and to specify the two-thirds requirement. *See* James Madison, Notes on the Constitutional Convention (Sept. 4, 1787), in 2 FARRAND'S RECORDS, *supra* note 11, at 496, 498–99. Although the delegates debated various amendments, none would have removed the Senate from the ratification process. *See* James Madison, Notes on the Constitutional Convention (Sept. 7, 1787), in 2 FARRAND'S RECORDS, *supra* note

the Senate, the Constitution gives small states disproportionate power to block—or use their leverage to alter—all federal measures capable of displacing state law.

Both proponents and opponents of equal suffrage understood the consequences of the decision in just these terms. That is why the issue was so divisive and brought the Convention to the brink of collapse.⁷⁶ Proponents sought equal suffrage precisely because it would enable the small states to defend their interests by blocking—or threatening to block—federal action. William Johnson asked: “Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence.”⁷⁷ “[O]therwise,” as Roger Sherman put it, “a few large States will rule the rest.”⁷⁸ Bedford likened the security offered by equal suffrage in the Senate to the executive’s “negative on the laws” and asked, “[I]s it not of more importance that the States should be protected, than that the Executive branch of the Govt. shd. be protected[?]”⁷⁹ Paterson likewise argued that “the small States would never be able to defend themselves without an equality of votes in the 2d. branch.”⁸⁰ For these delegates, empowering small states to defeat or alter federal laws in the Senate was the primary purpose of the proposal.⁸¹

Large state delegates opposed equal suffrage for precisely the same reasons that small state delegates sought it. Madison repeatedly opposed equal suffrage because it would allow the small states (through the Senate) to thwart the will of the majority. He also foresaw how the small states could use their power in the Senate to put the interests of their citizens above those of the majority. Responding to the argument “that an equality of votes in the 2d. branch was not only necessary to secure the small, but would be perfectly safe to the large ones,” he stressed that

11, at 535, 538, 540–41, 543; James Madison, Notes on the Constitutional Convention (Sept. 8, 1787), in 2 FARRAND’S RECORDS, *supra* note 11, at 547, 547–50.

76 See *supra* notes 35–59 and accompanying text.

77 James Madison, Notes on the Constitutional Convention (June 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 461, 461.

78 James Madison, Notes on the Constitutional Convention (June 11, 1787), in 1 FARRAND’S RECORDS, *supra* note 11, at 196, 196.

79 Madison, *supra* note 53, at 531.

80 Madison, *supra* note 56, at 551.

81 See *id.* at 550 (“If they vote by States in the 2d. branch, and each State has an equal vote, there must always be a majority of States as well as a majority of the people on the side of public measures”); see also Madison, *supra* note 57, at 5 (“Mr. Sherman urged the equality of votes . . . for the State Govts. which could not be preserved unless they were represented & had a negative in the Genl. Government.”).

the Majority of States might still injure the majority of people. 1. they could *obstruct* the interests and wishes of the majority. 2. they could *extort* measures, repugnant to the wishes & interest of the majority. 3. They could *impose* measures adverse thereto; as the 2d branch will probly exercise some great powers, in which the 1st will not participate.⁸²

Madison reiterated this point after the Grand Committee recommended equal suffrage in the Senate: Madison objected that if the Constitution granted “an equality of votes in the 2d. branch,” then “the minority could negative the will of the majority of the people.”⁸³ The large states regarded this consequence as a serious flaw, but the small states saw it as the proposal’s primary virtue.

Thus, when the Convention ultimately voted to give states equal suffrage in the Senate, delegates on all sides fully understood that structuring the Senate in this way would institutionalize the small states’ disproportionate power to block all federal measures subject to Senate approval. This feature of the Constitution did not represent the secret or idiosyncratic intent of the drafters, but was an obvious consequence of the compromises required to produce agreement at the Convention. Several subsequent decisions during the remainder of the Convention only served to reinforce the significance of equal suffrage in the Senate.

As discussed, the Convention rejected congressional power to negative state law in favor of the carefully worded Supremacy Clause, which recognizes only the “Constitution,” “Laws,” and “Treaties” as “the supreme Law of the Land.”⁸⁴ Whereas the negative would have allowed Congress to adjudicate conflicts between state and federal law, the Supremacy Clause—augmented by Article III’s parallel “arising under” jurisdiction—assigned this task to independent federal and state courts.⁸⁵ At the same time, the Convention adopted precise procedures to govern the adoption of each source of supreme federal law, and all of these procedures require the participation of the Senate or the states.⁸⁶ Finally, the Convention exempted equal suffrage in the Senate from ordinary amendment under Article V.⁸⁷ The combined effect of these provisions was to give small states—through the

⁸² Madison, *supra* note 47, at 486.

⁸³ Madison, *supra* note 57, at 9.

⁸⁴ See U.S. CONST. art. VI, cl. 2; *supra* note 63 and accompanying text.

⁸⁵ See Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 292–317 (2007); Clark, *supra* note 4, at 1346–55; Liebman & Ryan, *supra* note 27, at 699–760.

⁸⁶ See *supra* notes 70–72 and accompanying text.

⁸⁷ See *supra* note 64 and accompanying text.

Senate—disproportionate and perpetual power to block or temper any and all attempts by the federal government to override state law. Taken as a whole, therefore, “the entire Constitution of 1787 was in a sense founded on compromises.”⁸⁸

During the ratification debates, several prominent Federalists who resisted equal suffrage in the Senate at the Convention now invoked this feature to reassure Americans fearful that the states might be giving up too much power.⁸⁹ As Madison argued in *The Federalist* No. 62, “[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty.”⁹⁰ In short, the Constitution was written, proposed, and ratified on the contingent understandings that the states would have equal suffrage in the Senate, and that the Senate’s approval would be necessary to adopt all forms of “the supreme Law of the Land.”

C. *Compromise and Interpretive Fidelity*

Sometimes conflict among participants in the lawmaking process is resolved by adopting vague or contradictory provisions. This was not the case in Philadelphia. The small states enjoyed disproportionate power under the Articles of Confederation and at the Convention because each state was entitled to one vote.⁹¹ They used this power at the Convention to perpetuate their disproportionate power under the new Constitution. All participants in the debate correctly anticipated that the Senate would have an essential role in adopting all forms of supreme federal law. A rule of equal suffrage in the Senate guaran-

88 Jackson, *supra* note 28, at 997; see also F.L. Siddons, *Constitutional Aspects of the Tillman-McLaurin Controversy*, 12 YALE L.J. 21, 23 (1902) (stating that “it is no exaggeration to declare that but for the acceptance of the principle of the equal suffrage of the States, by the convention, there would have been no constitution to submit for ratification”).

89 For example, during the North Carolina convention, James Iredell responded to fears about the power of the Senate in part by stressing the nature of its composition: “The manner in which our Senate is to be chosen gives us an additional security. Our senators will not be chosen by a king, nor tainted by his influence. They are to be chosen by different legislatures in the Union. Each is to choose two.” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 40 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891). Similarly, Alexander Hamilton, during the New York convention, observed “that the *equal vote in the Senate* was given to secure the rights of the states,” and that “[i]t is proper that the influence of the states should prevail to a certain extent.” 2 *id.* at 319.

90 THE FEDERALIST NO. 62 (James Madison), *supra* note 24, at 378.

91 See *supra* note 25 and accompanying text.

teed the small states disproportionate power in the lawmaking process to block or modify federal law whenever they objected to its content.

Although the small states could not persuade the delegates to embrace the New Jersey Plan, they did convince them to incorporate three concrete proposals into the new Constitution—equal suffrage in the Senate,⁹² a Supremacy Clause that limited supremacy to three specific sources of law,⁹³ and federal lawmaking procedures that required the participation of the Senate to adopt each of these sources.⁹⁴ The combined effect of these carefully crafted provisions was to give small states—through the Senate—disproportionate power to block any and all attempts by the federal government to override state law. This was the price that the large states had to pay to secure the small states' assent to the new Constitution.

Carlos Vázquez concludes that one could just as easily regard federal lawmaking procedures as safeguards of *nationalism* as safeguards of *federalism*.⁹⁵ Compared to the Articles of Confederation, he points out, the "procedures set up by the Constitution for creating supreme federal law . . . make it *easier* to displace state law."⁹⁶ Although Professor Vázquez is correct, the Articles may not be the proper point of comparison. All delegates to the Constitutional Convention agreed on the need to give the central government more power than it possessed under the Articles of Confederation. The contested question was how much more. Delegates from larger states sought representation in the Senate based on population, and strongly preferred the congressional negative to the Supremacy Clause.⁹⁷ If the larger states had prevailed, then smaller states would have had no real opportunity to block or alter attempts to override state law under the new Constitution. As discussed, the small states refused to support a constitution with these features, thus forcing the large states to compromise by incorporating several important and precise provisions into their

92 See U.S. CONST. art. I, § 3, cl. 1 (stating that the Senate "shall be composed of two Senators from each State"); *id.* art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

93 See *id.* art. VI, cl. 2 (declaring that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

94 See *id.* art. I, § 7, cl. 2 (prescribing procedures for adopting laws); *id.* art. II, § 2, cl. 2 (prescribing procedures for adopting treaties); *id.* art. V (prescribing procedures for adopting constitutional amendments).

95 See Vázquez, *supra* note 11.

96 *Id.* at 1603.

97 See *supra* notes 30–39, 60–63, 82–83 and accompanying text.

plan.⁹⁸ These provisions were designed to afford the small states disproportionate and perpetual power to block the adoption of—and alter the content of—all forms of “the supreme Law of the Land.”

The centrality of these compromises to the success of the Convention and the specificity of the provisions they produced suggest that courts should adhere closely to their precise commands both to remain faithful to the Constitution and to respect the rights of participants in the process. Professor Vázquez attempts to downplay the significance of these compromises by urging us to “look at [the original] structure at a high level of generality.”⁹⁹ Accordingly, he repeatedly characterizes the constitutional structure as striking a balance “between federalism and nationalism”¹⁰⁰ and “between the status quo and change.”¹⁰¹ Courts necessarily have some degree of latitude when construing open-ended constitutional provisions, such as Congress’ power to regulate commerce “among the several States.”¹⁰² By contrast, the lines of compromise reflected by the states’ equal suffrage in the Senate and the Senate’s power to veto all forms of “the supreme Law of the Land” are spelled out so carefully in the Constitution and were so crucial to its adoption that they leave no real room for courts to disregard these features.¹⁰³ This means that—however one chooses to characterize the compromise struck by the Founders—courts should not permit the federal government to override state law outside the Supremacy Clause—that is, without the participation and assent of the Senate. Were courts to ignore the specific provisions that implement the founding compromise, they would not only undermine the legitimacy of the Constitution itself, but substitute their views for those of the various participants authorized to speak for the people in adopting and amending the Constitution.¹⁰⁴

This does not mean, of course, that constitutionally prescribed lawmaking procedures always function to safeguard federalism. As Professor Vázquez reminds us, such procedures make it just as hard to

98 See *supra* Part I.A.

99 Vázquez, *supra* note 11, at 1636.

100 E.g., *id.* at 1601.

101 *Id.* at 1625.

102 See U.S. CONST. art. I, § 8, cl. 3.

103 See Manning, *supra* note 3, at 1713–20.

104 There are also important functional reasons for upholding constitutional compromise. See Jackson, *supra* note 28, at 998 (“Compromise is important; compromise between competing principles is often essential to constitution making and maintenance; security in enforcement of compromises may be important for future bargaining; and compromises may have become embedded in a legal landscape and require continued enforcement in order to promote stability and coherence.”).

repeal federal law as to *adopt* such law.¹⁰⁵ Similarly, Bill Eskridge points out that the vetogates associated with federal lawmaking may actually lead to more rather than less federal regulation as a result of the “logrolling” and “bundling” frequently employed to secure enactment of a given proposal.¹⁰⁶ These phenomena are even more likely now that Senators are no longer chosen by state legislatures.¹⁰⁷ Although one can debate whether the procedural safeguards of federalism still function to protect the governance prerogatives of the states,¹⁰⁸ that point does not diminish the continuing constitutional distribution of power between the large and small states in the lawmaking process. Whether one wishes to adopt, amend, or repeal legislation—or, indeed, to thwart any of these actions—the fact remains that federal lawmaking procedures continue to give the small states disproportionate power to further any of these goals.¹⁰⁹

The Supreme Court’s decision in *Clinton v. City of New York*¹¹⁰ illustrates the point. There, the Court invalidated the Line Item Veto Act¹¹¹ because it permitted the President to “amend[] two Acts of Congress by repealing a portion of each”¹¹² outside the “single, finely wrought and exhaustively considered, procedure” established by Article I, Section 7.¹¹³ It was irrelevant to the Court’s decision that the Act under consideration—by giving the President an item veto—actually made it *harder* rather than easier for Congress to change the status quo. The key to understanding the decision was that the Act vested a form of lawmaking power in the President alone, and thereby deprived the small states of their disproportionate power to influence the final contours of federal appropriations legislation. By permitting the President to cancel individual items of spending unilaterally, the Act effectively deprived the small states of their power to insist on compromise as the price of enactment.¹¹⁴

105 See Vázquez, *supra* note 11, at 1604–05.

106 See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1449–53 (2008).

107 See U.S. CONST. amend. XVII.

108 See Vázquez, *supra* note 11, at 1606–07.

109 See Clark, *supra* note 4, at 1324, 1340.

110 524 U.S. 417 (1998).

111 Pub. L. No. 104-130, 110 Stat. 1200 (1996).

112 *Clinton*, 524 U.S. at 438.

113 *Id.* at 439–40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

114 A one-house legislative veto could similarly circumvent the small states’ influence in the lawmaking process. See Clark, *supra* note 4, at 1382 (“If Congress could authorize the House of Representatives to exercise lawmaking power without the Senate’s consent, then it could strip the small states of the benefits of the compromise they secured as a condition of their assent to the Constitution.”).

CONCLUSION

Some features of the constitutional structure are spelled out so carefully in the Constitution and were so central to the creation of the federal system that they cannot be read out of the document without fundamentally altering its character. The Senate's ability to veto all forms of "the supreme Law of the Land" is one such feature. The delegates to the Constitutional Convention disagreed sharply over the proper basis for representation in the Senate, and ultimately agreed to the small states' demand for equal suffrage in order to secure their assent to the Constitution. The small states also succeeded in replacing the congressional negative with the Supremacy Clause as the mechanism for securing the supremacy of federal law. The effect of these decisions—in conjunction with the lawmaking procedures specified by the Constitution—was to give small states (through the Senate) perpetual and disproportionate power to block the adoption of all forms of federal law capable of displacing state law. Respect for the fundamental compromises built into the Constitution counsels courts to recognize the precise lawmaking procedures spelled out in the document as the exclusive means of adopting "the supreme Law of the Land."

