

majority or were closely divided. To swing over a small group of "antis" in each state, Federalists had to promise that they would consider amendments. This was enough to secure ratification by narrow margins in Massachusetts, 187 to 168; in New York, 30 to 27; and in Virginia, 89 to 79.

What the anti-Federalists wanted were dozens of changes in the structure of the government that would cut back national power over the states, curb the powers of the presidency as well as protect individual liberties. What they got was far less. But in the first Congress in 1789, James Madison, true to his pledge, considered all the amendments and shepherded 12 amendments through both houses. The first two of these failed in the states; one would have enlarged the House. The 10 that were ratified by December 1791 were what we have since called the Bill of Rights, protecting freedom of expression and the rights of the accused before the law. Abraham Yates considered them "trivial and unimportant." But other democrats looked on them much more favorably. In time the limited meaning of freedom of speech in the First Amendment was broadened far beyond the framers' original intent. Later popular movements thought of the Bill of Rights as an essential part of the "constitutional" and "republican" rights that belonged to the people.

VI. The "Losers'" Role

There is a cautionary tale here that surely goes beyond the process of framing and adopting the Constitution and Bill of Rights from 1787 to 1791. The Constitution was as democratic as it was because of the influence of popular movements that were a presence, even if not present. The losers helped shape the results. We owe the Bill of Rights to the opponents of the Constitution, as we do many other features in the Constitution put in to anticipate opposition.

In American history popular movements often shaped elites, especially in times of crisis when elites were concerned with the "system." Elites have often divided in response to such threats and according to their perception of the "genius" of the people. Some have turned in coercion, others to accommodation. We run serious risk if we ignore this distinction. Would that we had fewer Gouverneur Morris and Alexander Hamiltons and more James Madison, and James Wilsons to respond to the "genius" of the people.

The Hope of the Framers to Recruit Citizens to Enter Public Life

JACK N. RAKOVE

It has been some time since historians have displayed conspicuous interest in the actual drafting of the Constitution or the origins of particular clauses. Modern

Jack N. Rakove, "The Structure of Politics at the Accession of George Washington," in *Beyond Confederation: Origins of the Constitution and American National Identity*, Richard Beeman, Stephen Botein, and Edward C. Carter II, eds. Copyright © 1987 by the University of North Carolina Press. Used by permission of the publisher.

political controversies have drawn renewed attention to a few provisions—notably those involving war powers and impeachment. Yet more than seventy years after Charles Beard offered *An Economic Interpretation of the Constitution*, historians still seem preoccupied with identifying the political and social alignments that favored or opposed the creation of a stronger national government. Creditors and debtors have given way to cosmopolitans and localists and, more recently, to court and country. But the thrust of inquiry has changed less than one might suppose.... Just as the framers of the Constitution tend to be submerged within the larger Federalist movement, so the specific concerns that operated within the convention often seem less important than the arguments that were made for and against ratification.

And not without reason. The concerns of framers and ratifiers *had* diverged. The struggle between large and small states that had so dominated the internal politics of the convention did not remain a pivotal issue after September 1787. Similarly, the principal result of the ratification debates was the acceptance of an idea that the framers had not taken seriously: that a bill of rights could somehow provide a valuable check against the excesses of power. Moreover, the intensity of the struggle over ratification left a body of writings and speeches whose rich detail contrasts sharply with the spare words of the Constitution and the elliptical character of the convention's debates as evidence of the fundamental divisions with the American polity. Yet for all this, the Constitution should not be viewed solely through the lens of *The Federalist* and other ratification commentaries. For, once the passions of 1788 had faded and the polemical literature they produced had fallen into an obscurity from which only modern scholarship has rescued it, the language of the Constitution retained its force. That was where contemporaries turned when constitutional disputes arose, as they did as early as June 1789, and that is where historians ought to begin as well.

Was the Constitution consciously framed to promote a filtration of talent? No doubt many Federalists supported it because they believed it would enable a better class of leaders—or simply a better class—to recover political power. But it is difficult to demonstrate that this was what either the Constitution itself mandated or the framers intended. The *formal* criteria for membership in Congress were certainly not set high: the attainment of age twenty-five and seven years of citizenship for the House, age thirty and nine years of citizenship for the Senate; and the additional requirement that a member, “when elected, be an Inhabitant of that State in [for] which he shall be chosen” are all that Article I asks. Nor did the framers seek to restrict the size of the electorate, in the way, for example, that the Whig oligarchy of early Georgian England had managed to. Members of the House of Representatives were to be elected by the same voters who had been sending “demagogues” into the state legislatures.

Moreover, when one tracks the various provisions that would regulate the process of selection through the convention, it is apparent that the course of debate led the framers *away* from the idea that the Constitution ought to erect significant barriers against entrance into public life. Perhaps the best evidence of this can be found in the fate of efforts to establish proper qualifications for appointment to office. As late as July 26, the convention had asked the Committee of

Detail to draft a provision "requiring certain qualifications of landed property and citizenship in the United States for the Executive, the Judiciary, and the Members of both branches of the Legislature." In its report of August 6, however, the committee merely proposed that the legislature should be empowered "to establish such uniform Qualifications of the Members of each House, with Regard to Property, as to the said Legislature shall seem expedient." When this provision was taken up on August 10, Charles Pinckney pointedly noted that the committee had departed from its instructions. He moved instead to insert a clause requiring legislators "to swear that they were respectively possessed of a clear unencumbered Estate." with a suitably descending scale of property for the two houses.

The ensuing debate revealed that attempts to establish property qualifications were objectionable on both practical and theoretical grounds. Two committee members explained why their report had not met Pinckney's expectations. Fix the requirement too high, John Rutledge noted, and it would anger the people; fix it too low, and the qualifications would be made "nugatory." Moreover, Oliver Ellsworth added, it was impossible to establish a scale that would work equally well for different parts of the Union or for different periods in the history of the nation. These objections were so decisive that Pinckney's motion was rejected by a simple voice vote.

But that still left open the question whether the legislature ought to possess any discretionary power to establish conditions of membership. One problem was the difficulty of employing any criterion other than property. The more telling objection lay, however, against giving the legislature any discretion. As Hugh Williamson noted, such license could allow the lawyers who might well dominate the new congress to secure "future elections ... to their own body." But if qualifications could not be fixed *constitutionally*, it seemed better to do away with them entirely. Otherwise, Madison warned, the legislature would be able "by degrees [to] subvert the Constitution." The entire clause was accordingly eliminated.

If the character of national legislators could not be regulated by imposing property requirements on the elected, could the same goal be achieved by limiting the suffrage? When the Committee of Detail proposed allowing the House of Representatives to be chosen by the same voters who elected the lower houses of the state legislatures, Gouverneur Morris and John Dickinson vigorously argued in favor of restricting the franchise to landed freeholders. But this proposal was also roundly rejected. The Constitution placed no restrictions on the right of suffrage.

Nor can it be said that the framers seriously considered just how elections for the House of Representatives were to be conducted. In agreeing to vest Congress with a residual power to determine the manner of electing congressmen, they were clearly concerned with the possibility that the state legislatures would manipulate the electoral process. But what is more striking is the latitude within which the states were to be allowed to act. As Madison himself noted,

Whether the electors should vote by ballot or *vivâ voce*, should assemble at this place or that place; should be divided into districts or all meet

at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures, and might materially affect the appointments.

Coming from one who presumably regarded the manner in which congressmen were to be elected as a critical element of the entire system—and who had once described voting by ballot as “the only radical cure for those arts of Electioneering which poison the very fountain of Liberty”—this was hardly a trivial concession. Indeed, nothing better illustrates the degree to which Madison’s notion of the electoral virtues of the extended republic was simply a statement of faith. The indefinite character of his thinking on this subject was due in part to the greater priority he had been forced to place within the convention on the struggle to secure the principle of proportional representation; and it may also have reflected his disappointment that the Senate, the single branch of government on which he had originally fastened his deepest hopes, was to be elected by the state legislatures. In any event, there is no evidence that Madison had developed beyond generalities his notion of how representatives were to be elected. When in 1788 the states began adopting a variety of procedures for electing representatives—including not only district and statewide elections but also a hybrid in which electors voted statewide for members from particular districts—Madison informed Jefferson, “It is perhaps to be desired that various modes should be tried, as by that means only the best mode can be ascertained.”

Decisions on other provisions also worked to remove formal barriers against election to the legislature. Instead of requiring a congressman to be “resident” in his state for a fixed period of years, the convention agreed that he need only be an “inhabitant” of the state at the time of election. When it came to deciding how legislators were to be paid, the convention did not presume that members of Congress would be independently wealthy. It authorized paying legislative salaries from the national treasury not merely to prevent the states from retaining undue influence over their representatives, but also from an expectation that newly admitted western states might balk at supporting an adequate representation if forced to defray legislative salaries from their own limited funds.

Finally, and perhaps most revealingly, the convention relaxed the prohibition against the appointment of legislators to other offices. Of all the provisions relating to conditions of membership, this was the most sharply controverted, and it was not resolved—and then only by the narrowest margin—until September 3. The report of the Committee of Detail would have prevented legislators from accepting any federal office during the term of their election, with senators further barred from “holding any such office for one year afterwards.” Supporters of these restrictions argued the conventional whiggish view that, without such restraints, the legislature would attract, as George Mason noted with typical irony, “those generous and benevolent characters who will do justice to each other’s merit, by carving out offices and rewards” for their own profit. But the majority, who eventually restricted the prohibition only to offices that had been either “created” or whose “emoluments [had been] increased” during

a legislator's term, were apparently swayed by equally candid arguments in favor of promoting ambition. James Wilson put the key point bluntly when he declared that "he was far from thinking the ambition which aspired to Offices of dignity and trust, an ignoble or culpable one." Thus while the narrow margin with which the diluted version of this clause was approved indicates that the framers had not reached a consensus, they would nevertheless have agreed that the revision was intended to encourage men to enter legislative service in part from forthright calculations of personal ambition. Whether the ambitions to be unleashed belonged to corruptible "office-hunters" or to "those whose talents" would "give weight to the Govern[men]t" remained to be seen.

On balance, then, the principal concern of the framers was not to limit access to national office to those who were most conspicuously qualified to occupy it, but rather to open up the process of political recruitment in the hope that better men would be moved to enter public life and prove capable of achieving electoral success. For the new government to succeed in this respect, however, it would have to rely on the actual circumstances of political life rather than the formal requirements that the Constitution itself had failed to impose. Federalist desires could be realized only if the enlarged sphere of the extended republic worked to filter talent upward or if the simple prestige and power of the new government drew qualified men away from the privacy of their law offices, plantations, and countinghouses. Neither the formal provisions of the Constitution nor the heated debates of the ratification campaign could secure such results; they depended instead on other factors—personal as well as political—that no constitution could by itself legislate.

If the adoption of the Constitution was thus meant to release new ambitions, the preservation of its intricate system of checks and balances would also depend, Madison argued in *Federalist* No. 51, on directing those ambitions toward appropriate ends. "Ambition must be made to counteract ambition," he wrote. "The interest of the man must be connected with the constitutional rights of the place." Yet despite its apparent gritty realism, this celebrated statement was no less problematic than other early predictions about the likely operation of the Constitution.

For ambition could counteract ambition only if those elected made continuation in a particular office the object of their careers. The benefits of bringing more enlightened leaders into office would be lost if they chose not to stay in positions of responsibility. But if one thing is clear about the political system that the Constitution created, it is that it long failed to promote the stability of tenure that Federalists desired and anticipated. The evidence on this point is unambiguous. Well into the next century, the new system proved embarrassingly productive in its *recruitment* of aspirants to national office, but its record on *retention* was another matter entirely. The best that can be said for Congress is that its membership was marginally more stable than that of the state legislatures. Throughout the entire first century of its history, members entered and left Congress with a frequency that stands in sharp contrast with modern standards. During this period, the median

term of service in the House of Representatives fluctuated between two and four years, and the proportion of members who served more than four terms never exceeded 10 percent. From 1790 to 1870, the median age of departure from the House remained steadily fixed in the mid-forties. And although the reasons why men left the House are often hard to come by, death, old age, and electoral defeat clearly played far less of a role in attrition before the late nineteenth century than they do today....

The one group of congressmen whose ambitions can be described most easily are the ninety-odd members of the First Federal Congress of 1789–1790. Their experience in gaining and holding office marked the first test of the various predictions that had been vented while the Constitution was being adopted. The First Congress, of course, numbered fewer members than all but its immediate successor, and its ranks almost certainly included a higher proportion of prominent personalities than any later congress. To some extent, it is true, the likelihood that many of these first congressmen had taken major parts in both the Revolution and the debate over the Constitution would suggest that their motives did not accurately represent the range of ambitions that came into play once the age of the founding patriarchs gave way to the era of mass political parties. Yet even during the Revolution, decisions about the depth of political involvement—as opposed to simple allegiance—often reflected personal concerns, and by the late 1780s, recovery from the turmoil and dislocation of the war was well enough advanced to enable potential candidates to weigh the benefits and costs of office quite carefully according to the dictates of individual interest and ambition. Finally, although one cannot fault the framers of the Constitution for failing to anticipate how “change of circumstances, time, and a fuller population of our country” would affect the character of representation, the “moderate period of time” separating the drafting of the Constitution from the first elections allows us to ask how well the arguments of 1787–1788 corresponded to certain aspects of what might be called, with all due respect to Sir Lewis Namier, the structure of American politics at the accession of George Washington.

By any criterion, including those criteria that contemporaries would have applied, the victors in the first federal elections were a distinguished group. The roster of the First Congress included twenty members of the Federal Convention—among them Madison, Elbridge Gerry, Rufus King, Roger Sherman, William Samuel Johnson, Oliver Ellsworth, William Paterson, and Robert Morris—as well as a number of other men who had held prominent military or political positions during the war, such as Philip Schuyler, Elias Boudinot, Jeremiah Wadsworth, John Langdon, Richard Henry Lee, and Egbert Benson. Prestige alone offers no proof of legislative talent, but most members of the First Congress shared another trait that would have enabled contemporaries to agree that they possessed what Madison had called for in *Federalist* No. 10; “the most attractive merit, and the most diffusive and established characters.” For in the milieu of the late 1780s, a notable record of involvement in the Revolution was itself the first and perhaps even sufficient test of political merit. In this respect, it is striking that fully half of the members of the First Congress were politically

active before Independence, with no fewer than a third entering politics during the final crisis of 1774–1776, and an additional quarter first holding office during the remaining years of the war....

Historians generally agree that the two Federalist movements of the 1780s and 1790s were committed to the preservation or restoration of traditional principles of deference and that their leadership (at least in the northern states) tended to be drawn from an established elite whose superiority was endangered by the democratizing impulses the Revolution had released. Yet among the “dual Federalists” who sat in the First Congress, it is striking to see how many fit the image of new men who had themselves struggled to gain—and not simply inherit—prestige and influence. Recognizing that their own rise to political power and higher social status had derived from participation in the Revolution, they were no less its products for resisting what they regarded as its excesses.

By way of example, consider the uncannily parallel paths that had led Oliver Ellsworth of Connecticut and William Paterson of New Jersey to the Senate in 1789. Both were born in 1745; both were graduates of the College of New Jersey; both served terms as state legal officers; both were delegates to the Federal Convention, where they collaborated on the making of the Great Compromise; and as the capstones of their political careers, both later accepted appointments to the Supreme Court, where they served together until Ellsworth’s retirement in 1800. Both came from families with solidly middle-class credentials. Ellsworth’s father was a respectable farmer, selectman, and militia captain who intended his second son for the ministry but saw him turn to law instead. Paterson emigrated with his family from Ireland in 1747; by 1750 his father was established in Princeton, where he prospered as a storekeeper and helped his eldest son take advantage of all the opportunities education could bestow.

The promise of education was one thing, however; success was another matter again. When war broke out in 1775, both men were still struggling to make a respectable career at law. Ellsworth had earned all of three pounds sterling during his first three years of practice; the one promising step he had taken was to marry a Wolcott and move to Hartford, where he could profit from his in-laws’ connections and status. Paterson, too, had remained a poor country lawyer. Rather than take his chances in Philadelphia or even one of the larger neighboring towns, he pursued a thankless practice in rural New Jersey; most of his work involved protecting his father’s debt-troubled property.

Perhaps native ability would have brought eventual success to these two future justices had the Revolution not intervened in their lives. Certainly they did not support the Revolution because they foresaw how their careers could benefit from Independence: neither had shown any ardent interest in politics before 1775 (though Ellsworth did serve a term in the Connecticut assembly in 1773). With Paterson and Ellsworth, as with so many of their colleagues, the events of the mid-1770s can be said, not so much to have furthered ambitions previously thwarted, but rather to have created ambitions which had hardly existed. Yet while their commitment to the whig cause enabled them to acquire substantial political influence within their states, in many ways professional prominence remained their deeper object. Paterson held no office at the time of his election

to the Senate; he was busy instead pursuing a hefty legal practice that had expanded enormously upon the basis of his record as wartime attorney general. For his part, Ellsworth accepted election grudgingly, informing Governor Samuel Huntington that he would have preferred to retain his seat on the Connecticut Superior Court. "Considering, however, that in the present scituation of our publick affairs, it may be a duty, for a time, to waive personal considerations, I have concluded, by the leave of Providence, to attend the Congress at its first, and perhaps two or three of its first, sessions." Ellsworth went on to serve a full six-year term before replacing John Jay as chief justice; Paterson resigned even before the First Congress expired to accept election as governor of New Jersey.

Legislation and debate appealed little to Ellsworth and Paterson, but there were other attorneys who relished these activities to a degree that irked congressmen drawn from other occupations. Few, if any, members of the First Congress commanded greater respect in these areas than the two leading Federalist representatives from Massachusetts, Theodore Sedgwick and Fisher Ames. They, too, came from moderately respectable families that had struggled to maintain an estate and improve their social standing in the cramped and jealous world of a New England town. Having lost their fathers at an early age, both were forced to rely on a college education (Sedgwick at Yale, Ames at Harvard) and the diligent pursuit of legal studies to establish their own livelihoods. Like Paterson and Ellsworth, both had experienced the pangs of disappointment and idleness that were the dues of young attorneys, and like colleagues throughout America—including William Paterson—they knew the kind of resentment, not to say enmity, that their profession attracted. They naturally equated animosity against lawyers with aversion to the rule of law itself, and they viewed Shays's Rebellion of 1786 as proof of the need to restore a due sense of obedience to the restless citizenry of Massachusetts (a lost cause if ever there was one). Having relied upon their own talents and fortitude to make their way, with some success, in the world, they found it difficult to look sympathetically on the social jealousy and resentment of class that the Shaysite uprising embodied. For Sedgwick and Ames, as for so many other attorneys to come, election to Congress provided a welcome opportunity to escape the routine bickering of court appearances while continuing to practice the professional arts of draftsmanship and oratory. To his despondent and domestically overburdened wife—"a sufferer from chronic pregnancy and loneliness," his biographer has noted—Sedgwick wrote tender letters lamenting his confinement in Congress; but his correspondence with male friends reveals his pride in the legislative art....

In certain ways, congressmen who did not feel too deeply attached to their constituencies could fit the original Madisonian ideal of representation better than those whose political loyalties never rose above their parochial roots. Yet to survey the diverse paths that brought the members of the First Congress to New York in 1789 is to realize how little relevance that ideal had to the actual recruitment and retention of national legislators. Even in 1789, when the existing political nation was still aroused over the character and fate of the Constitution and when the heady debates of the preceding months still resounded clearly, it is clear that men sought national office for various reasons, public and private,

patriotic and self-interested. It is easy enough to explain why men so long committed to public life as Madison and Roger Sherman wished to attend Congress in 1789, nor is it much more difficult to gauge the balance of public and private concerns that brought Baldwin, Williamson, and the Philadelphia merchants (all members of the Federal Convention) there as well. But it is no less revealing to examine the motives of Benjamin Contee of Maryland, who may have hoped a seat in Congress would help him stave off his Philadelphia creditor, or Thomas Scott of Pennsylvania, who balked at taking his seat until he was assured that his son would inherit his position as prothonotary of Washington County. Rather than seek reelection to the Second Congress, Scott sought to retain his clerkship of the county court, but after Governor Thomas Mifflin removed him from this position, he ran successfully for the Third Congress and then, apparently, refused to run again.

In point of fact, of course, there was never a time when the political system operated solely as a filter of talent or when expedient calculations did not enter forthrightly into decisions to enter or leave Congress. Legislation was a tedious and often frustrating task that kept one away from family and business. Such appeal as it exerted in the early years of the new regime was probably felt most strongly either by those whose prior experience of the Revolution had already converted them to what John Jay called "the charms of liberty" or by those who (like Fisher Ames and William Branch Giles) were young enough to enter politics before finding themselves bound to another career. The great majority of congressmen acted on different calculations. If they sought election out of some sense of engagement with public issues, their commitment was far from permanent. And if, on the other hand, they hoped a term or two in Congress might redound to their personal advantage, the rewards they hoped to garner were more likely to come in the form of an appointment to the bench or, better yet, a customs collectorship—positions that were more secure and less demanding. Whatever the framers of 1787 may have intended, they could not alter the underlying character of political activity by constitutional fiat. At the close of the Revolution, politics remained more of an avocation than a profession. Over time, the emergence of the political party system provided a more reliable channel of recruitment than the powerful but erratic impulses of patriotism. But the persistence of high rates of turnover both in Congress and the state assemblies suggests that the dividends of legislative service were still found elsewhere, in a later appointment to a more comfortable sinecure. These were not quite the ambitions that the framers had hoped to evoke.