

# States or nation: Who gets power?

By Roger Witherspoon

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**G**EORGE READ, the delegate from Delaware, was adamant about sovereignty for the small states. He reminded his colleagues that the Articles of Confederation, under which the colonies had joined to fight for their independence, decreed that "each state retains its sovereignty, freedom and independence." Delaware, he warned, would not participate in any system where power was apportioned according to population.

"Such is my jealousy of most of the larger states that I would trust nothing to their candor, generosity or ideas of public justice," he said.

"Delaware and the other small states insisted on a system of national government in which they would have an equal say with the larger states and retain the right to have the ultimate say over the lives of their residents."

The issue of representation was resolved by the creation of two houses of Congress: a lower House with proportioned seating, and a Senate with equal voting rights for the states. That was the easy part.

It did not ease the fears of a dominant national government. The fight over states rights would affect all ensuing actions, dictate the need for a bill of rights, usher in a civil war and form the basis of the current split between advocates of judicial liberalism and strict construction.

If there was one item on which virtually all delegates to the Constitutional Convention agreed, it was that the states were still supreme. True, they had given up some power to the federal government. But not much, in their minds, even though in international law, the body that negotiates treaties and makes decisions on war and peace is considered the central authority.

In that regard, the Continental Congress already was a central government. For 200 years, in fact, some have argued that the states ceded dominance to the federal government the moment they let the Continental

Congress wage war. But its power over the states was minimal nonetheless.

"These were separate English colonies," said Thomas Grey, a professor of constitutional law at Stanford University Law School, "and they were quite different in their relation to the crown. Pennsylvania was wholly owned by the Penn family, Massachusetts and a few others were royal colonies, with governors appointed by the king. Connecticut and Rhode Island had corporate boards of directors and were run like private firms."

"The states were autonomous, controlling land titles, marriage, their courts, the power of incorporation, the enforcement of law and punishment of crimes, the business of government and their legal systems. The central government had no power to tax. It was like the United Nations: It could pass resolutions and urge the states to send money — which sometimes they did, and sometimes they didn't."

The states didn't get along, either. There were boundary disputes between many states. Vermont had been a part of New York under British rule, but wanted to secede. Vermonters had their own constitution during the Revolutionary War, but it wasn't recognized as independent and did not have delegates at the convention. Now that the external threat was over, they were threatening to fight another war of independence from the Empire State.

The West was a vast unknown to which virtually all the colonies laid some claim. The border disputes were becoming increasingly acrimonious. The delegates in Philadelphia during the summer of 1787, said Grey, knew that a central government was needed if for no other reason than to figure out their boundaries.

But what kind of government? In the world of 1787 America was the only nation without a strong central government — most had monarchs with absolute authority. The delegates wanted no part of such a system. Yet, they also wanted an end to the small-scale bickering among the fledgling American nation-states.

"The individuals who drafted



the Constitution did so out of loyalty to the nation rather than loyalty to their particular state or colony," said Hughes,

assistant professor of history at the University of Texas in Austin.

The states provided the only models to build on. In the aftermath of the Declaration of Independence, said Hughes, virtually all of the states adopted their own constitutions in a period of republic building. "These were representative governments where sovereignty emanated from the bottom of the system, rather than the top."

"Many were excessive in the power they gave to the new legislatures, and there was little power given to governors and little given to the judiciary."

Those models, then, provided the seeds of the struggle between the states, which had the wealth, the population and the power, and the federal government, which had only what it could squeeze from its subordinate parts.

"The Constitution," said Stanford Law School professor Don Kaplan, "contains different kinds of provisions. Some are specific, such as those requiring indictments or trials by jury. Others are vague, like those requiring due process of law. The people who put them into the Constitution understood the courts would have to make up

their definitions as they went along."

Indeed, Benjamin Franklin wrote, "The laws are a dead letter without courts to expound and define their true meaning and operation."

But the courts operated on custom, and the customs of 1787 dictated that the states were the repository of strength. The prevailing theory, said University of Texas at Arlington law school professor Stanford Levinson, "held that the national government had only the powers it was assigned, as opposed to the state governments."

Virtually all the states in 1787 had their own bills of rights, said Levinson. But Alexander Hamilton argued that the federal constitution not only didn't need one, "it would be dangerous to include as it suggested the government could do everything except what it was prohibited from doing."

The key to the struggle for supremacy between the states and the federal government would be the Supreme Court, whose changing ideology would, in time, revise the vision of the founding fathers.

*Saturday: The U.S. Supreme Court's role in redefining states rights.*

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