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### Cover Page Footnote

This Article adapts and expands material presented in Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (forthcoming 1993). I am grateful to William E. Nelson, Christopher N. Eisgruber, John Phillip Reid, Howard Venable, William P. La Piana, Peter C. Hoffer, Walter Walsh, Bill Braverman, Larry Kramer, and the other members of the New York University Law School Colloquium on Legal History for their incisive and lively comments on an earlier version of this Article. I am also indebted to Professor Thomas C. Mackey of the University of Louisville; Professor Martin Flaherty of Fordham Law School; Professor Ruti Teitel of New York Law School; Professor Stephen L. Schechter of Russell Sage College; Ene Sirvet, editor of *The Papers of John Jay*, Columbia University; Joanne B. Freeman, Department of History, University of Virginia; Linda Faulhaber, Assistant Editor of *Constitution* magazine; Paul Golob of *Times Books*; Jerome Agel; Dennis G. Combs; Phillip G. Haultcoeur; Steven J. Bernstein; Bob and Barbara Tramonte; Stephanie A. Thompson; April Holder; Joan Challinor; Diantha D. Schull; and Ron Blumer. Anyone who does research in the history of the early American republic owes an incalculable debt of gratitude to the labors of Charlene E. Bickford, Kenneth R. Bowling, and Helen E. Veit, editors of the *Documentary History of the First Federal Congress* (1972-), and to John P. Kaminski, Gaspare J. Saladino, and Richard Leffler, editors of the *Documentary History of the Ratification of the Constitution and the Bill of Rights* (1976-). I am especially grateful for their kindness, generosity, and encouragement. I am beholden to New York Law School for providing invaluable logistical and collegial support for my historical research and writing, and to the staff of the *Fordham Law Review* for their professionalism and good humor. Finally, I extend special thanks to Gregory D. Watson, the stepfather of the Twenty-seventh amendment, who in several telephone interviews graciously reviewed my account of the Amendment and the history of which he was so much a part; and to Timothy L. Hanford, Esq., Assistant Minority Tax Counsel, Committee on Ways and Means, U.S. House of Representatives, who first piqued my curiosity about the compensation amendment more than four years ago, and who has helped me satisfy that curiosity with unfailing good humor and friendship.

## ARTICLES

# THE SLEEPER WAKES: THE HISTORY AND LEGACY OF THE TWENTY-SEVENTH AMENDMENT

RICHARD B. BERNSTEIN\*

*No provision of the United States Constitution has a more drawn-out, tortured history than the Twenty-seventh Amendment, which was ratified more than two centuries after Representative James Madison introduced it in the First Congress. In this Article, Professor Bernstein traces the Amendment's origins to the legislative political culture of the late eighteenth century, as influenced by the controversy over ratifying the Constitution. He then examines the perennial controversies over congressional compensation in American history, elucidating how in the 1980s and 1990s public anger at Congress reached critical mass sufficient to propel the 1789 compensation amendment into the Constitution. Finally, this Article demonstrates that the adoption of the Amendment has consequences beyond its effects on congressional compensation—both for the unresolved issues of the Article V amending process and for the practice of "amendment politics."*

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Adjunct Associate Professor of Law, New York Law School; Assistant Editor, The Papers of John Jay, Columbia University. This Article adapts and expands material presented in Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (forthcoming 1993).

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## INTRODUCTION

ON May 7, 1992, the American people discovered that they had amended the Constitution almost in a fit of absent-mindedness. On that date, Michigan became the thirty-eighth state to ratify an amendment proposed in the First Congress on June 8, 1789 by Representative James Madison. The amendment, which had been all but neglected for two centuries, provides as follows:

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.<sup>1</sup>

Thirteen days later, on May 20, 1992, the relevant authorities—the Archivist of the United States, the House of Representatives, the Senate, and the academic community—concurred that the amendment had been validly adopted.<sup>2</sup>

No one in the Revolutionary generation of Americans would have predicted the protracted birth pangs of the amendment proposed so indifferently in 1789. Ironically, however, the issues that its adoption revived in the 1990s were familiar to the ablest and most sophisticated constitutional theorists of the 1780s. For example, during the Federal Convention of 1787, James Madison tried to draw the attention of his colleagues to the uncertainties that surrounded the amending process set forth in Article V of the Constitution. On September 15, 1787, Madison pleaded unsuccessfully that the Convention define with more specificity and clarity the workings of that process, stating, “difficulties might arise as to the form, the quorum, &c. which in Constitutional regulations ought to be as much as possible avoided.”<sup>3</sup> The triumph of the Twenty-seventh Amendment has exposed to public view some of the “difficulties . . . in Constitutional regulations” that Madison had vainly sought to address.<sup>4</sup>

This Article seeks to clarify the Amendment’s tangled history and sketch its legacy.<sup>5</sup> Part I elucidates the antecedents of the Amendment in the confluence of two historical phenomena—the Anglo-American concern over the role of legislatures in governance and the demand by

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1. U.S. Const. amend. XXVII.

2. See *infra* part IV.

3. 2 The Records of the Federal Convention of 1787, at 630 (Max Farrand ed., 1937) [hereinafter Records] (all references are to James Madison’s notes unless otherwise indicated).

4. *Id.*

5. This Article draws on, corrects, and supplements the two previous extended discussions of the Amendment. See David C. Huckabee, Congressional Research Serv. No. 86-889 GOV, *The Constitutional Amendment to Regulate Congressional Salary Increases: A Slumbering Proposal’s New Popularity*, (Sept. 16, 1986) [hereinafter *Slumbering Proposal*]; Robert S. Miller & Donald O. Dewey, *The Congressional Salary Amendment: 200 Years Later*, 10 Glendale L. Rev. 92-109 (1991). I also make extensive use of Congressional Research Serv. No. LRS92-3691, *The Twenty-seventh Amendment: Congressional Pay and the Constitution—Background Material and Selected News Articles, 1987-1992* (June 1992) [hereinafter *Background Material*].

many Americans during the period from 1787 to 1791 for amendments to the Constitution of 1787. Part II describes the Amendment's framing in 1789 by the First Federal Congress. Part III addresses its apparent failure by 1791 and its long term of suspended animation. Part IV describes the resurrection of the Amendment by a modest, grass-roots campaign that all but escaped the attention of most scholarly and professional commentators on the Constitution. It also examines the confused and fumbling reaction of scholars and politicians alike to the adoption of the Amendment in May 1992. Part V seeks to explain the effects of the Amendment's adoption on the unresolved issues of the amending process. The Conclusion examines why the Twenty-seventh Amendment succeeded in a period when every other attempt but one to amend the Constitution failed, and what implications its ratification has for practitioners of "amendment politics."

### I. ANTECEDENTS

The document that most Americans picture when they think of the Bill of Rights is an engrossed parchment resolution codifying the amendments proposed by Congress on September 26, 1789. In the decades before May 1992, when Americans visited the National Archives to see the "record copy" of the Bill of Rights, they did not recognize that it contained a constitutional time-bomb. Even those who noticed that the original Bill of Rights lists twelve amendments (rather than the familiar ten) skipped over the first two as historical curiosities.

The compensation amendment<sup>6</sup> is more than a curiosity. It represents the intersection of two important historical phenomena: first, the ongoing struggle in the eighteenth-century Anglo-American world to craft a representative legislature and, second, the battle over ratification of the Constitution, which dominated American politics in 1787-1788 and cast a threatening shadow over the launching of the new government in 1789. To understand its origins, therefore, we must reexamine each of these phenomena in turn.

#### A. *Legislative Design and Legislative Compensation: The Anglo-American Experience*

In designing Congress, the delegates to the Federal Convention drew upon the Anglo-American experience with legislatures in Great Britain, in the American colonies and states, and at the national level (the Continental and Confederation Congresses).<sup>7</sup> Questions of legislative compensation were an important secondary consideration in the task of

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6. For purposes of clarity, and to avoid teleology, this Article refers to the Amendment as the compensation amendment in the period before its adoption, and as the Twenty-seventh Amendment in the period after its adoption.

7. This section draws on Richard B. Bernstein, 'Conven'd in Firm Debate': The First Congress as an Institution of Government, 1789-1791 (forthcoming 1993).

legislative design, following such primary considerations as methods of representation and grants of legislative power.

The Americans' principal model for a national legislative institution was the British Parliament. From Parliament, Americans derived their ideas of legislative practice and procedure and their ideas about how legislatures should respond to national problems and issues.<sup>8</sup> Even after Congress was set in motion under the Constitution, notable American politicians often had recourse to Parliamentary models and precedents. For example, in 1805, when Vice President Aaron Burr prepared for the Senate's impeachment trial of Justice Samuel Chase, he adopted arrangements for the Senate chamber echoing those used in the House of Lords during the impeachment trial of Warren Hastings.<sup>9</sup> Thus, Americans of the Revolutionary era were familiar with Parliamentary customs and usages, including such questions as what (if any) compensation members of the House of Commons were to receive.

Until the sixteenth century, members' wages were paid by their constituents;<sup>10</sup> until 1710, there was no property qualification for members of the House of Commons;<sup>11</sup> and until 1712 there was no provision for imposing election expenses (previously almost negligible) on candidates.<sup>12</sup> Beginning in the seventeenth century, however, the House of Commons gradually erected barriers that had the effect of excluding men without means from Parliament.<sup>13</sup> The leading student of the House of Commons before the Great Reform Bill of 1832<sup>14</sup> has shown how some candidates at first bid for their constituents' approval and support by promising to take lower wages, and later raised the stakes by pledging

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8. See, e.g., Thomas Jefferson, *Jefferson's Parliamentary Writings*, reprinted in *The Papers of Thomas Jefferson*, second series (Wilbur S. Howell ed., 2d ed. 1988); Ralph V. Harlow, *The History of Legislative Methods in the Period Before 1825* (1917); 1 Edward Porritt with Annie G. Porritt, *The Unreformed House of Commons: Parliamentary Representation Before 1832*, at vi (1909).

9. See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 96 (1971). For further discussions of the Chase impeachment, see *id.* at 81-82, 90, 92-93, 96-107; Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 57-88* (1992); 2 Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate 59-92* (1991); William H. Rehnquist, *Grand Inquests 15-134* (1992). On the Hastings precedent, see generally *The Impeachment of Warren Hastings: Papers from a Bicentenary Commemoration* (Geoffrey Carnall & Colin Nicholson eds., 1989).

10. See 1 Porritt, *supra* note 8, at 153-54.

11. See *id.* at 166-67 (citing 9 Anne, c. 5 (1710) (statute imposing property requirement)). An excerpted version is given in *The Eighteenth-Century Constitution: 1688-1815*, at 192-93 (E. Neville Williams ed., 1960) [hereinafter *The Eighteenth Century Constitution*].

12. See 1 Porritt, *supra* note 8, at 152-53, 182-203 (citing 10 Anne, c. 31 (1712) (statute placing the burden of election expenses on the candidates)).

13. See 1 *id.* at 151-203.

14. 2 W. IV. c. 25 (1832). The leading study is John Cannon, *Parliamentary Reform, 1640-1832* (1973); see also *The Eighteenth-Century Constitution*, *supra* note 11, at 208-21; Paul Langford, *A Polite and Commercial People: England 1727-1783*, at 548, 552-53, 563-64, 710-19 (1989).

not to accept wages altogether.<sup>15</sup> The demand for seats in the House of Commons became so fierce during the eighteenth century that would-be members even found themselves assuming the cost for municipal improvements, such as new public buildings or repaved streets, in an effort to win the support of their constituents.<sup>16</sup> Such largesse continued even after the adoption of the two great reform measures of 1832 and 1867.<sup>17</sup>

Americans in the 1770s and 1780s, fascinated by the apparent and real corruption of the British constitution, were aware that members of the House of Commons often played these artful political games to win and secure their seats—including, ultimately, the purchase and sale of constituents' votes. To the Americans, the ostentatious purchase of Parliamentary seats (including such unpopulated "rotten boroughs" as Old Sarum)<sup>18</sup> and the often blatant vote-buying attending elections, even in legitimate boroughs containing living-and-breathing constituents, exemplified the extraordinary corruption that tainted the British constitutional system. This corruption, they believed, led members of Parliament to override the Americans' rights under the British constitution.<sup>19</sup>

Guarding against such real or perceived corruption, colonial and state governments early on assumed the responsibility of paying the salaries of their members.<sup>20</sup> At the same time, however, the adoption of property qualifications helped to exclude from the legislature most of those who would rely on the salaries they might expect to receive as members.<sup>21</sup>

In 1774, when the colonists convened the First Continental Congress, the colonial legislatures assumed the burden of paying their delegations. This practice persisted once, in 1776, the Second Continental Congress ceased to be an extraordinary body and began to assume the character and functions of an American legislature; and it continued after the framing (in 1777) and adoption (in 1781) of the Articles of

15. See 1 Porritt, *supra* note 8, at 155, 157, 158. For illustrative documents, see *The Eighteenth-Century Constitution*, *supra* note 11, at 154-73.

16. See 1 Porritt, *supra* note 8, at 158-66. See generally *The Eighteenth-Century Constitution*, *supra* note 11, at 138-208 (collected documents depicting patterns of electoral behavior and customs).

17. See 1 Porritt, *supra* note 8, at 164-65.

18. See 1 *id.* at 96-98; *The Eighteenth-Century Constitution*, *supra* note 11, at 151-52 (agreement for purchase of Old Sarum by Prince of Wales, 1749).

19. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 46-51, 85-93, 130-138 (enlarged ed. 1992).

20. See, e.g., Mass. Const., Part Second: Frame of Gov't, ch.1, § 3, art. 2, cl.4 (1780) (payment of expenses of members of house of representatives). On colonial governance in general, see Bernard Bailyn, *The Origins of American Politics* (1968); Jackson Turner Main, *The Sovereign States 1775-1783*, at 102-06 (1973); Allan Nevins, *The American States During and After the Revolution, 1775-1789*, at 1-14 (1924); R.C. Simmons, *The American Colonies from Settlement to Independence* (1976).

21. See Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions 90* (1980) (table of property qualifications for holding office). On the growing ineffectiveness of these requirements, see Main, *supra* note 20, at 200-06.

Confederation.<sup>22</sup>

Two distinct but related developments, however, interfered with the states' self-assumed responsibility for footing the bills of their delegations. First, state legislatures continued the practice, honored by tradition, of using their control on the pursestrings to punish Congress for ignoring their state's interests, and this fiscal war of nerves extended to the pay of state delegations.<sup>23</sup> Second, as the nation's economy worsened during and after the American Revolution, expenses closer to home assumed a greater importance for tight-fisted state legislators than expenses of a far-off and less relevant Confederation. In either case, the effect was the same: delegates to the Continental and Confederation Congresses had to wait longer and longer to be paid—if they were paid at all. Even those delegates who had independent means, and thus did not rely on the small salaries paid by the states, did not accept this situation lightly. Notable American politicians began to write scathing letters to their home states, demanding to know how long they were to serve their country without being paid for it.<sup>24</sup>

### B. *Framing the Compensation Clause*

The compensation amendment was intended to amend Article I, Section 6, Clause 1 of the United States Constitution, which provides as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.<sup>25</sup>

It is therefore appropriate at this point to examine the origins and development of this clause in the Federal Convention.

One of the Convention's subsidiary purposes in designing the first true national legislature was to ensure that the national government would be able to pay its officials to safeguard its independence and stability. The means to this objective first appeared in the Virginia Plan, drafted by James Madison (and revised by his colleagues in the Virginia delegation) and submitted to the Convention on May 29, 1787, by Governor Edmund Randolph.<sup>26</sup> The fourth and fifth resolutions provided that the members of both chambers of the national legislature "receive liberal sti-

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22. See Articles of Confederation, art. V, para. 3 (1781): "Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states."

23. For the history of these contests in the colonies, see Jack P. Greene, *The Quest for Power* (1963). For examples and discussions of these struggles in the Continental and Confederation Congresses, see Edmund Cody Burnett, *The Continental Congress* 420, 421, 425, 629, 650, 710, 713 (1941); Richard B. Morris, *The Forging of the Union, 1781-1789*, at 91-94 (1987); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress 235-38* (1979).

24. See sources cited *supra* note 23.

25. U.S. Const. art. I, § 6, cl. 1.

26. See 1 Records, *supra* note 3, at 20-22.



pendis by which they may be compensated for the devotion of their time to public service.”<sup>27</sup> Massachusetts delegate Elbridge Gerry indirectly commented on the salary question on May 31. In arguing that “[t]he evils we experience flow from the excesses of democracy,”<sup>28</sup> he noted as “one principal evil” of democracy “the want of due provision for those employed in the administration of Governnt [sic]. It would seem to be a maxim of democracy to starve the public servants.”<sup>29</sup>

The delegates first discussed this clause of the Virginia Plan on June 12, when the Convention was meeting as a committee of the whole house—a useful parliamentary device permitting freer, more wide-ranging discussion than formal debate. Madison proposed amending the clause by adding the words “& fixt” (that is, fixed).<sup>30</sup> He observed: “[I]t would be improper to leave the members of the Natl. legislature to be provided for by the State Legisls: because it would create an improper dependence; and to leave them to regulate their own wages, was an indecent thing, and might in time prove a dangerous one.”<sup>31</sup> To avoid the admixture of politics with the process of setting legislative salaries, Madison proposed that the Constitution incorporate a reliable and easily ascertainable economic benchmark, such as the price of wheat.<sup>32</sup> A colleague from Virginia, George Mason, seconded Madison’s motion, and suggested two reasons why it would be unwise to permit states to regulate their members’ wages. First, the various pay scales among the states would tend to create an atmosphere of inequality in chambers where members were equal in all other respects. Second, because “the parsimony of the States might reduce the provision so low as had already happened in choosing delegates to Congress, the question would be not who were most fit to be chosen, but who were most willing to serve.”<sup>33</sup> Madison’s amendment was adopted, eight states to three,<sup>34</sup> as was a motion by William Pierce of Georgia “that the wages should be paid out of

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27. 1 *id.* at 20. Only one delegate firmly rejected the idea of any salaries for federal office, and then only for executive posts. On June 2, 1787, Benjamin Franklin suggested that no member of the executive branch of the new national government be paid a salary. He posited that the Convention should not create lucrative posts that would attract unworthy men seeking to earn a salary rather than serving their country. His colleagues at the Convention treated the proposal gently, with great respect for its author, but shelved it without comment. See Benjamin Franklin, speech of June 2, 1787, *reprinted in* 1 Records, *supra* note 3, at 81-85; William G. Carr, *The Oldest Delegate: Franklin in the Constitutional Convention* 90-91, 151-54 (1990).

28. 1 Records, *supra* note 3, at 48.

29. *Id.*

30. See 1 *id.* at 215.

31. 1 *id.* at 215-16.

32. See 1 *id.* at 216.

33. *Id.*

34. The vote was as follows: New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and Georgia in favor, with Massachusetts, Connecticut, and South Carolina opposed. See *id.* New Hampshire’s delegation had not yet arrived, and Rhode Island had refused to send delegates.

the National Treasury."<sup>35</sup>

Ten days later, on June 22, the full Convention revisited the resolution, and issues that seemingly had been settled exploded. Oliver Ellsworth of Connecticut moved that the national legislators be paid by the states rather than out of the national treasury. Ellsworth observed:

[T]he manners of different States were very different in the Stile [sic] of living and in the profits accruing from the exercise of like talents. What would be deemed therefore a reasonable compensation in some States, in others would be very unpopular, and might impede the system of which it made a part.<sup>36</sup>

Hugh Williamson of North Carolina agreed, noting that the new states "to the Westward" would be so poor, and so unable to make adequate contributions to the national treasury, that they would have different interests from the older states. It would not be fair, he concluded, to ask the older states to shoulder the burden of compensating "men who would be employed in thwarting their measures & interests."<sup>37</sup>

Both Nathaniel Gorham of Massachusetts and Edmund Randolph of Virginia countered by urging that the question of salaries not be determined by "consulting popular prejudices."<sup>38</sup> Gorham made a two-pronged argument. First, he maintained that state legislatures "were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them."<sup>39</sup> Second, he pointed out that because the state legislatures exercised the same power of setting their own salaries without significant abuse, the national legislature would not abuse this power in its own interest. Randolph then stressed that "[i]f the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System."<sup>40</sup> Randolph concluded that "[t]he whole nation has an interest in the attendance & services of the members. The Nationl. Treasury therefore is the proper fund for supporting them."<sup>41</sup>

Rufus King of Massachusetts echoed Randolph's point, suggesting that it actually might defuse controversy to set an exact "quantum."<sup>42</sup> Roger Sherman of Connecticut insisted that both the level of and the responsibility for paying salary should remain with the state legislatures.<sup>43</sup> James Wilson of Pennsylvania opposed fixing the level of com-

35. *Id.* Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and Georgia supported Pierce's motion, and Connecticut, New York, and South Carolina opposed it. Nothing in the surviving documentation explains the switches by Massachusetts and New York from their positions in the previous vote.

36. 1 *id.* at 371-72.

37. 1 *id.* at 372.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* 1 *id.* at 373.

compensation for "circumstances would change and call for a change of the amount."<sup>44</sup> He emphasized the necessity of rendering the national government "as independent (as possible) of the State Govts. in all respects."<sup>45</sup>

Madison agreed with Wilson on the general question of independence but returned to his proposal for fixing the degree of compensation. Madison rejected the arguments of Ellsworth and Williamson for state-by-state or regional variation in compensation, citing the plight of the future western states:

He disliked particularly the policy suggested by Mr. Williamson [sic] of leaving the members from the poor States beyond the Mountains, to the precarious & parsimonious support of their constituents. If the Western States hereafter arising should be admitted into the Union, they ought to be considered as equals & as brethren. If their representatives were to be associated in the Common Councils, it was of common concern that such provisions should be made as would invite the most capable and respectable characters into the service.<sup>46</sup>

Alexander Hamilton of New York demurred from Madison's proposal that the wages be fixed in the body of the Constitution, and suggested that it would produce "inconveniency."<sup>47</sup> Hamilton reserved his greatest scorn, however, for the proposal that the states pay the national legislators. He stated, "Those who pay are the masters of those who are paid. . . . [There is a] difference between the feelings & views of the *people* & the *Governments* of the States arising from the personal interest & official inducements which must render the latter unfriendly to the Genl. Govt."<sup>48</sup>

At this point, James Wilson moved that the salaries of the first branch "be ascertained by the National Legislature, and be paid out of the Natl. Treasury."<sup>49</sup> Madison reasserted his worry that allowing members to set their own salary would present a conflict of interest. He stated that "[i]t wd. be indecent to put their hands into the public purse for the sake of their own pockets."<sup>50</sup> Wilson's motion failed, seven states to two, with two divided.<sup>51</sup> Ellsworth then moved, once again, to strike out the reference to the "Natl. Treasury." Hamilton insisted that "[t]he State legislatures ought not . . . to be the paymasters" of the national legislature, but Ellsworth retorted: "If we are jealous of the State Govts. they will be so of us. If on going home I tell them we gave the Gen. Govt. such powers

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. 1 *id.* at 374.

51. New Jersey and Pennsylvania favored the motion; Massachusetts, Connecticut, Delaware, Maryland, Virginia, North Carolina, and South Carolina opposed it; and New York and Georgia were divided. See *id.*

because we cd. not trust you.—will they adopt it. & with[ou]t yr. approbation it is a nullity.”<sup>52</sup> Ellsworth’s motion also failed, by a vote of four states to five with two divided.<sup>53</sup>

The Convention then managed a rare instance of unanimity, agreeing to substitute the phrase “adequate compensation” for “fixt stipends”—but, as Madison noted, the proponents of the latter phrase agreed to discuss the practicability of fixing the compensation at a later time.<sup>54</sup>

Pierce Butler of South Carolina then moved to adopt the entire amended clause (“adequate compensation to be paid out of the Natl. Treasury”).<sup>55</sup> Butler’s motion was opposed as being out of order since the Convention had considered each of its two parts separately.<sup>56</sup> President Washington, however, referred the question of order to the Convention, which supported Butler’s motion by a vote of six states to four;<sup>57</sup> but then South Carolina invoked its right to postpone the entire clause.<sup>58</sup> Consequently, on June 23, the Convention revisited the clause and defeated it, five states to five, with one divided.<sup>59</sup>

The issue then was sidetracked, as the Convention pitched into its last great contest over the modes of representation in the national legislature. The compensation clause did not resurface until after the Committee of Detail (appointed on July 26 to prepare a first draft of the Constitution) delivered its report on August 6. Article VI, section 10 of that draft read as follows:

The members of each House shall receive a compensation for their services, to be ascertained and paid by the State, in which they shall be chosen.<sup>60</sup>

From August 6 through September 10, the delegates carried out another cycle of informal and formal review, clause by clause. They revisited the compensation provision on August 14, when Oliver Ellsworth announced that he had changed his mind and now opposed having the

52. *Id.*

53. Massachusetts, Connecticut, North Carolina, South Carolina favored it; New Jersey, Pennsylvania, Delaware, Maryland, and Virginia opposed it; and New York and Georgia divided. *See id.* In a marginal note, Madison observed: “It appeared that Massts. concurred, not because they thought the State Treasy. ought to be substituted; but because they thought nothing should be said on the subject, in which case it wd. silently devolve on the Natl. Treasury to support the National Legislature.” *Id.*

54. *See id.*

55. *Id.*

56. *See id.*

57. Connecticut, New Jersey, Delaware, Maryland, North Carolina, and South Carolina voted that the motion was in order; New York, Pennsylvania, Virginia, and Georgia voted that it was not; and Massachusetts divided. *See 1 id.* at 374-75.

58. *See 1 id.* at 375.

59. Massachusetts, New Jersey, Pennsylvania, Maryland, and Virginia favored it; Connecticut, New York, Delaware, North Carolina, and South Carolina opposed it; and Georgia divided. *See 1 id.* at 385.

60. *2 id.* at 180.

states pay national legislators.<sup>61</sup> His motion to amend the clause to replace the states with the national treasury touched off a debate that replayed the arguments of June 22 and 23, but with less vehemence and more conciliation.

Gouverneur Morris (a New Yorker who was a member of the Pennsylvania delegation) urged that it would be unfair to distant states to saddle them with costs that would be higher than those of states near the seat of government.<sup>62</sup> He then suggested that the national legislature exercise its discretion in setting its members' pay.<sup>63</sup> In a comment that modern readers might view with disbelief, he said, "[t]here could be no reason to fear that they would overpay themselves."<sup>64</sup>

Pierce Butler of South Carolina renewed his arguments that the national legislators ought to be paid by the states, "particularly in the case of the Senate, who will be so long out of their respective States, that they will lose sight of their Constituents unless dependent on them for their support."<sup>65</sup> But John Langdon of New Hampshire opposed Butler's position, stressing the unfairness of "oblig[ing] the distant States to bear the expence [sic] of their members travelling to and from the Seat of Govt."<sup>66</sup> Madison suggested, in a speech generally directed to issues other than compensation, that the Constitution should fix "at least two extremes not to be exceeded by the Natl. Legislre. in the payment of themselves."<sup>67</sup>

A flurry of debate ensued, with most of the speakers rising to endorse both the transfer of payment of Congress to the national treasury and the trusting of Congress to set its own compensation. Only the Anti-Federalist Luther Martin of Maryland opposed these positions; Martin urged that "[a]s the Senate is to represent the States, the members of it ought to be paid by the States."<sup>68</sup> Daniel Carroll, another Marylander, objected: "The Senate was to represent & manage the affairs of the whole, and not to be the advocates of State interests. They ought then not to be dependent on nor paid by the States."<sup>69</sup> The Convention then voted to have the members of Congress paid out of the national treasury, nine states to two.<sup>70</sup>

The delegates then made an abortive attempt to specify the salaries of Senators and Representatives, but none of the proposed rates of payment could muster a majority. Finally, the delegates agreed to add the phrase

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61. *See* 2 *id.* at 290.

62. *See id.*

63. *See id.*

64. *Id.*

65. *Id.*

66. 2 *id.* at 290-91.

67. 2 *id.* at 291.

68. 2 *id.* at 292.

69. *Id.*

70. New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and Georgia supported it; Massachusetts and South Carolina opposed it. *See id.* New York had departed the Convention on July 10, 1787.

"to be ascertained by law" to the clause, leaving it to Congress to set its own pay.<sup>71</sup>

On September 12, the Convention received the report of the Committee of Style and Arrangement, which prepared the second draft of the Constitution (the handiwork of Gouverneur Morris). Article I, section 6 of this draft was carried over into the finished document, unchallenged and unaltered, except for capitalizations added by the clerk who prepared the engrossed final copy of the Constitution for signing on September 17.<sup>72</sup>

### C. *The Ratification Controversy and the Quest for Amendments*

The compensation clause was caught up in the Anti-Federalist campaign to amend the Constitution before its adoption. Both the Anti-Federalists and those who sought to remain neutral in the ratification controversy worried that the Constitution authorized a government so powerful and so independent of the people that it would destroy the states and the rights of the people. Such Federalists as John Jay and Alexander Hamilton derided these fears as groundless, explaining that the general government could exercise only those powers conferred on it by the Constitution.<sup>73</sup> Moreover, they contended, the people were the ultimate sovereigns; how could the people violate their own rights?<sup>74</sup> They also cited such provisions as Article I, Section 9, cataloguing a series of limitations on federal power, to refute the Anti-Federalist charge that the Constitution conferred unlimited powers on the general government.<sup>75</sup> Finally, the Federalists maintained, state governments were far from bastions of liberty themselves; throughout the 1770s and 1780s they had been responsible for the most frequent and blatant violations of individual rights.<sup>76</sup>

Unconvinced, the Anti-Federalists insisted that the Constitution provided few explicit limitations on governmental power, making even more glaring the document's lack of a bill of rights.<sup>77</sup> They brushed aside the Federalists' attacks on state governments, pointing out that the powers of a new, untried federal government was the issue under debate. Furthermore, they refused even to consider the argument (so popular with Federalist polemicists) that the people could not violate their own rights. Clinging to the traditional view that the government and the people were and could only be adversaries, Anti-Federalists could not embrace the

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71. See 2 *id.* at 292-93.

72. See 2 *id.* at 593.

73. See The Federalist No. 84 (Alexander Hamilton); John Jay, An Address to the People of the State of New York (1788), reprinted in 3 The Correspondence and Public Papers of John Jay 1763-1826, at 294-319 (Henry P. Johnston ed., 1971).

74. See The Federalist No. 84 (Alexander Hamilton).

75. See *id.*

76. See The Federalist No. 48 (James Madison).

77. See Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* 64-70 (1981).

new Federalist theories of popular sovereignty. The Anti-Federalists also knew that many Americans who were otherwise friendly to the Constitution shared their views on the need to limit the federal government's power over the rights of the people.<sup>78</sup>

As this debate developed both within and without the ratifying conventions, the Constitution's lack of a bill of rights limiting the powers of the general government over the individual became the Anti-Federalists' most compelling argument against the document. Anti-Federalists pointed to state constitutions that either began with declarations of rights, as in Virginia and Massachusetts, or incorporated rights-protecting provisions, as in New York.<sup>79</sup> That the Constitution created a government possessing power over individual citizens, they insisted, meant that, like the state constitutions it resembled, it ought to include provisions defining and protecting rights.

The defects that the Anti-Federalists perceived in the Constitution only began, however, with its lack of a declaration of individual rights. The new charter's opponents also demanded amendments limiting federal powers to levy taxes and to regulate interstate and foreign commerce—changes that would have reduced the Constitution to little more than a redrafted Articles of Confederation. They also insisted that the proposed Constitution be revised or fully rewritten before its adoption; many Anti-Federalists even favored submitting it to a second constitutional convention.<sup>80</sup> Still, the demand for a bill of rights became the ideological centerpiece and the intellectual core of the case against the Constitution.

Several Anti-Federalist strategists and polemicists saw the compensation clause as a useful peg on which to hang what modern political analysts call “red-meat” arguments designed to provoke visceral responses against the Constitution.<sup>81</sup> For example, on June 14, 1788, Patrick Henry turned the full force of his derisive oratory in the Virginia ratify-

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78. See *id. passim*.

79. See the suggestive essay by Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, in *Contexts of the Bill of Rights 3-17* (Stephen L. Schechter & Richard B. Bernstein eds., 1990). Lutz maintains that the principal influences on the American rights tradition as codified in the Bill of Rights were state constitutions, declarations of rights, and colonial charters.

80. Kenneth R. Bowling has produced the authoritative modern examination of this point. See Kenneth R. Bowling, *'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 *J. Early Republic* 223 (1988). For an analysis that recapitulates many of Bowling's arguments, see Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, in 1990 *Sup. Ct. Rev.* 301.

81. See Kathleen Hall Jamieson, *Dirty Politics: Deception, Distraction, and Democracy* 64-101 (1992) (discussing “visceral responses and stereotypes that foil argument”); William Safire, *Bush's Gamble*, *N.Y. Times*, Oct. 18, 1992, (Magazine), at 31 (illustrating “red-meat” rhetoric). Probably because they recognized that arguments over the clause might produce a no-win scenario for their cause, the authors of *The Federalist* nowhere discussed the compensation clause.

ing convention against the compensation clause.<sup>82</sup> In his reply, James Madison was hard-pressed to defend the clause, conceding the apparent impropriety of permitting the legislators to determine their own rate of compensation and halfway acknowledging the necessity and appropriateness of amending the clause.<sup>83</sup> Governor Edmund Randolph, who had proposed the Virginia Plan only to turn against the finished Constitution by the end of the Convention, published a pamphlet setting forth his reasoning. Among the corrections he desired to "obnoxious" clauses of the Constitution, he included "incapacitating the Congress to determine their own salaries."<sup>84</sup> Further, in April 1788, an anonymous Philadelphia newspaper pamphleteer, "A Farmer," attacked the clause in the *Freeman's Journal*, citing it as proof that the government authorized by the Constitution was not truly federal but national, and that the national legislators would be independent of control by the states.<sup>85</sup>

Given the public obsession with parsimony that dominated politics in the New England states, it is not surprising that New Englanders seemed most incensed over the compensation clause. On December, 1787, the pseudonymous Massachusetts newspaper essayist "Cornelius" fired a detailed salvo at the compensation clause in a two-part essay published in the *Hampshire Chronicle*, a newspaper appearing in one of the counties where Shays's Rebellion had found its greatest popularity.<sup>86</sup> Noting that federal Representatives and Senators apparently were under no obligation to listen to instructions adopted by their constituents, "Cornelius" demanded:

Is it altogether certain, that a body of men elected for so long a term,—rendered thus independent, and most of them placed at the distance of some hundreds of miles from their constituents, will pay a more faithful regard to their interest, and set an example of economy, more becoming the circumstances of this country, than they would do, if they were annually elected, subject to some kind of instructions, and liable to be recalled, in case of male administration [sic] [i.e., maladministration].<sup>87</sup>

"Cornelius" also challenged the implication that the clause was neces-

82. See 3 Records, *supra* note 3, at 312-13 (extract from the debates of the Virginia Convention, June 14, 1788).

83. See 3 *id.* at 313-15. James McHenry's defense of the clause in the Maryland ratifying convention was similarly hesitant and half-hearted. See 3 *id.* at 148.

84. Edmund Randolph, Letter from Edmund Randolph Giving His Reasons for Refusing His Signature To the Proposed Federal Constitution (Oct. 10, 1787), reprinted in 2 The Complete Anti-Federalist 83-97 (Herbert J. Storing ed., 1981); see also Samuel Chase, Notes of Speeches Delivered to the Maryland Ratifying Convention (April 1788), reprinted in 5 The Complete Anti-Federalist, *supra*, at 79-91.

85. See "A Farmer," *The Fallacies of the Freeman Detected by A Farmer*, (Philadelphia) *Freeman's Journal*, Apr. 1788, reprinted in 3 The Complete Anti-Federalist, *supra* note 84, at 181-93.

86. See "Essay by Cornelius," *Hampshire Chronicle*, Dec. 11 & 18, 1787, reprinted in 4 The Complete Anti-Federalist, *supra* note 84, at 138-46.

87. 4 *id.* at 140-41.



sary to ensure a fair rate of compensation for members of the new Congress:

Have the several states, in the estimation of the compilers of this Constitution, been hitherto, so parsimonious and unjust in paying their delegates, that they have rendered themselves unfit to contract with their Senators and Representatives, respecting a compensation for their service? If so, what may we suppose will be considered as a just compensation, when this honourable Body shall set their own pay, and be accountable to none but themselves?<sup>88</sup>

In his second part, "Cornelius" answered the Federalist argument that since state legislatures set their own pay, Congress should be able to do the same. First, "Cornelius" insisted that there were great differences between the cases of the state and national legislatures. On the one hand, he pointed out, state legislators were known personally to their constituents, were elected for short (annual) terms, and could be bound by specific instructions from their constituents. By contrast, members of Congress were to be chosen to serve for several years, by large blocs of constituents to whom they might not be personally known. Moreover, "Cornelius" argued, members of Congress would be far removed from the interests and day-to-day conditions of their constituents, and exposed to "the enchanting example of Ambassadors, other publick [sic] Ministers, and Consuls from foreign courts, who, both from principles of policy, and private ambition, will live in the most splendid and costly style."<sup>89</sup> Pointing out the dangers of emulation, "Cornelius" declared:

Let any body of men whatever be placed, from year to year, in circumstances like these; let them have the unlimited controul [sic] of the property of the United States; and let them feel themselves vested, at the same time, with a constitutional right, out of this property to make themselves such compensation as they may think fit: And then, let any one judge, whether they will long retain the same ideas, and feel themselves under equal restraints as to fixing their own pay, with the members of our state legislature.<sup>90</sup>

"Cornelius" concluded:

This part of the Constitution . . . [is] calculated, not only to enhance the expense of the federal government to a degree that will be truly burdensome; but also, to increase that luxury and extravagance, in general, which threatens the ruin of the United States; and that, to which the Eastern States in particular, are wholly unequal.<sup>91</sup>

On January 10, 1788, "Samuel" contributed a short essay to the *Independent Chronicle and Universal Advertiser*,<sup>92</sup> in which the writer also

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88. 4 *id.* at 141.

89. *Id.*

90. 4 *id.* at 141-42.

91. 4 *id.* at 142.

92. "Essay by Samuel," (Boston) *Independent Chronicle and Universal Advertiser*, Jan. 10, 1788, reprinted in 4 *The Complete Anti-Federalist*, *supra* note 84, at 191-97.

tried to stress the supposed unfairness of the compensation clause to the New England states. He wrote: "These Representatives are to set their own wages, to be paid out of the Continental Treasury; therefore the New England States will have to pay nearly every fifth dollar, to support Representatives in the other States, according to the apportionment in said Constitution."<sup>93</sup>

The next day, in New Hampshire, another Anti-Federalist writer (also styling himself "A Farmer") observed, in the *Freeman's Oracle and New Hampshire Advertiser*, "The truth is, when you carry a man's salary beyond what decency requires, he immediately becomes a man of consequence, and does little, or no business at all."<sup>94</sup>

On February 8, 1788, in New Hampshire, "A Friend to the Rights of the People" attacked the compensation clause in the *Freeman's Oracle*.<sup>95</sup> He added little to the arguments that the writers already discussed had presented, but what he lacked in theoretical originality he made up in rhetorical flair. He wrote:

How far Congress will extend this power . . . there is no man alive can tell—It is left without bound or limitation—and we may be sure, from the craving appetites of men for gain, it will be stretched as far as the patience, and abilities of the people will bear—European fashions have been transplanted into America—The high taste of foreign Courts will be relished by Congress— They must live in all the splendor of equipage and attendance—Their revenue must be equivalent— This being an infant country, and besides loaded with a large debt, will by no means be able to support it.<sup>96</sup>

The writer concluded with an analogy calculated to appeal to ordinary New England farmers and tradesmen: "No wise householder will let her servants make a law to fix their own wages, or dip as deep as they please in his coffers—Nor will any wise community give a greater liberty to the ruling servants of the state . . ."<sup>97</sup>

Finally, on January 17, 1788, the noted South Carolina lawyer and state legislator Rawlins Lowndes sought to draw ominous parallels between the proposed Constitution's nationalizing tendencies and Britain's attempts to choke off the independence of the colonial governments before 1776:

Why take from us the right of paying our delegates, and pay them from the federal treasury? He remembered formerly what a flame was raised in Massachusetts, on account of Great Britain assuming the

93. 4 *id.* at 192.

94. "Essays by A Farmer," (New Hampshire) *Freeman's Oracle and New Hampshire Advertiser*, Jan. 11, 1788, *reprinted in* 4 *The Complete Anti-Federalist*, *supra* note 84, at 207-08.

95. "A Friend to the Rights of the People," *Anti-Federalist, No. I*, (New Hampshire) *Freeman's Oracle*, Feb. 8, 1788, *reprinted in* 4 *The Complete Anti-Federalist*, *supra* note 84, at 235-42.

96. 4 *id.* at 238.

97. *Id.*

payment of salaries to judges and other state officers; and that this conduct was considered as originating in a design to destroy the independence of their government.<sup>98</sup>

The informal argument over the Constitution formed the context within which the formal actions of the state ratifying conventions took place. Within the conventions, beginning with that of Massachusetts in February 1788, moderates in the Federalist and Anti-Federalist camps developed the device of recommended amendments, which would be submitted to the first Congress to convene under the Constitution, should it be adopted. Previously, Federalists had insisted that the Constitution had to be adopted as it was, with no possibility of amendment while Anti-Federalists had demanded that the document be amended before they would support its adoption. The tactic of recommended amendments broke the rhetorical logjam, permitting Anti-Federalists to support the Constitution while binding the Federalists to support the submission of these lists of amendments to Congress.<sup>99</sup>

The amendments proposed by the ratifying conventions illustrate the neat division between those that would protect individual rights or enshrine fundamental principles of government, and those that would cripple the government created by the Constitution. The Virginia and New York conventions took pains in their instruments of ratification to separate rights-declaring amendments from amendments altering the structure of government.

The proposed rights-declaring amendments covered virtually everything now found in the first ten amendments to the Constitution, so little would have changed had every one of them been adopted as proposed. If, however, even some of the structural amendments had been adopted, the result would have been a dismemberment of the government set forth in the Constitution. For instance, these proposals would have curtailed the number of terms for the President, Senators, and Representatives; abolished the Vice Presidency; limited the scope of jurisdiction of the federal courts; forbidden Congress to create any court but a Supreme Court and federal admiralty courts; restricted congressional powers of taxation and regulation of interstate and foreign commerce; barred any

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98. Rawlins Lowndes, Speech Before the South Carolina House of Representatives on the Proposed Federal Constitution (January 17, 1788), in *Debates Which Arose in the House of Representatives of South Carolina on the Constitution Framed for the United States by a Convention of Delegates Assembled at Philadelphia 26 (1788)*, reprinted in *5 The Complete Anti-Federalist*, *supra* note 84, at 154. Lowndes was a Charleston member of the South Carolina House of Representatives, which in January 1788 debated and adopted legislation authorizing the calling of elections for a ratifying convention; on May 23, 1788, the convention voted to ratify the Constitution. Lowndes almost single-handedly made the case against the Constitution in the House of Representatives, conceiving that his pro-Constitution constituents would not elect him to the convention. Evidence indicates that Lowndes was elected to the ratifying convention, but declined to serve. See 5 *id.* at 148-49.

99. See Richard B. Bernstein with Kym S. Rice, *Are We to be a Nation? The Making of the Constitution* 207 (1987).

exercise of federal power to raise revenue unless and until the states refused to comply with congressional requisitions; and required a two-thirds vote of both houses of Congress for any statute regulating commerce, any tax law, and any treaty.<sup>100</sup> Given the unhappy fate of the Articles of Confederation, it is doubtful whether such an eviscerated form of government would have lasted long.

By far the least sweeping of the structural amendments were those proposed by Virginia, New York, and North Carolina to the compensation clause:

*Virginia*

That the laws ascertaining the compensation of senators and representatives for their services, be postponed in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted, which shall first be passed on the subject.<sup>101</sup>

*New York*

That the compensation for the senators and representatives be ascertained by standing laws; and that no alteration of the existing rate of compensation shall operate for the benefit of the representatives, until after a subsequent election shall have been had.<sup>102</sup>

*North Carolina*

That the laws ascertaining the compensation of senators and representatives for their services, be postponed in their operation, until after the election of representatives immediately succeeding and passing thereof, that excepted, which shall first be passed on the subject.<sup>103</sup>

In response to the structural amendments, some Federalists tried to stonewall, linking the call for any amendments, including rights-declaring amendments, to the more extreme structural proposals. They feared that any attempt to answer the public demand for a bill of rights would open the door wide to potentially disastrous "alterations," especially in

100. See *Creating the Bill of Rights: The Documentary Record from the First Federal Congress 14-28* (Helen E. Veit et al. eds., 1991) [hereinafter *Creating the Bill of Rights*]; *The Ratifications of the New Foederal Constitution, Together with the Amendments, Proposed by the Several States* (Aug[ustine] Davis ed., 1788), reprinted in *Contexts of the Bill of Rights*, *supra* note 79, at 112-46.

101. Form of Ratification, which was read and agreed to by the Convention of Virginia (June 25, 1788), in *The Ratifications of the New Foederal Constitution, together with the Amendments, Proposed by the Several States* (Aug[ustine] Davis ed., 1788), reprinted in *Contexts of the Bill of Rights*, *supra* note 79, at 137.

102. Ratification of the Constitution by the Convention of the State of New-York (July 26, 1788), in *The Ratifications of the New Foederal Constitution, together with the Amendments, Proposed by the Several States* (Aug[ustine] Davis ed., 1788), reprinted in *Contexts of the Bill of Rights*, *supra* note 79, at 119.

103. State of North-Carolina In Convention (Aug. 2, 1788), reprinted in *Contexts of the Bill of Rights*, *supra* note 79, at 143. The leading student of North Carolina's ratification of the Constitution has concluded that the North Carolina convention closely followed the text of the Virginia amendments. See Louise Irby Trenholme, *The Ratification of the Federal Constitution in North Carolina 184* (1932).

light of the New York and Virginia legislatures' threats to demand a second convention to secure the alterations they had specified.<sup>104</sup> Moderate Federalists, however, recognized both the binding nature of their pledges to the state ratifying conventions and the likelihood that rights-protecting amendments would do no harm and might achieve much good. This was the posture of the amendments issue (including the amendments to the compensation clause) in the winter of 1788-1789, as the first federal elections took place.<sup>105</sup>

## II. FRAMING: THE FIRST FEDERAL CONGRESS

When the First Congress convened on March 4, 1789 (and assembled its quorum to do business by April 6), it had before it recommendations for amendments from the ratifying conventions of five states—Massachusetts, South Carolina, New Hampshire, Virginia, and New York.<sup>106</sup> In addition to these, Anti-Federalist newspapers and pamphleteers circulated the lists of demands promulgated by the Anti-Federalist minority of the Pennsylvania ratifying convention<sup>107</sup> and the amendments demanded by the North Carolina convention, whose Anti-Federalist majority had refused even to vote on the Constitution unless it were amended first.<sup>108</sup> Rhode Island thus far had refused even to hold elections for a ratifying convention; its opposition to the Constitution and its support for a declaration of rights were well-known.<sup>109</sup>

The question of amendments was one of the trickiest and riskiest facing the new government. Federalists who were willing to consider rights-declaring amendments in order to promote conciliation and harmony (as well as to repair a defect that began to look both obvious and ominous) found themselves divided from those who regarded any attempt to amend a Constitution just adopted as a conspiracy to commit sabotage.<sup>110</sup> It was essential, they perceived, to stake out a temperate posi-

104. See Bernard Schwartz, *The Great Rights of Mankind* 162-63 (enlarged ed. 1992).

105. See *id.* at 160-86. Apparently the issue of congressional power to set congressional compensation played no role in the first federal elections. See Bernstein, *supra* note 7, ch. 4.

106. See *Creating the Bill of Rights, supra* note 100, at 14-28; *The Ratifications of the New Foederal Constitution, Together with the Amendments, Proposed by the Several States* (Aug[ustine] Davis ed., 1788), reprinted in *Contexts of the Bill of Rights, supra* note 79, at 112-46. North Carolina and Rhode Island submitted their lists of recommendations in November 1789 and May 1790, respectively, once they ratified the Constitution; however, within a month after each state ratified the Constitution, its legislature also ratified the amendments proposed by Congress in 1789. See *infra* notes 109, 176 (Rhode Island); *supra* note 103 (North Carolina); *infra* note 175 (same).

107. See *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents*, *Pennsylvania Packet and Daily Advertiser*, Dec. 18, 1787, reprinted in 3 *The Complete Anti-Federalist, supra* note 84, at 145-67.

108. See *supra* note 103.

109. See Bernstein with Rice, *supra* note 99, at 270-71; Patrick T. Conley, *Democracy in Decline: Rhode Island's Constitutional Development, 1776-1841*, at 105-42 (1977); Irwin H. Polishook, *Rhode Island and the Union, 1774-1795*, at 213-23, 226-31 (1969).

110. See *supra* notes 104-05 and accompanying text.

tion—one that could secure the support of moderates in both the Federalist and the Anti-Federalist camps, while not goading extremists on either side to action that would cripple the government. These Federalists agreed that the best course would be to launch the promised campaign to add a bill of rights to the Constitution.

Leadership to obtain a bill of rights from the First Congress came from someone who, only a year earlier, would have been a most unlikely candidate for the role—James Madison, who had reversed his stand from the opening stages of the struggle for ratification. His about-face was the most noteworthy development in the ratification controversy with respect to future amendments. Madison brought many strengths to the movement for a declaration of rights: his national political stature; his ability to secure President Washington's backing of the call for amendments securing individual rights; and his extraordinary intellectual talents and capacity for hard work.

At first Madison had been cool to the idea of adding a bill of rights to the Constitution. His experience with Virginia politics in the 1780s, and his scrutiny of politics on both state and national levels, had led him to conclude that a bill of rights would be insufficient to restrain a government or a popular majority bent on violating rights. Madison explained his thinking in a letter to Jefferson in 1788: "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul [sic] is most needed. Repeated violations of these *parchment barriers* have been committed by overbearing majorities in every State."<sup>111</sup> Such arguments carried great force, especially among veterans of the tumultuous state politics of the 1780s, who had seen firsthand the ineffectiveness of state constitutional provisions guaranteeing rights against determined legislative and popular majorities.

Eighteenth-century opinions on the nature of a declaration of rights and its function in the life of a polity differed profoundly from today's understandings of the same questions. Declarations of rights originally were not legally enforceable limitations on government power. Rather, they were political documents, enshrining the people's values and providing the citizenry a standard for evaluating the performance of elected officials.<sup>112</sup> They were generally phrased as admonitions, stating that the

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111. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *The Papers of James Madison* 295, 297 (Robert A. Rutland et al. eds., 1977) (emphasis added) (discussing Madison's role in the origins of the Bill of Rights and his thinking on the concept of "parchment barriers") [hereinafter *Madison Papers*]; see also Jack N. Rakove, *Parchment Barriers and the Politics of Rights*, in *A Culture of Rights* 98-143 (Michael J. Lacey & Knud Haakonssen eds., 1991) (analyzing the transformation of the theory underlying the protection of rights, from the colonial period through the constitutional debates).

112. See Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, in *Contexts of the Bill of Rights*, *supra* note 79, at 3-17; Robert C. Palmer, *Liberties as Constitutional Provisions: 1776-1791*, in William E. Nelson & Robert C. Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* 55-148 (1987).

government “ought” to do this or “should not” do that. Government officials could, and did, ignore such political guidelines, however, with virtual impunity from popular reaction and even with popular approval.<sup>113</sup>

In his arguments for the federal Constitution, Madison used the state governments’ inability to abide by their own constitutions with telling effect. In *The Federalist No. 48*, for example, he itemized the many violations of specific provisions of the Pennsylvania constitution of 1776—catalogued by the 1783 report of the state’s Council of Censors—abuses that had been, and continued to be, tolerated by the people of the state:

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation [sic] on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.<sup>114</sup>

It is not surprising that Madison at first found the “parchment barriers” argument persuasive. He believed that the plan for representation in the national legislature of an extended republic (which he defended in *The Federalist No. 10*) and the Constitution’s devices of checks and balances (which he vindicated in *The Federalist No. 51*) provided a solution to the problem of government abuse of power that was both theoretically satisfying and workable in practice, and on both counts more secure than formal declarations of rights could ever be. Thus, Madison at first resisted adding a declaration of rights to the Constitution at least in part because he believed that the new Federalist science of politics he had helped devise could better perform the tasks most Americans assigned to a declaration of rights.<sup>115</sup>

A veteran drafter of constitutions and legislation, Madison understood the limitations of legal and political language—especially vague admonitory language—as a means to achieve political ends.<sup>116</sup> He believed that it would be difficult, if not impossible, to draft a bill of rights that would give sufficient protection to the rights it mentioned; he also knew that it was possible that a bill of rights might give protection so broad as to paralyze the needed powers of government. Finally, he feared that it would be all too easy to leave some rights out by mistake, with the result that those rights would not be protected.

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113. See sources cited *supra* note 112.

114. *The Federalist No. 48*, at 338 (James Madison) (Jacob E. Cooke ed., 1961).

115. See Bruce Ackerman, *We the People: 1. Foundations* 165-266 (1991); *Fame and the Founding Fathers: Essays by Douglass Adair* 93-106 (Trevor Colbourn ed., 1974); Michael Foley, *Laws, Men and Machines: Modern American Government and the Appeal of Newtonian Mechanics* 144-45 (1990); Jack N. Rakove, *James Madison and the Creation of the American Republic* 44-52 (1990); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 469-564, 593-615 (1969).

116. See *The Federalist No. 37* (James Madison) for a masterful analysis of the consequences for constitutional and political problem-solving of the imprecision and ambiguity of language.

Despite his struggles against the demand for a declaration of rights, in late 1788 Madison became determined to lead the effort to amend the Constitution. Four linked reasons explain his about-face:

- First, Madison received a series of admonishing and persuasive letters between late 1787 and the summer of 1789 from his friend Thomas Jefferson, then American Minister to France and a keen observer of the ratification controversy.<sup>117</sup> Taking pains to refute each argument that Madison raised against a declaration of rights, Jefferson reminded Madison that a “bill of rights is what the people are entitled to against every government on earth, general or particular, [and] what no just government should refuse or rest on inference.”<sup>118</sup> He also rebutted Madison’s fears that “a positive declaration of some essential rights could not be obtained in the requisite latitude” by asserting that “half a loaf is better than no bread. [I]f we cannot secure all our rights, let us secure what we can.”<sup>119</sup> The Jefferson-Madison correspondence served not simply as a source of intellectual and personal leverage on Madison, but also as an indication to him that moderate Federalists throughout the nation might well think as Jefferson did. The correspondence also provided Madison with a valuable catalogue of arguments that he would later use to persuade reluctant Federalist colleagues in the House and the Senate to support his amendments.

- Second, Madison’s close observation of the American political scene and the communications he received from friends and political allies around the nation in 1788-1789 helped to convince him that Americans of all persuasions would rest easier if a bill of rights were added to the Constitution. Moreover, as the leader of the campaign for amendments within Congress, Madison knew that he would have the most advantageous position from which to ward off any proposed amendments that might go beyond a bill of rights.<sup>120</sup>

- Third, Madison feared that diehard Anti-Federalists in New York and Virginia would carry out their oft-repeated threat to seek a second

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117. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 10 Madison Papers, *supra* note 111, at 335-39; Letter from Thomas Jefferson to James Madison (Feb. 6, 1788), in 10 *id.* at 473-75; Letter from Thomas Jefferson to James Madison (July 31, 1788), in 11 *id.* at 210-14; Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), in 11 *id.* at 353-55; Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 *id.* at 13-16; Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 12 *id.* at 360-65. For Madison’s response to Jefferson’s letters, see Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *id.* at 295-300; Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), in 11 *id.* at 381-84; Letter from James Madison to Thomas Jefferson (May 27, 1789), in 12 *id.* at 185-86; Letter from James Madison to Thomas Jefferson (June 13, 1789), in 12 *id.* at 217-18; Letter from James Madison to Thomas Jefferson (June 30, 1789), in 12 *id.* at 267-72.

118. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 10 Madison Papers, *supra* note 111, at 335-39.

119. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *Creating the Bill of Rights*, *supra* note 100, at 219.

120. See Rakove, *supra* note 115, at 79.



convention. If he could assume leadership of the quest for amendments within Congress, he reasoned, he might be able to deflect the momentum of the second-convention movement or even stop it altogether. Even though only these two states had adopted resolutions making clear their intention to demand a new convention, Virginia and New York were nonetheless among the most powerful states in the Union. As the largest and most populous state (and the home state of the likely first President), Virginia wielded extraordinary political and economic power in American affairs. New York, the home of the new nation's temporary capital and fastest-growing port, was not far behind Virginia. Had Anti-Federalists in both states succeeded in making common cause against the Constitution in 1788, they might well have derailed the momentum that the Federalists had managed to build for the new government. Should these two states indeed issue calls for a convention, Madison worried, other states might follow the lead of Virginia and New York—unless he placed an alternative on the agenda of Congress.<sup>121</sup>

• Fourth, and of most direct personal concern, Madison recalled the role that the demand for amendments had played during the federal elections of 1788-1789, when he ran for a seat in the first United States House of Representatives against his friend, and fellow protegee of Jefferson, James Monroe.<sup>122</sup> Virginia Anti-Federalists launched a whispering campaign charging that Madison still opposed a bill of rights despite his public pledge, which they suspected had been only a ruse to lure wavering delegates to support ratification. They hoped that this charge would alienate the Baptist community, who were not only among Madison's staunchest supporters, but were also among the strongest advocates of a bill of rights. Madison gained election to the House largely because he refuted these charges, in person and in writing, publicly reaffirming his promises to work for the adoption of a federal bill of rights.<sup>123</sup>

Thus, when the First Congress convened the following spring, Madison was already hard at work, studying with great care a pamphlet published by Augustine Davis, a Virginia printer, which set forth the more than two hundred amendments to the Constitution recommended by the ratifying conventions.<sup>124</sup> Madison realized that the existence of this pamphlet, and its wide-spread circulation, confirmed that the ques-

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121. See Bowling, *supra* note 80, at 227-34; Linda Grant DePauw, *The Anticlimax of Antifederalism: The Abortive Second Convention Movement, 1788-89*, 2 Prologue 98 (1970); Edward P. Smith, *The Movement Towards a Second Constitutional Convention in 1788*, in *Essays in the Constitutional History of the United States in the Formative Period, 1775-1789*, at 46-115 (J. Franklin Jameson ed., 1970).

122. See Harry Ammon, James Monroe: The Quest for National Identity 75-77 (1971); Irving Brant, James Madison: Father of the Constitution, 1787-1800, at 236-42 (1950); 2 *The Documentary History of the First Federal Elections: 1788-1790*, at 310-65 (Gordon DenBoer et al. eds., 1984).

123. See sources cited *supra* note 122.

124. See *The Ratifications of the New Foederal Constitution, Together with the Amendments, Proposed by the Several States, reprinted in Contexts of the Bill of Rights*, *supra* note 79 and accompanying text.

tion of amendments was still alive. He therefore scoured its pages, identifying redundancies and sorting out those amendments that were designed to identify and protect rights from those that would otherwise alter the structure of government provided for by the Constitution.

Madison used other political demands on his time and energies to advance the cause of amendments. At the same time that he immersed himself in the Davis pamphlet, he consulted with President-elect George Washington, who had arrived in the capital city on April 23. On April 30, in his first inaugural address (either drafted by Madison or approved by him beforehand), Washington made only one substantive recommendation to the First Congress which he expressed with the overbalanced, ponderous eloquence characteristic of his formal statements. Acknowledging "the nature of objections which have been urged against the system, or . . . the degree of inquietude which has given birth to them,"<sup>125</sup> Washington disclaimed any ability or desire to use his authority to guide the amending process—and then proceeded to do just that:

Instead of undertaking particular recommendations on this subject, in which I could be guided by no lights derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good. For I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an united and effective government, or which ought to await the future lessons of experience; a reverence for the characteristic rights of freemen, and a regard for the public harmony, will sufficiently influence your deliberations on the question, how far the former can be more impregably fortified, or the latter be safely and advantageously promoted.<sup>126</sup>

With Washington firmly in the moderate camp of amendment advocates, Madison judged it a good time to move forward. On May 4, 1789, Madison first gave notice to his colleagues that he would act on the question of amendments, moving that the subject be raised on May 25.<sup>127</sup> He thus stole the thunder of Anti-Federalist Representatives who had hoped to focus the attention of the House on the Virginia and New York demands for a second convention.

Still determined to do his part for a second convention despite Madison's actions, Representative Theodorick Bland of Virginia introduced his state's application for a second convention on May 5.<sup>128</sup> Bland's New York colleague, John Laurance, submitted his state's application on May 6.<sup>129</sup> The Virginia application sparked a brief and occa-

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125. George Washington, Inaugural Address (Apr. 30, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 233. On Madison's role in the drafting of this speech, see Brant, *supra* note 122, at 255-56, 258.

126. *Creating the Bill of Rights*, *supra* note 100, at 233-34.

127. *See id.* at 5.

128. *See* The Daily Advertiser, May 6, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 57-59; the text of the application appears in *id.* at 235-37.

129. *See* John P. Kaminski, *The Making of the Bill of Rights: 1787-1792*, in *Contexts*

sionally testy debate: should the House appoint a select committee to consider the application, or just lay it on the table until enough states' applications were received to compel Congress to call a second convention?<sup>130</sup> Madison proposed that all applications be laid upon the table as they arrived, and that Congress wait until constitutional critical mass was achieved.<sup>131</sup> Despite Bland's protests, the House adopted Madison's views, and the Virginia and New York applications were tabled, never to be heard from again. No other state sent Congress an application for a second convention.<sup>132</sup>

Madison had achieved the first of his two goals—the derailing of the second convention movement. Yet, when the appointed day for discussion of amendments arrived three weeks later, he was forced to postpone the question until June 8 to accommodate his colleagues' desire to complete work on legislation setting up federal systems of customs regulation and revenue legislation. Once again, the majority of Representatives did not share Madison's sense of urgency.

When June 8 arrived, Madison claimed recognition from the floor to fulfill his promise to introduce the subject of amendments. He was confident of success, having worked hard to prepare a set of proposals which would satisfy the goals that he and the President had set forth in Washington's inaugural address. With the people's expectations about to be gratified, and the support of the President, how could he fail?

Madison's list of amendments included none that would limit the necessary powers of the general government.<sup>133</sup> The Virginian aimed, instead, to state basic principles of republican government and to protect individual rights. Virtually every one of the twelve amendments<sup>134</sup> ultimately proposed by Congress in 1789—including the compensation amendment demanded by Virginia, New York, and North Carolina—has roots in Madison's list.<sup>135</sup> He also included four provisions, derived from the Virginia Declaration of Rights and the American Declaration of Independence, affirming the proposition that government is derived from the people and is instituted to protect their liberty, safety, and happiness. Madison stated that the people have an "indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be

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of the Bill of Rights, *supra* note 79, at 18, 45. Kaminski misstates the New York Representative's name as Nathaniel Lawrence. The text of the application is reprinted in *Creating the Bill of Rights*, *supra* note 100, at 237-38.

130. See *The Daily Advertiser*, May 6, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 57-58.

131. See *id.* at 58.

132. See *The Congressional Register*, May 5, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 60-62.

133. See Madison Resolution (June 8, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 11-14.

134. See Amendments to the Constitution (Sept. 28, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 3-4.

135. See the table in Donald S. Lutz, *A Preface to American Political Theory* 56-60 (1992).

found adverse or inadequate to the purposes of its institution."<sup>136</sup> Finally, he included one other amendment not derived from any proposal—formal or informal—made during the ratification controversy: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>137</sup>

As for the compensation amendment, Madison deemed it worthy of addition precisely because, and apparently only because, the conventions of three states had demanded it. His version closely tracked their proposals:

*Thirdly.* That in article Ist, section 6, clause I, there be added to the end of the first sentence, these words, to wit: "But no law varying the compensation last ascertained shall operate before the next ensuing election of representatives."<sup>138</sup>

Madison's discussion of this proposal was offhand, at best, drawing on remarks that he had made at the Federal Convention two years before:

There are several lesser cases enumerated in my proposition, in which I wish also to see some alteration take place. That article which leaves it in the power of the legislature to ascertain its own emolument is one to which I allude. I do not believe this is a power which, in the ordinary course of government, is likely to be abused, perhaps of all the powers granted, it is least likely to abuse; but there is a seeming impropriety in leaving any set of men without controul [sic] to put their hand into the public coffers, to take out money to put in their pockets; there is a seeming indecorum in such power, which leads me to propose a change. We have a guide to this alteration in several of the amendments which the different conventions have proposed. I have gone therefore so far as to fix it, that no law, varying the compensation, shall operate until there is a change in the legislature; in which case it cannot be for the particular benefit of those who are concerned in determining the value of the service.<sup>139</sup>

Finally, Madison discussed the form that the amendments should take. He proposed that Congress rewrite the Constitution to incorporate the amendments in their appropriate places in the 1787 text. Thus, for example, the compensation amendment would have revised Article I, Section 6, and the rights-declaring amendments would have been added to

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136. Madison Resolution (June 8, 1789), *reprinted in* *Creating the Bill of Rights* *supra* note 100, at 11-12; *see* *The Daily Advertiser*, June 9, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 100, at 63-64; *Gazette of the United States*, June 10, 1789, *reprinted in id.* at 66-68; *The Congressional Register*, June 8, 1789, *reprinted in id.* at 77-86. The reported debates from all three newspapers are reprinted in *Creating the Bill of Rights*, *supra* note 100, at 63-95. For the text of the amendments Madison offered, *see id.* at 11-14. (Most legal scholars still cite to the version reprinted in 1 *Annals of Cong.* 448-59 (Joseph Gales ed., 1834). This source is based on the *Congressional Register* version).

137. Madison Resolution, *supra* note 133, at 13.

138. *Id.* at 12.

139. James Madison, Speech in the House of Representatives (June 8, 1789), *in* *The Congressional Register*, June 8, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 100, at 84.

Article I, Section 9, which codified limits on the powers of Congress.<sup>140</sup>

Two letters that Madison received at the time suggest his success in devising amendments that would meet the objectives defined in Washington's inaugural address. The first was a letter from George Washington, in which the President praised the amendments and acknowledged their importance:

As far as a momentary consideration has enable[d] me to judge, I see nothing exceptionable in the proposed amendments. Some of them, in my opinion, are importantly necessary, others, though of themselves (in my conception) not very essential, are necessary to quiet the fears of some respectable characters and well-meaning men. Upon the whole, therefore, not foreseeing any evil consequences that can result from their adoption, they have my wishes for a favorable reception in both houses.<sup>141</sup>

Washington knew that Madison would find the letter useful in persuading colleagues to adopt his position. Three weeks later, the moderate Virginia Anti-Federalist Joseph Jones wrote that the proposed amendments "are calculated to secure the personal rights of the people so far as declarations on paper can effect the purpose, leaving unimpaired the great Powers of the government."<sup>142</sup>

Madison's colleagues in the House, however, were not so agreeable or well-disposed as Washington and Jones. Congressional treatment of the amendments issue shows that, while Madison led the fight for amendments, he was by no means omnipotent. Indeed, on June 8, Madison ran into the legislative equivalent of a full-body block, as Representatives protested that the business before them (revenue and customs legislation) was too important to set aside, especially for conjectures as to what reforms the Constitution might require.<sup>143</sup>

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140. See Madison Resolution, *supra* note 133, at 12.

141. Letter from George Washington to James Madison (May 31, 1789), *reprinted in* Creating the Bill of Rights, *supra* note 100, at 242.

142. Letter from Joseph Jones to James Madison (June 24, 1789), *reprinted in* Creating the Bill of Rights, *supra* note 100, at 253.

143. The stark recitation of motions in the *House Journal* conveys little of the atmosphere of the debate in the House on Madison's amendments. It is very difficult, perhaps impossible, to recapture that atmosphere or the exact structure and terms of the debates themselves. Even though three New York City newspapers published reports of the House debates, see Creating the Bill of Rights, *supra* note 100, at 55-56, the accounts are by no means complete or verbatim despite the tendency of legal scholars to assume their completeness.

Legislative reporting was in its infancy in the early national period. Only in 1787-1788 (with widespread newspaper coverage of the ratification debates) had citizens, politicians, and the "news media" of the time begun to appreciate the value and interest of newspaper coverage of legislative business. Even with the newfound public taste for political news, coverage of congressional proceedings was more of an oddity in 1789 than it might seem to us today. The Senate did not open its debates to the public and the press until the Gallatin election controversy of 1795, and Representatives made periodic protests against the perceived bias and inaccuracy of the reporters. Occasionally, Congressmen even made requests to expel reporters from debates and hearings. See generally Daniel Hoffman, *Governmental Secrecy and the Founding Fathers: A Study in Constitutional Con-*

After a complex series of postponements and parliamentary maneuvers,<sup>144</sup> the Representatives spent most of their time on June 8 squabbling over whether amendments were necessary, rather than focusing on the terms of Madison's proposal. James Jackson of Georgia argued that amendments were not needed at all; both he and Connecticut's Roger Sherman stressed the newness of the government authorized by the Constitution and protested that there had not been enough time to determine what, if any, defects in the new system required amendment.<sup>145</sup>

Madison stuck to his position, protesting, "I am sorry to be accessory to the loss of a single moment of time by the house."<sup>146</sup> In defense of his motion, he reminded his colleagues of the public's expectations, and of his and his allies' promises in 1788:

If I thought I could fulfill the duty which I owe to myself and my constituents, to let the subject pass over in silence, I most certainly should not trespass upon the indulgence of this house. But I cannot do this . . . . And I do most sincerely believe that if congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence on the public councils, and prepare the way for a favorable reception of our future measures. It appears to me that this house is bound by every motive of prudence, not to let the first session pass over without proposing to the

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trols (1981) (discussing the early history in America of the public's "right to know"); J.R. Pole, *The Gift of Government* (1983) (discussing "right to know"); Langford, *supra* note 14, at 526, 705-06 (British practice); P.D.G. Thomas, *The Beginnings of Parliamentary Reporting in Newspapers, 1768-1774*, 74 Eng. Hist. Rev. 623, 623-36 (1959) (same).

These protests were rooted in a related problem that complicates historical investigation of the First Congress. Technical and practical obstacles such as bad acoustics of the House chamber and the lack of a practiced, reliable system of shorthand reporting prevented even the most assiduous and responsible reporter of debates from recording anything more than fragments of a typical legislative session. Thus, we should keep these cautions firmly in mind as we sift through the surviving evidence of the First Congress.

For a useful article debunking *legal* scholars' assumptions about the character and reliability of both Madison's notes and the surviving records of debates in the First Congress, see James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 1-39 (1986). Madison himself was perhaps the greatest American recorder of debates of his time, as evidenced by his notes of the debates in the Federal Convention. Yet he confided to contemporaries that the rigors of his self-assumed task almost killed him, and he never again made the attempt. Modern scholars have concluded that Madison managed to preserve only a fraction of the actual debates in the Convention. James H. Hutson of the Library of Congress, for example, has estimated the proportion as about 10%. Hutson's strictures on these sources do not impeach their credibility or usefulness for *historical* inquiry, though he does not acknowledge this point, and indeed seems unduly harsh on Thomas Lloyd, the journalist who compiled the most complete surviving record of the House debates in the First Congress. See *Creating the Bill of Rights*, *supra* note 100, at 55-56 (discussion of Thomas Lloyd as parliamentary reporter).

144. The legislative history of the Bill of Rights is traced in *Creating the Bill of Rights*, *supra* note 100, at 1-53.

145. See *The Congressional Register*, June 8, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 100, at 70-72 (James Jackson), 73-74 (Roger Sherman).

146. James Madison, Speech of June 8, 1789, *in* *The Congressional Register*, June 8, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 100, at 77.

state legislatures some things to be incorporated into the constitution, as will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them.<sup>147</sup>

Madison emphasized four objectives: convincing the people of the trustworthiness of the new government; bringing the dissenting states of North Carolina and Rhode Island back into the Union; redeeming a campaign promise made by Federalists throughout the nation; and remedying a real defect in the Constitution. He then presented the amendments he thought necessary and explained and defended each in turn. It was in this speech that Madison conferred on these amendments the name, so powerful in political controversy at the time and so generally revered afterward: "The first of these amendments, relates to what may be called a bill of rights."<sup>148</sup>

The House ended its first debate on amendments by agreeing to set down Madison's proposals for discussion at a later date by the Committee of the Whole House on the State of the Union. There matters rested for six weeks, until July 21, when Madison sought to move that the House go into Committee of the Whole House to take up his amendments. Upon this motion another wrangle ensued over the proper procedure for dealing with the amendments.

The House finally voted, thirty-four to fifteen, to appoint a select committee, with one member from each state, to report a set of draft amendments.<sup>149</sup> The committee worked quickly, producing a report listing seventeen amendments, which on July 28 was ordered printed for the full House.<sup>150</sup> Six days later, on August 3, Madison successfully moved to have the Committee of the Whole House take up the committee report on August 12.

Without explanation, the House delayed this action by a day, but on August 13, the Committee of the Whole House began its detailed debate on the proposed amendments, clause by clause, concluding on August 18. The next day, the House began formal debate, reviewing the accomplishments of the previous week. Throughout this period, Anti-Federalist Representatives pleaded for amendments restricting the powers of the federal judiciary and preserving state authority over congressional elections. The House rejected these requests; the Representatives were aware of the need to walk a narrow line between protecting the rights of individuals and damaging the powers of the government. Further, they understood the challenge of drafting a declaration of rights that would be

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147. *Id.* at 77-78.

148. *Id.* at 80.

149. This committee included Madison, Jacob Vining of Delaware, Abraham Baldwin of Georgia, Roger Sherman of Connecticut, Nicholas Gilman of New Hampshire, George Clymer of Pennsylvania, Egbert Benson of New York, Benjamin Goodhue of Massachusetts, Elias Boudinot of New Jersey, George Gale of Maryland, and Aedanus Burke of South Carolina. See *Creating the Bill of Rights*, *supra* note 100, at 6.

150. For the text of this report, with annotation indicating subsequent changes made by the House in August, see *id.* at 29-33.

neither too constricted nor too expansive.<sup>151</sup>

Once it became clear that the House would propose amendments of some sort, the discussion shifted to the choice of words and phrases, as the Representatives groped for the right constitutional language. The major characteristic of their draftsmanship was haste. For example, what is today one of the most controversial clauses in the Bill of Rights—the Fourth Amendment's prohibition against unreasonable searches and seizures—got through the House with only a few minutes of debate.<sup>152</sup>

The compensation amendment made its only extended appearance in the debates of Congress during this stage of the process. On July 28, 1789, the committee named by the House to frame proposed amendments delivered its report. Its treatment of the compensation proposal was as follows:

ART. I, SEC. 6 — Between the words "*United States*" and "*shall in all cases*" strike out "*they,*" and insert, "But no law varying the compensation shall take effect until an election of Representatives shall have intervened. The members."<sup>153</sup>

On August 14, 1789, in debate in Committee of the Whole House, this resolution was the focus of a listless and desultory discussion. The four participants were all leading members of the House; three of them—Theodore Sedgwick of Massachusetts, Jacob Vining of Delaware, and James Madison of Virginia—were Federalists, while only one, Elbridge Gerry of Massachusetts, was an Anti-Federalist. Sedgwick indicated his familiarity with the practices of British candidates for the House of Commons of manipulating the wages questions before the custom of paying wages died out altogether; Gerry sought to use the compensation amendment as a basis to revive Anti-Federalist concerns about the sufficiency of representation in the House, a point that Madison was quick to refute; and Vining, the spokesman for the committee, once more indicated the matter-of-fact nature of the proposition in the minds of most Representatives. The entire surviving record is given below:

#### MR. SEDGWICK

Thought much inconvenience, and but very little good would result from this amendment, it might serve as a tool for designing men, they might reduce the wages very low, much lower than it was possible for any gentleman to serve without injury to his private affairs, in order to procure popularity at home, provided a diminution of pay was looked upon as a desirable thing; it might also be done in order to prevent men

151. See John P. Kaminski, *The Making of the Bill of Rights: 1787-1792*, in Contexts of the Bill of Rights, *supra* note 79, at 47-49.

152. See Debate in the Committee of the Whole House (August 17, 1789), in *Gazette of the United States*, August 22, 1789, *reprinted in* Creating the Bill of Rights, *supra* note 100, at 181; The Congressional Register, August 17, 1789, *reprinted in* Creating the Bill of Rights, *supra* note 100, at 187-88.

153. House Committee Report (July 28, 1789), *reprinted in* Creating the Bill of Rights, *supra* note 100, at 30.



of shining and disinterested abilities, but of indigent circumstances, from rendering their fellow citizens those services they are well able to perform, and render a seat in this house less eligible than it ought to be.

#### MR. VINING

Thought every future legislature would feel a degree of gratitude to the preceding one, which had performed so disagreeable a task for them. The committee who had made this a part of their report, had been guided by a single reason, but which appeared to them a sufficient one, there was, to say the least of it, a disagreeable sensation, occasioned by leaving it in the breast of any man to set a value upon his own work; it is true it was unavoidable in the present house, but it might, and ought to be avoided in future; he therefore hoped it would obtain without any difficulty.

#### MR. GERRY

Would be in favor of this clause, if they could find means to secure an adequate representation, but he apprehended that would be considerably endangered, he should therefore be against it.

#### MR. MADISON

Thought the representation would be as well secured under this clause as it would be if it was omitted; and as it was desired by a great number of the people of America, he should consent to it, though he was not convinced it was absolutely necessary.

#### MR. SEDGWICK

Remarked once more, that the proposition had two aspects which made it disagreeable to him, the one was to render a man popular to his constituents, the other to render the place ineligible to his competitor.

He thought there was very little danger of an abuse of the power of laying their own wages, gentlemen were generally more inclined to make them moderate than excessive.<sup>154</sup>

The reporter who recorded this unedifying debate then observed, "The question being put on the proposition, it was carried in the affirmative, 27 for, and 20 against it."<sup>155</sup>

At this point the House, at the urging of Roger Sherman, abandoned Madison's idea of incorporating the amendments in the constitutional text. Sherman had two reasons for his demand. His first indicated his respect for the canons of legal draftsmanship:

We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heteroge-

154. Debates in the House of Representatives (Aug. 14, 1789), in *The Congressional Register*, Aug. 14, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 149-50.

155. *Id.* at 150.

neous articles; the one contradictory to the other. Its absurdity will be discovered by comparing it with a law: would any legislature endeavor to introduce into a former act, a subsequent amendment, and let them stand so connected. When an alteration is made in an act, it is done by way of supplement; the latter act always repealing the former in every specified case of difference.<sup>156</sup>

Sherman's second reason, one of principle, was grounded in his understanding of the Constitution as an exercise of the constituent power by the people of the United States through their delegates in the Federal Convention and the state ratifying conventions:

The constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the state governments; again all the authority we possess, is derived from that instrument [the Constitution]; if we mean to destroy the whole and establish a new constitution, we remove the basis on which we mean to build.<sup>157</sup>

Despite the resistance of Madison and some of his colleagues,<sup>158</sup> the House adopted Sherman's point of view. This vote set a precedent for all future exercises of the amending power. The House's decision, setting amendments aside from the rest of the Constitution, also led to the placement of the Bill of Rights at the head of the post-1787 text of the document, thus ensuring its primacy in popular imagination.<sup>159</sup>

On August 24, the House endorsed the seventeen draft amendments, including the following text of the compensation amendment:

No law varying the compensation to the members of Congress, shall take effect, until an election of Representatives shall have intervened.<sup>160</sup>

Once the amendments made their way up the stairs of Federal Hall to the Senate the next morning, however, our detailed knowledge of the debates evaporates. Unlike the House, which had a visitors' gallery and several self-employed reporters recording the proceedings, the Senate met behind closed doors. The only record of the Senate's actions appears in its barebones Legislative and Executive Journals, which record mo-

156. Debates in the House of Representatives (Aug. 13, 1789), in *The Congressional Register*, Aug. 13, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 117; see also Schwartz, *supra* note 104, at 173-74 (describing debates over the proposed location of the amendments in the Constitution).

157. Debates in the House of Representatives (Aug. 13, 1789), in *The Congressional Register*, Aug. 13, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 117. On the concept of the constituent power, see Willi Paul Adams, *The First American Constitutions* 63-65, 96-98 (1980).

158. Debates in the House of Representatives (Aug. 13, 1789), in *The Congressional Register*, Aug. 13, 1789, reprinted in *Creating the Bill of Rights*, *supra* note 100, at 105, 109, 118-19, 126.

159. See Morris, *supra* note 23, at 318.

160. House Resolution and Articles of Amendment (Aug. 24, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 38.

tions and votes but not debates or individual speeches.<sup>161</sup> We do know that the Senate, which had only two Anti-Federalist members out of twenty-two, was much less responsive to the desirability of amendments than the House of Representatives; for, despite its Federalist majority, the House had a higher proportion of Anti-Federalist members from key states such as Virginia, New York, Massachusetts, and South Carolina.

The amendments produced by the Senate on September 14 embodied the Senators' coolness. The Senate reduced the House's proposals from seventeen to twelve and significantly weakened them. For example, the House version of the religious-liberty provision clearly deprived Congress of any power over religion:

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.<sup>162</sup>

The Senate's version only barred Congress from creating an established church like the Church of England:

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . .<sup>163</sup>

By contrast, the Senate only slightly edited the language of the compensation amendment proposed by the House:

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.<sup>164</sup>

Although Roger Sherman declared that, in his view, the amendments had been "altered for the Better,"<sup>165</sup> Madison was angered by the Sen-

161. See 1, 2 Documentary History of the First Federal Congress 1789-1791 (Linda Grant De Pauw et al. eds., 1972, 1974) (publishing the Senate Legislative and Executive Journals).

To the extent that we know anything of the Senate's debates, we are indebted to William Maclay of Pennsylvania. A veteran of his state's rough-and-tumble politics, Maclay was a moderate Federalist from the western part of his state, elected to counterbalance Philadelphia financier Robert Morris. He kept an acerbic and entertaining journal that is by far our finest contemporary account of the launching of the new government. Unfortunately, like so many middle-aged men of his day (Maclay was in his early fifties), the Pennsylvanian was a man of variable health and a hypochondriac. Just as the Senate was about to begin debate on the amendments, Maclay experienced one of his periodic bouts of illness and missed the sessions at which the amendments were reviewed, clause by clause. See 9 Documentary History of the First Federal Congress 1789-1791 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (publishing the diary of William Maclay and other notes on Senate debates).

162. House Resolution and Articles of Amendment (Aug. 24, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 38.

163. Articles of Amendment, as Agreed to by the Senate (Sept. 14, 1789), reprinted in *Creating the Bill of Rights*, *supra* note 100, at 48. The Senate also condensed the religious-liberty clauses with those clauses protecting freedom of speech, press, assembly, and petition; the House accepted this revision.

164. *Id.*

165. Letter from Roger Sherman to Samuel Huntington (Sept. 17, 1789), in *Creating the Bill of Rights*, *supra* note 100, at 297.

ate's handiwork, or so Senator Paine Wingate of New Hampshire reported to his colleague John Langdon: "As to amendments to the Constitution Madison says he had rather have none than those agreed to by the Senate."<sup>166</sup> Representative Fisher Ames of Massachusetts noted that Madison believed that the Senate version lacked the "sedative Virtue" of the original House proposals, and Ames fretted that a "contest on this subject between the two houses would be very disagreeable."<sup>167</sup>

A conference committee of three Representatives and three Senators<sup>168</sup> restored many of the twelve proposed amendments to the form favored by the House; the House approved the final list of twelve on September 24, 1789, and the Senate followed suit in two votes on September 25 and 26.<sup>169</sup> The House had no objection to the Senate's reworking of the compensation amendment. Clerks prepared fourteen engrossed copies; one was sent to each of the thirteen states and the fourteenth was retained in the files of the federal government.<sup>170</sup>

As we have seen, Madison originally arranged what we now know as the Bill of Rights by reference to various provisions of the Constitution needing revision. Even in the final form as proposed to the states, these amendments appear in the order of the provisions they were intended to modify.

Of the twelve amendments proposed by Congress, the first two had nothing to do with rights. They pertained to the structure of Congress (outlined in the first sections of Article I), responding to Anti-Federalist critiques of that institution. The remaining ten amendments were intended to revise Sections 9 and 10 of Article I, which established limitations on the substantive powers of federal and state governments, respectively.

The first—the reapportionment amendment—would have altered Article I, Section 2, by adding a rigid formula tying the size of the House of Representatives to increases in population.<sup>171</sup> It was designed to protect the principles of representation deemed necessary to protect the people against any danger to their liberties from the actions of their elected rep-

166. Letter from Paine Wingate to John Langdon (Sept. 17, 1789), in *Creating the Bill of Rights*, *supra* note 100, at 297.

167. Letter from Fisher Ames to Caleb Strong (Sept. 15, 1789), in *Creating the Bill of Rights*, *supra* note 100, at 297.

168. Madison, Sherman, and Vining were the House members of the conference committee; Oliver Ellsworth of Connecticut, Charles Carroll of Maryland, and William Paterson of New Jersey were the Senate members. See *Creating the Bill of Rights*, *supra* note 100, at 10-11.

169. See *id.* at 3-4, 11.

170. Eleven of these official engrossed copies survive in various public and private repositories, including state archives, the Library of Congress, and the New York Public Library. What lawyers would dub the "file copy" is on permanent display at the National Archives in Washington, D.C.

171. For the text of the reapportionment amendment, see *Creating the Bill of Rights*, *supra* note 100, at 3.

representatives.<sup>172</sup> This proposal provided that there should be one Representative for every 30,000 people until the House had 100 members, after which there would be one Representative for every 40,000 people until the House grew to 200 members. Congress then would establish a new ratio, making sure that there was no more than one Representative for every 50,000 people. Two centuries later, when the nation's population exceeds 250,000,000, the proposed amendment would mandate a House of more than 5,000 members rather than the present 435.<sup>173</sup> The proposal now seems a quaint anachronism that failed to anticipate the growth of the nation.

The second was the compensation amendment.

### III. SUSPENDED ANIMATION

#### A. *Ratifying the Amendments*

Anti-Federalists divided over the amendments proposed by Congress. Some, who had objected to the Constitution because it lacked a declaration of rights, welcomed the amendments and abandoned their distrust of the new government. Others, who wanted to restrict the general government's powers over taxation and regulation of interstate and foreign commerce, charged that the amendments produced by Congress only distracted the people from the serious flaws still present in the Constitution. Federalists rejected these arguments with scorn, pointing out that those who had painted themselves as friends of liberty now showed their true colors by opposing the Bill of Rights.

The ratification process started quickly; several states adopted the amendments almost as soon as the engrossed copies arrived.<sup>174</sup> For example, North Carolina, one of the two hold-out states, ratified the amendments on December 22, 1789, one month after the state's second ratifying convention had adopted the Constitution (194 to 77).<sup>175</sup> Rhode Island was more stubborn. It took veiled threats of trade reprisals from Congress, the refusal of President Washington to visit the state during his fall 1789 tour of New England, and talk of secession from the Federalists of Providence and Newport before the state at last called a ratifying convention to assemble in April 1790. The convention took nearly a month to adopt the Constitution by a two-vote margin (34 to 32),<sup>176</sup> with

172. See Bowling, *supra* note 80, at 229, 236.

173. See Creating the Bill of Rights, *supra* note 100, at 3.

174. Those who are frustrated by the lack of reliable documentary evidence on the intent of the framers of the Bill of Rights will be even more put out by an examination of the scanty evidence of the intent of the ratifiers of the amendments. For the best available examination of the amendments' adoption, see *The Bill of Rights and the States* (Patrick T. Conley & John P. Kaminski eds., 1992).

175. See William S. Price, Jr., "There Ought to Be a Bill of Rights": North Carolina Enters a New Nation, in *The Bill of Rights and the States*, *supra* note 174, at 424-42.

176. See Patrick T. Conley, *Rhode Island: Laboratory for the "Lively Experiment,"* in *The Bill of Rights and the States*, *supra* note 174, at 123-61.

dozens of recommended amendments; less than two weeks later, on June 11, the Rhode Island legislature adopted the Bill of Rights.<sup>177</sup>

The amendments bitterly disappointed Anti-Federalists in the Virginia legislature because none of them acted to rein in the powers of the general government over taxation and commerce. Following the lead of their commander, Patrick Henry, they blocked action in the legislature's upper house for months.

By March 4, 1791, nine states had ratified ten of the twelve proposed amendments, leaving the proposals one state short of the required three-fourths. On that date, Vermont joined the Union. The problem was that, with Vermont's addition to the Union (and even its ratification of the Bill of Rights on November 3), the number of necessary state ratifications automatically rose from ten (out of thirteen) to eleven (out of fourteen). With no word from Connecticut, Massachusetts, or Georgia, the focus shifted back to Virginia.<sup>178</sup> Supporters of the amendments in the Virginia legislature revived them, mocking the diehard Anti-Federalists as obstacles to the amendments they had demanded years before. Caught in an uncomfortable political predicament, the Anti-Federalists at last gave in to overwhelming pressure. On December 15, 1791, Virginia ratified all but the first of the twelve proposed amendments, and added the third through the twelfth to the Constitution as the Bill of Rights.<sup>179</sup>

Between 1789 and 1791, the first proposed amendment was ratified by ten states and rejected by one.<sup>180</sup> The compensation amendment was adopted by only six states,<sup>181</sup> with five rejecting it,<sup>182</sup> making its ratifica-

177. *See id.* at 153.

178. There is no evidence that Georgia completed action to adopt the Bill of Rights—due in part to the destruction of many of the state's early records during and after the Civil War. It was formerly thought that Federalists in Connecticut and Massachusetts blocked consideration of the amendments or engineered their rejection, but one modern authority maintains that legislative inattention resulted in Massachusetts's failure to adopt a formal instrument of ratification even though both houses of the legislature approved the Bill of Rights in 1790. *See* A History of the American Constitution 244 (Daniel A. Farber & Suzanna Sherry eds., 1990). *Contra* John M. Murrin, *From Liberties to Rights: The Struggle in Colonial Massachusetts, in The Bill of Rights and the States*, *supra* note 174, at 63, 97 (Massachusetts legislatures rejected amendments).

179. *See* Warren M. Billings, "That All Men Are Born Equally Free and Independent": *Virginians and the Origins of the Bill of Rights*, in *The Bill of Rights and the States*, *supra* note 174, at 362-66. In 1939, to mark the sesquicentennial of the Bill of Rights, the legislatures of Massachusetts, Connecticut, and Georgia ratified the first ten amendments. *See* John P. Kaminski, *The Making of the Bill of Rights: 1787-1792*, in *Contexts of the Bill of Rights*, *supra* note 79, at 18, 54-57.

180. New Jersey, Maryland, North Carolina, South Carolina, New Hampshire, New York, Rhode Island, Vermont, Virginia, and Pennsylvania supported the amendment. Delaware rejected the amendment. *See* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, in 2 Annual Report of the American Historical Association for the Year 1896, app. A at 320 (1897) (calendar of amendments No. 295).

181. Maryland, North Carolina, South Carolina, Delaware, Vermont, and Virginia. *See id.* at 34-35, app. A at 317 (calendar of amendments No. 243).

182. New Jersey (November 20, 1789); New Hampshire (January 25, 1790); Pennsylvania (March 10, 1790); New York (March 27, 1790); and Rhode Island (June 15,

tion impossible.

### B. *Stirrings in Limbo*

As Congress worked in its desultory and hesitant fashion to frame amendments to the Constitution, it spent about as much time and far more energy on an issue closer to its members' hearts: establishing the rate of compensation for Senators and Representatives. Bitter argument in the summer and fall of 1789 resulted in a statute establishing that Senators and Representatives were to be paid six dollars per day of actual attendance at legislative sessions, as well as six dollars per day for time spent traveling to and from the seat of the federal government. Effective March 4, 1795, Senators would receive seven dollars per day—a discrimination justified by its advocates as necessary considering the longer term of service of Senators and their supposed greater distinction.<sup>183</sup>

Thereafter, Congress altered its compensation only gradually, often letting years, even decades, go by before attempting a new adjustment of its pay.<sup>184</sup> On March 8, 1817, Congress attempted a radical increase of its salary, shifting from a per diem to a per annum rate of compensation.<sup>185</sup> Public outcry prompted Congress to repeal the salary legislation, which had become a lightning-rod for criticism. So traumatized was Congress by the public reaction that it did not attempt to enact new salary legislation for nearly forty years. Moreover, there was a flurry of proposed amendments—some introduced by members of Congress, others adopted by state legislatures and then submitted to Congress by friendly Senators or Representatives—similar in substance to the 1789 compensation amendment, with three more following in 1822.<sup>186</sup> Despite the repeal, the 1818 elections resulted in the defeats of several leading Senators and Representatives (including Daniel Webster, then a Representative from New Hampshire, who did not return to Congress until 1823).

Only in 1855 was Congress emboldened to alter the basis of its com-

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1790). *See id.* It is ironic that New York rejected the amendment that its convention had done so much to bring about. For subsequent action by New Jersey and New Hampshire, see *infra* note 214.

183. *See* 6 *Documentary History of the First Federal Congress 1789-1791*, at 1833-35 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) (text of the legislative salaries statute); 6 *id.* at 1835-45 (legislative history); 11 *Documentary History of the First Federal Congress 1789-1791*, at 1136-39, 1149-56, 1174-89, 1399, 1472-74 (Charlene Bangs Bickford et al. eds., 1992) (debates in the House of Representatives). For executive salaries, see Leonard D. White, *The Federalists: A Study in Administrative History* 291-302 (1948).

184. The figures in this section are taken from *Congressional Quarterly's Guide to Congress 635-49*, tbl. at 642 (4th ed. 1991) [hereinafter *Guide to Congress*]. Ironically, this otherwise authoritative reference work makes no mention of the 1789 compensation amendment.

185. *See id.* at 636.

186. *See* Ames, *supra* note 180, at 34-35, app. A at 333-34, 337 (listing five separate resolutions received in late 1817 and early 1818, and three more in 1822).

pensation to an annual salary, which it then held in place for ten years. In 1866, Congress enacted legislation increasing its salary by two-thirds,<sup>187</sup> which continued in effect until March 3, 1873, when Congress attempted another salary increase. The 1873 "Salary Grab" Act<sup>188</sup> authorized an increase at the end of the Forty-second Congress (1871-1873) to \$7,500, retroactive to the beginning of that Congress. The increase thus provided all members with a \$5,000 windfall—\$2,500 per year for each of the previous two years.<sup>189</sup>

The public outcry against the "salary grab" was, if anything, even more explosive than that experienced in 1815. Senator Robert C. Byrd writes in his history of the Senate, "Startled by the ferocity of the outcry, members rushed to return their back pay to the Treasury or donate it to charity."<sup>190</sup> Legislators in Ohio found a novel way of signalling their outrage and disgust with the national legislature. On May 6, 1873, the Ohio General Assembly adopted three resolutions against the Salary Grab Act. The first called for a constitutional amendment prohibiting retroactive pay increases for Congress, which it termed "vicious and corrupting in the tendering"; the second ratified the 1789 compensation amendment; the third demanded the repeal of the Salary Grab Act, which it declared "unnecessary, uncalled for, and distasteful to the people of Ohio, and it is believed of the whole Union . . ."<sup>191</sup> Although Ohio's protest gesture helped to shame Congress into repealing the Salary Grab Act, no other state ratified the 1789 compensation amendment at that time.

As in 1817-1818, members scrambled to avoid the political fallout from the 1873 legislation. In the first two months of the first session of the Forty-third Congress (1873-1875), five proposals were introduced in Congress to amend the compensation clause of the Constitution; these proposals aimed to revive the substance of the 1789 compensation amendment without running the risk that the amendment already proposed by Congress but resting in limbo for over eight decades might be given new life.<sup>192</sup> And, in January 1874, Congress voted to repeal the increase. Voters' wrath, however, in the 1874 congressional elections toppled members wholesale.<sup>193</sup>

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187. See Guide to Congress, *supra* note 184, at 636-37.

188. See *id.*; 1 Byrd, *supra* note 9, at 309-10. For a more general discussion, see 2 *id.* at 347-59.

189. See *supra* note 188.

190. 2 Byrd, *supra* note 9, at 355.

191. 70 Ohio Laws 409-10, May 6, 1873, reprinted in 138 Cong. Rec. S6836 (daily ed., May 19, 1992) (documents supplementing remarks of Senator Byrd). Gregory Watson notes that this reprint was the first time that Ohio's ratification was ever published in the Congressional Record or in any other formal journal kept by Congress. Telephone Interview with Gregory D. Watson (June 24, 1992); see Miller & Dewey, *supra* note 5, at 98-99.

192. See Ames, *supra* note-180, at 35, app. A at 395.

193. See 2 Byrd, *supra* note 9, at 355.



illustrates the gradual transition from part-time to full-time government and the emergence of politics as a distinct, full-time career—two developments largely unexamined, and even unrecognized, by most citizens. In 1907, Congress increased its annual salary to \$7,500—a rate it maintained until 1925, when it voted an increase to \$10,000 per year. During the Great Depression, Congress voted twice to reduce its salary—to \$9,000 in 1932 and to \$8,500 in 1933. These were the last pay cuts that Congress gave itself. The following table illustrates further Congressional pay increases, many of which were accompanied by modifications or increases of travel allowances, tax-exempt and taxable expense allowances, and rules at first authorizing but eventually eliminating outside honoraria:

1935-1947:	\$10,000	per year
1947-1955:	\$12,500	per year
1955-1965:	\$22,500	per year
1965-1969:	\$30,000	per year
1969-1975:	\$42,500	per year
1975-1977:	\$44,600	per year
1977-1979:	\$57,500	per year
1979-1982:	\$60,662.50	per year
Dec. 1982-1983:	\$69,800	per year (H)
July 1983:	\$69,800	per year (S)
1984:	\$72,600	per year
1985-1986:	\$75,100	per year
Jan. 1987:	\$77,400	per year
Mar. 1987-1989:	\$89,500	per year
1990:	\$96,600	per year (H)
	\$98,400	per year (S)
Jan. 1991:	\$125,100	per year (H)
	\$101,900	per year (S)
Aug. 1991:	\$125,100	per year (S) <sup>194</sup>

As congressional salaries and perquisites mounted, public resentment of Congress grew. So, too, did the circumspection of Senators and Representatives, who sought to develop increasingly subtle and invisible ways of ensuring that congressional salaries would continue to increase, while avoiding the politically risky method of simply voting for pay-raise legislation. In recent years, Congress has experimented with independent commissions—in the apparent hope that an independent commission's recommendation will strike the electorate as more nonpartisan and reasonable than direct action by Congress. In 1955, for example, the increase recommended by the Commission on Judicial and Congressional Salaries (established by Congress in 1953) was approved by a vote of Congress.<sup>195</sup> In 1967, Congress set up the President's Commission on Executive, Legislative, and Judicial Salaries, which was to make recom-

194. See Guide to Congress, *supra* note 184, at 637-49.

195. See *id.*

mendations every four years that would take effect unless the Senate or the House adopted a resolution blocking the proposed increase.<sup>196</sup> In 1975, Congress voted to make its members eligible for cost-of-living-adjustments (COLAs) like those given to other federal employees—but members still would have to vote on the record to authorize COLAs; in 1981, Congress adopted methods to dispense with the need for on-the-record votes to accept COLAs.<sup>197</sup> After the Supreme Court's decision in *INS v. Chadha*,<sup>198</sup> striking down legislative vetoes, Congress reconfigured its 1967 legislation to provide that both the House and the Senate had to adopt a resolution disapproving a pay increase (subject to veto by the President) within thirty days of the date the President submits his budget.<sup>199</sup>

Senator Robert C. Byrd concluded his review of the history of congressional salaries with a melancholy observation:

[W]e will undoubtedly continue to struggle with the salary issue as Congress moves into its third century. It is an issue that has, from the beginning, borne the curse of political grandstanding, posturing, hypocrisy, and demagoguery—by members, the news media, and others—thus feeding public opposition to congressional pay increases, and, in all probability, it will continue to do so.<sup>200</sup>

Thus, as Senator Byrd noted, the public mood was ripe for a revival of the 1789 compensation amendment—a proposal that he welcomed on the merits, but the validity of which he questioned on constitutional grounds.<sup>201</sup>

#### IV. RESURRECTION

The modern story of the ratification of the compensation amendment begins with Gregory D. Watson, an aide to Texas state senator Ric Williamson. Convinced that the amendment was still “live,” Watson waged a lonely ten-year campaign to add it to the Constitution despite the conventional wisdom—shared by most politicians, historians, and legal scholars—that the 1789 proposal was a dead letter.

In 1982, while a sophomore majoring in economics at the University of Texas-Austin, Watson was looking for a paper topic for a government course; he discovered the unratified compensation amendment of 1789, which seemed to him to have abiding relevance. Watson confirmed the ratifications by Maryland, North Carolina, South Carolina, Delaware, Vermont, and Virginia that occurred between 1789 and 1791, when the Bill of Rights was added to the Constitution and the compensation amendment seemingly passed away. But Watson also discovered Ohio's

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196. *See id.*

197. *See id.*

198. 462 U.S. 919 (1983).

199. *See* 2 Byrd, *supra* note 9, at 357-58.

200. *Id.* at 359.

201. *See id.* at 358-59.

action on the amendment in 1873.<sup>202</sup> He concluded that the 1789 amendment was still validly before the states principally because, unlike most recent proposed amendments, it has no internal time limit. Intrigued, he wrote a paper reporting and analyzing his discovery and urging that the amendment be adopted. But Watson received only a "C" from his instructor, who told him that the amendment was a dead letter and never would become part of the Constitution.

Despite the cold reception his paper received, Watson began and pursued a solitary, self-financed quest to revive the compensation amendment, encouraging state legislators throughout the United States to work for its ratification.<sup>203</sup> Beginning with Maine in 1983<sup>204</sup> and Colorado in 1984,<sup>205</sup> the states gradually responded to his arguments, and many of those legislatures that did ratify the amendment cited his point that the lack of a time limit confirms the amendment's "live" status.

Soon after the Colorado ratification, Watson discovered that Wyoming had ratified the compensation amendment six years earlier. Reviving the Ohio strategy in response to a 1977 congressional pay increase, the Wyoming legislature had acted on March 3, 1978, resolving that

the percentage increase in direct compensation and benefits was at such a high level, as to set a bad example to the general population at a time when there is a prospect of a renewal of double-digit inflation; and . . . increases in compensation and benefits to most citizens of the United States are far behind these increases to their elected Representatives . . . .<sup>206</sup>

No other state had followed Wyoming's lead, and it was only because of the coverage of the Maine and Colorado ratifications in *State Legislatures* magazine that Wyoming State Representative Mark N. Sorenson reported his state's action on the amendment.<sup>207</sup> Meanwhile, as Watson's crusade gathered momentum, conservative and liberal activists of national reputation made short-lived attempts to jump on the bandwagon.<sup>208</sup>

202. See *supra* note 191 and accompanying text.

203. The core of Watson's campaign was his updated paper. See Gregory D. Watson, *Can An Amendment To The United States Constitution Proposed by Congress in 1789, Which Has Never Been Ratified, Still Be Ratified—Even After All These Years?* (Mar. 1982, updated Nov. 1985) (unpublished manuscript, on file with *Fordham Law Review*).

204. See Miller & Dewey, *supra* note 5, at 101 n.44 (citing 111th Leg., 1st Reg. Sess., 1983 Me. Laws 2727 (April 27, 1983)).

205. See *id.* at 102 n.46 (citing H.R. Con. Res. 1008, 54th Leg., 2d Reg. Sess., 1984 Colo. Sess. Laws 1151 (April 18, 1984)).

206. Wyo. H.R.J. Res. 6 (March 3, 1978), reprinted in 138 Cong. Rec. S6836 (daily ed. May 19, 1992) (documents supplementing remarks of Senator Robert C. Byrd). Miller and Dewey report that the governor of Wyoming signed the resolution on March 6 even though the Constitution does not require him to do so. See Miller & Dewey, *supra* note 5, at 100.

207. See Miller & Dewey, *supra* note 5, at 100 n.36 (citing Mark N. Sorenson, *Wyoming ratified amendment in 1978*, 10 *State Legislatures* No. 9, at 4 (Oct. 1984)).

208. In 1987, Paul Gann, co-author (with Howard Jarvis) of California's Proposition 13 (an influential limit on state property taxes), founded a movement to submit the com-

As grounds for reviving a nearly two-hundred-year-old proposal, Watson and his allies cited the public's general and growing anger with the mechanisms by which Congress has sought to raise its salaries without going on record.<sup>209</sup> They also invoked the authority of the original authors and supporters of the amendment, particularly James Madison, arguing that history had borne out their concerns. For example, the Colorado legislature declared as part of its 1984 resolution of ratification:

Whereas, The General Assembly of the State of Colorado finds that the proposed amendment is still meaningful and needed as part of the United States Constitution and that the present political, social, and economic conditions are the same or even more demanding today than they were when the proposed amendment was submitted for its adoption . . . .<sup>210</sup>

Most scholars had dismissed the 1789 compensation amendment as a trivial backwater of constitutional law. For example, Professor Walter Dellinger of Duke University Law School commented in 1989:

I think it's clearly dead. . . . It was proposed without any time deadline. . . . There's no rule in the Constitution saying an amendment proposed by Congress expires if not ratified by a certain time. But the Supreme Court has held that the adoption of an amendment is to reflect a "contemporary consensus." Therefore, an amendment dormant for 200 years is no longer viable.<sup>211</sup>

And yet the parade of state ratifications continued:

1984:	1
1985:	5
1986:	3
1987:	4
1988:	3
1989:	7
1990:	2
1991:	1
1992:	6 <sup>212</sup>

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pensation amendment anew to more states' legislatures, and consumer activist Ralph Nader also urged its adoption. And, in the early months of 1992, freshman Republican members of the House led by John Boehner (Republican-Ohio) took up the amendment as one of their chief projects. None of these efforts made a significant contribution to the eventual success of the Twenty-seventh Amendment. Telephone Interview with Gregory D. Watson, *supra* note 191.

209. See Watson, *supra* note 203, at 3-11, 27. On that anger, see Americans to Limit Congressional Terms, Inc., *Kick the Bums Out! The Case for Term Limitations* 16, 42 (1992) [hereinafter *Kick the Bums Out!*]; Alan Ehrenhalt, *The United States of Ambition: Politicians, Power, and the Pursuit of Office* 15-16 (1992); George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* 199-200 (1992).

210. *Slumbering Proposal*, *supra* note 5, at 17 (quoting *Journal of the Senate, State of Colorado*, 54th Gen. Assembly, 2d Reg. Sess., at 966 (1984)).

211. Don Phillips, *Proposed Amendment, Age 200, Showing Life*, *Wash. Post*, March 29, 1989, at A23.

212. See *infra* note 214.

The ratification of the compensation amendment spawned several constitutional oddities of its own. For example, in only one state (for the only time in the history of the amending process) did the people have the chance to decide the amendment's fate themselves. In 1978, Idaho's legislature had adopted a resolution requiring that any proposed amendment to the Constitution be approved by a statewide referendum before the legislature could ratify it. In 1986, the state's attorney general issued an opinion declaring that the 1978 requirement was a violation of Article V, but in 1988 the state legislature directed the holding of a referendum on the compensation amendment. Once it was overwhelmingly approved by the voters, on November 8, 1988, the Idaho legislature ratified it.<sup>213</sup>

On May 7, 1992, the legislatures of Michigan and New Jersey raced to supply the needed thirty-eighth ratification. Michigan acted first; New Jersey's legislators, disappointed that they missed the honor of putting the amendment into the Constitution, nonetheless ratified the amendment as the thirty-ninth state, overturning their predecessors' decision in 1789 to reject it. Five days later, Illinois also ratified, bringing the total number of states approving the amendment to forty. Five weeks later, California boosted the total to forty-one.<sup>214</sup>

Members of Congress and constitutional scholars reacted with confusion to the news of the 1789 amendment's apparent success. For example, Professor Dellinger declared, "My own view is that Congress has no formal role to play. . . . The amendment process is completed by act of the last necessary state."<sup>215</sup> Some made a quick check to see if there were any other "unexploded time bombs" lurking in the amending process,<sup>216</sup> others continued to insist that the amendment had become a

213. Telephone Interview with Gregory D. Watson, *supra* note 191.

214. According to Watson, the following states have ratified the amendment: Maryland (December 19, 1789); North Carolina (December 22, 1789 & July 4, 1789); South Carolina (January 19, 1790); Delaware (January 28, 1790); Vermont (November 3, 1791); Virginia (December 15, 1791); Ohio (May 6, 1873); Wyoming (March 3, 1978); Maine (April 27, 1983); Colorado (April 18, 1984); South Dakota (February 21, 1985); New Hampshire (March 7, 1985); Arizona (April 3, 1985); Tennessee (May 23, 1985); Oklahoma (July 10, 1985); New Mexico (February 13, 1986); Indiana (February 19, 1986); Utah (February 25, 1986); Arkansas (March 5, 1987); Montana (March 11, 1987); Connecticut (May 13, 1987); Wisconsin (June 30, 1987); Georgia (February 2, 1988); West Virginia (March 10, 1988); Louisiana (July 6, 1988); Iowa (February 7, 1989); Idaho (March 23, 1989); Nevada (April 26, 1989); Alaska (May 5, 1989); Oregon (May 19, 1989); Minnesota (May 22, 1989); Texas (May 25, 1989); Kansas (April 5, 1990); Florida (May 31, 1990); North Dakota (March 25, 1991); Missouri (May 5, 1992); Alabama (May 5, 1992); Michigan (May 7, 1992); New Jersey (May 7, 1992); Illinois (May 12, 1992); California (June 26, 1992). Telephone Interviews with Gregory D. Watson (June 24, 1992 & September 24, 1992). Watson notes several inaccuracies in the list prepared by the Archivist. See Letter from Don W. Wilson, Archivist of the United States, to the Senate and House of Representatives (May 17, 1992), *reprinted in* 138 Cong. Rec. S6828 (daily ed. May 19, 1992).

215. Bill McAllister, *Across Two Centuries, a Founder Updates the Constitution*, Wash. Post, May 14, 1992, at A1, A5 (quoting Professor Walter Dellinger).

216. The "unexploded time bombs" are the following: the 1789 reapportionment amendment, which in 1992 would produce a House of Representatives of more than

dead letter some time between September 26, 1789, when Congress proposed it to the states, and May 7, 1992.<sup>217</sup>

Attention focused on the Archivist of the United States, who since 1984 has had the statutory responsibility for certifying amendments.<sup>218</sup> The task of certifying an amendment extends only to determining whether the state certificates of ratification meet the requirements of Article V and whether the certificates set forth congruent texts of the amendment. Declaring these requirements met, Archivist Don W. Wilson ruled the Twenty-seventh Amendment ratified, on May 18, 1992. A day later, it was published in the *Federal Register*, the official repository of statutes, regulations, and constitutional amendments.<sup>219</sup> Wilson's certification persuaded most constitutional scholars to accept the amendment.

Stunned by the adoption of the amendment, the leadership of the House and the Senate seesawed back and forth. Speaker of the House Thomas S. Foley (Democrat-Washington), who at first was dubious about the validity of the amendment, then declared that, if the Archivist was willing to certify it, he would accept its adoption. At the same time, however, he publicly toyed with the possibility of holding hearings on the amending process—which in the end never took place.

The Senate's President *pro tempore*, Robert C. Byrd (Democrat-West Virginia), maintained that Congress retained its prerogative to determine whether and when an amendment is validly ratified. Senator Charles Grassley (Republican-Iowa) agreed, insisting that "there is a reason that the Senate needs to act . . . to ward off any legal attacks that might come on the issue of timeliness."<sup>220</sup> Byrd and Grassley reproved the Archivist for not following the former custom of sending notification to the House

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5,000 members, Ames, *supra* note 180, at 42-45; an 1810 proposal stripping American citizenship from any citizen who accepts a title of nobility from any foreign prince or potentate, *see id.* at 186-89; the 1861 "Corwin amendment," adopted during the tense months before the outbreak of the Civil War, which would have deprived Congress of any power to tamper with slavery, *see id.* at 195-97; and a 1924 proposal authorizing Congress to regulate or prohibit products of child labor in interstate commerce, *see* Alan P. Grimes, *Democracy and the Amendments to the Constitution 101-04* (1978); *see also infra* notes 242-56 and accompanying text.

217. *See* Paul M. Barrett & David Rogers, *A Timely Measure Gains Ratification After Two Centuries*, Wall St. J., May 8, 1992, at A10 (reaction of Prof. Walter Dellinger); Richard L. Berke, *1789 Amendment Is Ratified But Now the Debate Begins*, N.Y. Times, May 8, 1992, at A1, A21 (comments of attorney Linda R. Monk); Paul Horwitz, *Foley Seeks Legal Advice After 39th State Ratifies 27th Amendment*, Roll Call, May 11, 1992, at 3, 35 (comments of Norman H. Ornstein, American Enterprise Institute).

218. From 1791 through 1818, the Secretary of State had carried out the duty of certifying amendments as a matter of course; in 1818, Congress enacted a statute officially assigning the Secretary that responsibility. In 1951, Congress amended the statute to transfer the responsibility to the Administrator of General Services, who supervised the publication of the *Federal Register*. *See* Act of Oct. 13, 1951, Pub. L. No. 82-248, § 2(b), 65 Stat. 710. In 1984, yet another statute transferred both tasks to the Archivist of the United States. *See* 1 U.S.C. § 106b (1988).

219. *See* 57 Fed. Reg. 21,187 (1992).

220. 138 Cong. Rec. S6940 (daily ed. May 20, 1992) (statement of Sen. Grassley).

and the Senate and allowing Congress a brief time to review the documents related to the amendment in question before certifying it. This procedure, they maintained, had been followed with previous amendments, particularly the Fourteenth, which had been beset by the problem of state legislatures' attempts to rescind ratifications. For this reason, they introduced a resolution seeking to declare invalid, by the expiration of time, the four unratified amendments.<sup>221</sup>

While praising the Twenty-seventh Amendment, Senator William V. Roth (Republican-Delaware) pointed out that "some questions are left unanswered."<sup>222</sup> Noting the existence of four other unratified amendments lacking time limits, Roth asked that Congress adopt Byrd's resolution declaring these proposals to have lapsed. If Congress could declare ratified an amendment that most scholars had assumed was a dead letter for two centuries, Roth demanded, "why cannot the States ratify even the expired amendments—those which failed ratification before a congressionally imposed deadline—in the hope that Congress would later extend the deadline?"<sup>223</sup>

Representative William B. Clay (Democrat-Missouri) reminded his colleagues that since 1989, Congress had followed, by statute, the same procedure that the 1789 amendment mandated. In Clay's view, the 1989 Ethics Reform Act,<sup>224</sup> passed in response to the public outcry against the latest congressional pay raises, seemed to make the Twenty-seventh Amendment unnecessary. Clay also asked whether the Amendment would outlaw for members of Congress the automatic COLAs that federal law provided to every federal employee.<sup>225</sup>

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221. The measure, Senate Concurrent Resolution 121, introduced May 19, 1992, is still pending in the Senate, as of October 16, 1992. See S. Con. Res. 121, 102d Cong., 2d Sess. (1992). Because its adoption would clarify this unresolved issue without significantly easing the restrictions of the amending process, the Senate should adopt it.

222. 138 Cong. Rec. S6950 (daily ed. May 20, 1992) (statement of Sen. Roth).

223. *Id.*

224. See Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (effective Jan. 1, 1991).

225. See 138 Cong. Rec. E1456 (daily ed. May 20, 1992) (extended remarks of Rep. Clay). When asked about the constitutionality of COLAs, Professor Laurence H. Tribe of Harvard Law School was uncertain, suggesting that he could come up with plausible arguments either way but doubting whether it would be "politically wise" for any member of Congress to bring the issue to court. See Bill McAllister, *Madison's Remedy May Ignite Hill Pay Dispute*, Wash. Post, May 19, 1992, at A17. Gregory Watson has concluded that the amendment would bar annual COLAs but not a statute permitting a COLA at the beginning of each Congress. Telephone Interview with Gregory D. Watson, *supra* note 191.

On October 29, 1992, less than six months after the amendment's adoption, a heterogeneous collection of politicians, attorneys, and organizations filed the first lawsuit to invoke the amendment in the U.S. District Court for the District of Columbia. See *Boehner v. Anderson*, Civ. No. 92-2427 (D.D.C. filed Oct. 29, 1992). The litigation, spearheaded by the American Constitutional Law Foundation, challenged as unconstitutional the 1989 Ethics Reform Act's system of annual COLAs for Senators and Representatives. Twenty congressional incumbents (eighteen Representatives and two Senators) and more than 100 challengers for congressional seats have joined the lawsuit.

Whatever the merit of these issues, political realities dictated the speedy endorsement of the Twenty-seventh Amendment. On May 20, 1992, Congress confirmed the Archivist's decision by overwhelming margins in both houses. The Senate vote was 99-0;<sup>226</sup> the House approved the amendment (after brief discussion) by a vote of 414-3, with eighteen Representatives either absent or not voting.<sup>227</sup>

The three Representatives voting "No" were Neal Smith (Democrat-Iowa), Carl C. (Chris) Perkins (Democrat-Kentucky), and Craig Washington (Democrat-Texas). Smith explained that, while he had no problem with the substance of the new amendment, "it's short-term political pandering without regard to long-term consequences to the Constitution."<sup>228</sup> Washington inexplicably cast his ballot against the amendment despite having voted for ratification as a Texas state senator in 1989.<sup>229</sup>

Though some journalists have characterized the campaign to resurrect the compensation amendment as a right-wing attack on Congress, Gregory Watson has rejected the charge:

That's pure nonsense. The state legislators who voted to ratify the amendment formed bipartisan coalitions, from both political parties, and those few who opposed the amendment also came from both parties. It transcended party; it transcended 'liberal versus conservative.' It was truly bipartisan.<sup>230</sup>

He declared that the adoption of the 1789 amendment "is the greatest thing in my thirty-year life."<sup>231</sup>

## V. CONSEQUENCES

The procedures outlined in Article V pose a host of unresolved difficulties. For example: Does a proposed amendment have a "shelf life"—

*See Lawmakers and Candidates Sue to Block Congressional Pay Raise*, N.Y. Times (nat'l ed.), Oct. 30, 1992, at A14. Ironically, this lawsuit seems to confirm the fears of Representative Theodore Sedgwick (Federalist-Massachusetts), who in 1789 warned that a compensation amendment might enable candidates to politicize the salary issue as a way to gain or retain office, and to defeat the hopes of the amendment's advocates to prevent manipulation of issues of congressional compensation for short-term political advantage. *See supra* text accompanying note 154. John C. Armor, the attorney who filed the suit, conceded that some of the plaintiffs might be politically motivated, but "other plaintiffs, like the American Legislative Exchange Council, have been pushing this for years. They don't stand to gain or lose anything by this—they just think that it's right and makes sense." Telephone Interview with John C. Armor, Esq. (Nov. 2, 1992).

226. *See* Richard L. Berke, *Congress Backs 27th Amendment*, N.Y. Times, May 21, 1992, at A26. Only Lloyd Bentsen (Democrat-Texas) missed the vote due to illness. Telephone Interview with Gregory D. Watson, *supra* note 191.

227. *See* S. Con. Res. 120, 102d Cong., 2d Sess. (introduced May 19, 1992 and passed May 20, 1992); Berke, *supra* note 226.

228. H. Con. Res. 320, 102d Cong., 2d Sess. (introduced May 19, 1992 and passed May 20, 1992); J. Jennings Moss, *House, Senate OK amendment*, Wash. Times, May 21, 1992, at A3.

229. Telephone Interview with Gregory D. Watson, *supra* note 191.

230. *Id.*

231. *Id.*



that is, a period after which it may be deemed to have expired? This issue is posed most starkly by the 202 years of the Twenty-seventh Amendment's birth pangs. May a state rescind its ratification of an amendment? May Congress establish a time limit on a proposed amendment's ratification?<sup>232</sup>

Such "ordinary" issues of the amending process have erupted in disputes over the framing and adoption of specific amendments. These issues fall into two categories: (i) the status of proposed amendments, and (ii) the states' actions in ratifying or rejecting amendments. Some of these issues have been affected, and perhaps partly resolved, by the adoption of the Twenty-seventh Amendment.

Only two decisions of the Supreme Court have dealt with such issues: *Dillon v. Gloss*,<sup>233</sup> concerning issues raised by the Eighteenth Amendment, and *Coleman v. Miller*,<sup>234</sup> which superseded *Dillon* and established the modern doctrinal framework for deciding issues arising under Article V.

*Dillon v. Gloss* addressed the validity of time limits imposed by Congress on proposed amendments. When Congress proposed the Eighteenth Amendment (authorizing Prohibition), it imposed a time limit of seven years within which the amendment had to be ratified. If the time limit passed without the amendment receiving a sufficient number of ratifications, it expired. All but one of the amendments following the Eighteenth have incorporated a time limit, either in the text or in the authorizing resolution adopted by Congress.<sup>235</sup> In *Dillon*, Justice Willis Van Devanter held that Congress could impose a reasonable time limit on the Eighteenth Amendment, and that the seven-year limit chosen was reasonable:

We do not find anything in [Article V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which

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232. Issues growing out of the convention procedure authorized by Article V—a procedure that has never been used—are beyond the scope of this Article, but they overshadow most attempts to use the amending process. For example: What, if any, standards govern the convention procedure? May Congress set conditions for determining when the constitutional prerequisites for calling a convention have been met? Do the terms of the Constitution control the organization and administration of a convention? May Congress impose enforceable limits or mandates on a convention? Is there any recourse if such a convention casts aside its mandate and limitations? May the convention set aside the requirements of Article V? See *infra* note 259. Further discussion may be found in Bernstein with Agel, *supra* note \*, at chapters 13-14, and in Thomas M. Durbin, Congressional Research Serv. No. 92-729A, *Amending the U.S. Constitution: by Congress or by Constitutional Convention* (Sept. 18, 1992).

233. 256 U.S. 368 (1921).

234. 307 U.S. 433 (1939).

235. The Child Labor Amendment, proposed in 1924, did not contain a time limit because the House and the Senate could not agree on how long that limit should be. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983).

strongly suggests the contrary.<sup>236</sup>

First, Van Devanter declared, proposal and ratification are succeeding steps in a single process, "the natural inference being that they are not to be widely separated in time."<sup>237</sup> Second, amendments are proposed when they are deemed necessary, and necessity implies that ratification should be accomplished with speed.<sup>238</sup> Third, because ratification is the approval of an amendment by the people in three-fourths of the states, it ought to be "sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period."<sup>239</sup>

In pursuing his reasoning, Van Devanter commented on the unratified amendments in words pregnant with irony seven decades later:

[F]our amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.<sup>240</sup>

Time limits again became an issue when, in 1979, Congress adopted a three-year extension of the time limit for the Equal Rights Amendment—a limit specified in the authorizing resolution but not in the amendment's text. Some charged that Congress had illegally changed the rules in the middle of the process. Defenders of the extension maintained that Congress only lacked the power to adjust time limits incorporated in the text of proposed amendments. Although a federal district court in Idaho ruled that Congress had erred in extending the time limit, the case did not reach the Supreme Court until after the amendment's extended deadline had elapsed, and the Justices vacated the lower court's decision as moot.<sup>241</sup>

*Coleman v. Miller*, decided in 1939, established the principle that issues having to do with the ratification of amendments are political questions best left to the determination of Congress. At issue in *Coleman* was the ratification of the Child Labor Amendment by the Kansas legislature, which in 1925 had rejected the amendment but reconsidered it in 1937, thirteen years after Congress had sent it to the states.<sup>242</sup> Although the Kansas House of Representatives voted to ratify, the state senate divided equally, twenty to twenty.<sup>243</sup> The lieutenant governor, who presided

236. *Dillon*, 256 U.S. at 374.

237. *Id.* at 374-75.

238. *See id.* at 375.

239. *Id.*

240. *Id.*

241. *See Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom. National Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

242. *See Coleman v. Miller*, 307 U.S. 433, 435 (1939).

243. *See id.* at 436.

over the senate, cast the tie-breaking vote in favor of ratification.<sup>244</sup> Twenty-one state senators and three state representatives then sued for an order directing the Kansas secretary of state not to authenticate the resolution.<sup>245</sup> They cited three grounds: (1) as an executive officer, the lieutenant governor should have no role in the ratification process; (2) the 1925 vote to reject the amendment ended Kansas's discussion of ratification, and could not be set aside by a later legislative vote; and (3) the amendment had lapsed, not having been ratified within a reasonable time.<sup>246</sup> The state supreme court rejected all three arguments.<sup>247</sup>

The United States Supreme Court heard the legislators' appeal, and held (5-4) that the legislators had standing to bring the suit.<sup>248</sup> But the Court did not resolve the issue of the lieutenant governor's authority to break a legislative tie vote on a proposed amendment. Chief Justice Charles Evans Hughes reported that the Court was equally divided and therefore "expresse[d] no opinion upon that point."<sup>249</sup>

Lumping together the issue of the effect of the 1925 vote to reject and that of timeliness, Chief Justice Hughes, joined by Justices Harlan Fiske Stone and Stanley Reed, disposed of each in turn. Citing the precedents established in 1868 by the adoption of the Fourteenth Amendment—in which the Secretary of State referred the question of rescinded ratifications to Congress, which in turn ignored the rescissions and declared the amendment ratified—Hughes wrote the following cloudy paragraph that has dominated congressional views on the amending process for over half a century:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.<sup>250</sup>

Turning to the timeliness issue, Hughes acknowledged that *Dillon* had accepted the power of Congress to set a time limit on a proposed amendment—but rejected the petitioners' contention "that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had."<sup>251</sup> Pointing out that there was no source from which criteria of timeliness could be derived, Hughes declared that the congressional power to set a time limit

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244. *See id.*

245. *See id.*

246. *See id.*; Dellinger, *supra* note 235, at 390-91.

247. *See* Coleman v. Miller, 71 P.2d 518 (Kan. 1937).

248. Justice Frankfurter, joined by Justices Roberts, Black, and Douglas, filed a separate opinion rejecting the legislators' claim to have standing to bring the suit. *See* Coleman, 307 U.S. at 460-70.

249. *Id.* at 447.

250. *Id.* at 450.

251. *Id.* at 452.

was part of a broader congressional prerogative to determine whether a time limit was necessary and appropriate.<sup>252</sup>

Justices Hugo L. Black, Owen J. Roberts, Felix Frankfurter, and William O. Douglas reached the same conclusion as did Chief Justice Hughes, but by a slightly different route. They recognized an even wider scope for congressional discretion:

The [amending] process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point. . . . Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts.<sup>253</sup>

Justices Pierce Butler and James C. McReynolds dissented, arguing in vain that the amendment had become a dead letter because "more than a reasonable time had elapsed."<sup>254</sup> Noting that in *Dillon* the Court had found that the seven-year time limit set by Congress was reasonable, Justices Butler and McReynolds charged that the majority had brushed aside the holding and reasoning of the earlier case. The dissenters concluded that the Child Labor Amendment had lapsed.<sup>255</sup>

Congress has relied ever since on *Coleman* as authority for its exclusive prerogative to decide whether to recognize proposed amendments as validly ratified. For example, in the May 1992 Senate debate on the Twenty-seventh Amendment, Senator Byrd invoked *Coleman*, a position with which Gregory Watson agreed. Watson stated, "Had Congress rejected the amendment, it would have been within their powers to do so under the doctrines of *Coleman v. Miller*. That's why, in many of the state resolutions of ratification, I made sure that *Coleman v. Miller* was cited and recognized."<sup>256</sup>

As Watson rightly perceived, *Coleman* has established the context within which issues of the amending process, including the following, are played out:

- *Contemporaneity*: We can keep a bottle of milk in our refrigerator indefinitely, but at some point it will spoil and become undrinkable. By analogy, even in cases where Congress has not set a specific time limit on a proposed amendment, and despite the holding of *Coleman*, many schol-

252. See *id.* at 453-56.

253. *Id.* at 459 (Black, Roberts, Frankfurter, and Douglas, JJ., concurring).

254. *Id.* at 470-74 (Butler and McReynolds, JJ., dissenting).

255. See *id.*

256. Telephone Interview with Gregory D. Watson, *supra* note 191. The more than fifty years that have passed since *Coleman v. Miller* was decided have witnessed dramatic constrictions of the "political questions" doctrine in constitutional law. See Laurence H. Tribe, *American Constitutional Law*, 96-107 (2d ed. 1988) (on political questions). But the doctrine retains its vitality when applied to issues of the amending process, see *id.* at 64-65 n.9, 101-02, though several scholars maintain the legitimacy, necessity, and advisability of an active judicial role in supervising the workings of the process. See *id.* at 101-02; Dellinger, *supra* note 235; *infra* note 262.

ars maintain that there must be some point in the life of the proposal when it is no longer "live."<sup>257</sup> In 1873, as we have seen, Ohio ratified an amendment proposed in 1789, leading Congress to impose a time limit on most subsequent proposed amendments.<sup>258</sup> But is an amendment lacking a time limit still valid? Or does Congress simply make assurance "double sure" by including time limits in proposed amendments even though they may not be needed?

At first glance, the Archivist's certification on May 18, 1992, and Congress's action on May 20, 1992, would seem to foreclose their respective authorities to reject any future amendment based merely on issues of contemporaneity. As noted above, however, Senators Byrd and Grassley have introduced a resolution by which Congress would invalidate the four other unratified and possibly "live" amendments—but Congress has not yet acted on this resolution.<sup>259</sup>

• *Rescission*: May a state rescind its decision to ratify a constitutional amendment? Or may a state that has rejected an amendment re-

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257. See Laura Michaelis, *The Constitution: Both Chambers Rush to Accept 27th Amendment on Salaries*, 50 Cong. Q. Wkly. Rep. 1423 (May 23, 1992) (comments of Professor Walter E. Dellinger); Richard L. Berke, *More Amendments Lurk in the Mists of History*, N.Y. Times, May 24, 1992, § 4, at 2 (comments of Professor Paul Gewirtz of Yale Law School).

258. See Ames, *supra* note 180, at 291-92, 292 n.1.

259. The convention procedure of Article V requires the submission of applications from two-thirds of the states to compel Congress to call a constitutional convention. As of October, 1989, 32 states—two short of the requirement—have filed applications, beginning with North Dakota in 1975. See Russell L. Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention 78-89* (1988); Durbin, *supra* note 232; David C. Huckabee, Congressional Research Serv. No. IB80062, *Constitutional Conventions: Political and Legal Questions* (October 18, 1989); *infra* text accompanying notes 283-84.

Historically, Congress has used two standards to evaluate—and to fend off—second-convention movements. First, the applications must agree in subject-matter (that is, the *purpose* of the convention). See Caplan, *supra*, at 105-08. Second, the applications must be timely or contemporaneous. See *id.* at 110-14.

Assuming only for the present discussion that there is no requirement of subject-matter consistency, what effect might the adoption of the Twenty-seventh Amendment have on the convention procedure? Has the success of that amendment disposed of the contemporaneousness requirement? Theoretically, advocates of a second convention could aggregate the thirty-two state resolutions from the period 1975-1988 with some or all of the thirty-two resolutions received in the 1960s to support a convention to overturn the Supreme Court's reapportionment decisions, see *id.* at 73-78; or some of the dozens of applications calling for other constitutional reforms, see *id.* at 65-73, or, in the years between 1893 and 1913, those demanding direct election of Senators, see *id.* at 61-65, or even the two 1789 applications by Virginia and New York? See *id.* at 36-38.

It can still be maintained, nonetheless, that contemporaneousness is a valid requirement governing the convention procedure. First, as suggested by the resolution offered by Senators Byrd and Grassley, *supra* note 221 and accompanying text, the Twenty-seventh Amendment succeeded because Congress applied a contextually sensitive rule of contemporaneousness, noting the lack of specific historical changes in the nation or its politics undercutting the amendment's continuing relevance. Second, the requirements surrounding invocation of the constituent power—the extraordinary power residing in the People of the United States to constitute or reconstitute their form of government—plausibly require that the applications be close together in time. Their contemporaneous-

verse itself and ratify the amendment? These issues are most famous in connection with the Equal Rights Amendment, but they first arose in connection with the Civil War Amendments. The ratifications of the Twenty-seventh Amendment by New Jersey (1992, after rejecting it in 1789) and New Hampshire (1985, after rejecting it in 1790) revive rescission issues yet again.

Although most courts seek to avert such questions by citing the "political question" doctrine, the prevailing view is that the amending process works in only one direction. Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification. A state's decision to adopt an amendment forms the basis for later states' decisions whether to adopt or to reject. To permit the rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning.<sup>260</sup> By contrast, if a state reconsiders its rejection of an amendment, its action does not undercut the basis for later states' decisions. A state should be free to change its mind about rejecting an amendment if other states' actions demonstrate that the amendment has general popular support. The Archivist's and Congress's acceptance of the Twenty-seventh Amendment—recognizing by implication that the New Jersey (1992) and New Hampshire (1985) ratifications were valid despite the states' previous decisions to reject the amendment—provide added support for this position.<sup>261</sup>

- *Constitutionality*: May Congress or the courts reject a constitutional amendment, otherwise validly ratified, as unconstitutional? The conventional and common-sense answer to this question is "No. Before an amendment is ratified, it is just a proposal—nothing more and nothing less. If it is ratified, then it is part of the Constitution, and becomes constitutional by definition."

This common-sense approach has been challenged by several legal

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ness would manifest a general consensus that only a convention is both adequate to respond to the perceived problem and competent to generate the necessary remedy.

I plan to explore the convention procedure in a future Article. *See also* Bernstein with Agel, *supra* note \*, at chs. 13-14 (same). Caplan, *supra*, is the most scholarly and thoughtful analysis of the convention clause, but it manifests a bias toward clearing away real or perceived obstacles to the calling of a limited constitutional convention. Also, see generally *Symposium on the Article V Convention Process*, 66 Mich. L. Rev. 837 (1968) (discussing Senator Everett Dirksen's call for a second convention to overturn the reapportionment decisions and Senator Sam J. Ervin, Jr.'s proposed legislation to authorize and structure a second convention).

260. Samuel S. Freedman & Pamela J. Naughton, ERA: May a State Change Its Vote? (1978), is the most detailed and thoughtful analysis. Professor Dellinger argues that, even though history and the constitutional text provide no dispositive answer, substantive questions of public policy and constitutional legitimacy give great weight to the position that a ratification may not be rescinded. *See* Dellinger, *supra* note 235, at 421-27.

261. *See, e.g.,* Dellinger, *supra* note 235, at 420-21 (calling for the Supreme Court to recognize, on the merits of an appropriate case, a state's right to reconsider a vote to reject).

scholars, who have suggested that certain amendments could be so threatening to the fabric of the constitutional system that they might well be deemed unconstitutional.<sup>262</sup> They note that in other nations, such as India, it is possible to invalidate a constitutional amendment if it would subvert the constitution's "basic structure."<sup>263</sup>

Article V sets forth only one limitation on the types of amendments that may be proposed: "that no State, without its Consent, shall be deprived of its [sic] equal Suffrage in the Senate."<sup>264</sup> Questions about constitutional limitations on Article V arose for the first time in reaction to the Civil War Amendments of 1865-1870. Opponents of the Thirteenth Amendment, which abolished slavery, and the Fifteenth Amendment, which outlawed racial discrimination in access to the franchise, asserted that these Amendments radically expanded the power of the general government beyond the confines set by the framers in 1787-1788, and thus exceeded the boundaries given to the amending process.<sup>265</sup> These arguments failed, but opponents of proposed amendments excluding issues of school prayer and reapportionment from the jurisdiction of the federal courts have tried to make a similar case.

Consider, for example, a hypothetical amendment that establishes the Judaeo-Christian tradition as the nation's official set of religious values. Such an amendment, being directly contrary to the commands of the Free Exercise and Establishment Clauses of the First Amendment and the extraordinary religious diversity of American life,<sup>266</sup> might be unconstitutional. Or suppose Congress decided to adopt the amendment, proposed in 1985 by a lawyer practicing in California, repealing the Civil War Amendments and limiting citizenship to white people of European descent.<sup>267</sup> Would this proposed amendment do such violence to the system of constitutional governance, and the long-established network of individual rights, that it should be deemed unconstitutional and unadoptable, even in the face of popular demand for it?

A major stumbling block for this line of reasoning is that under these

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262. Compare Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 433-45 (1983) (discussing and rejecting the concept of judicial review of amendments' substance), with Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 Harv. L. Rev. 446, 446-50 (1983) (defending judicial review) and Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. Cal. L. Rev. 703, 755-56 (1980) (urging judicial invalidation of an amendment contrary to the preeminent constitutional value of human dignity).

263. See Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, Wall St. J., May 13, 1992, at A15.

264. U.S. Const. art. V.

265. See Grimes, *supra* note 216, at 37 (remarks of Senator Garret Davis); Walter F. Murphy, *Slaughter-House, Civil Rights, and the Limits on Constitutional Change*, 1987 Am. J. Juris. 1.

266. See Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986). *Contra* Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

267. James O. Pace, *Amendment to the Constitution: Averting the Decline and Fall of America* (1985).

criteria, the Thirteenth Amendment could be deemed unconstitutional, for it was an extraordinary reversal of constitutional doctrines having to do with the institution of slavery and the question of racial equality. Arguments against the constitutionality of proposed amendments revive the arguments by border-state Senators and Representatives in 1865 describing the abolition amendment as unconstitutional because it exceeded the permissible scope of the amending power recognized by Article V and struck at central components of the compromises underlying the original Constitution.

Can these "ordinary issues" of the amending process be resolved, whether by Congress or by the federal courts? One obstacle is the principle underlying the "political question" doctrine: because the people can and should govern themselves, the institutions of a representative democracy entrusted with the operation of the amending process ought to assume the responsibility of dealing with such questions, rather than handing the issues off to an unelected judiciary. Another obstacle is practical: the courts do not wish to inject themselves into disputes between political institutions, or between the people and their elected officials. Whatever the reason, these questions are unlikely to be resolved in the foreseeable future.

Citing such problems as these, Gregory Watson favors amending Article V. After enduring a weary, decade-long struggle to get the compensation amendment adopted by the states, he concludes, "It's a terrible process. It's sloppy, extremely unprofessional, and terribly haphazard."<sup>268</sup> Recalling his unexpected discovery of Wyoming's ratification of the amendment more than six years after the event, he asked, "Is it possible that there are state ratifications that nobody knows about? I think it is. This amendment may have been ratified a long time ago, and nobody knew it. There still may be ratifications floating around out there that nobody knows about."<sup>269</sup>

Watson's proposed amendment to Article V would require that any amendment be proposed "by a two-thirds vote of the *entire membership* of the House and of the *entire membership* of the Senate," eliminating the present practice of using two-thirds of those present and voting. Once proposed, the amendment would be put before a national popular referendum, to take place on Election Day in the next even-numbered year, to coincide with Presidential elections or midterm Congressional elections. An amendment would be declared adopted if it amassed "an absolute majority—at least 51%—in two-thirds of the House districts through the entire nation."<sup>270</sup> Watson maintains that this revision would preserve the requirement of a contemporaneous national consensus in support of a

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268. Telephone Interview with Gregory D. Watson, *supra* note 191.

269. *Id.*

270. *Id.* Watson's new standard for congressional action would set aside the decision of the United States Supreme Court in the *National Prohibition Cases*, 253 U.S. 350, 386 (1920). See Durbin, *supra* note 232, at 2 & n.7.



successful amendment, and it would bring order, professionalism, and certainty to "a terrible process."<sup>271</sup> Pointing out that forty-nine of the fifty states submit state constitutional amendments to a popular vote (Delaware being the only exception), Watson concludes: "I would take state legislatures out of the amending process. They shut out the majority of the American people. Amending the Constitution should be a matter between the federal government and the American people."<sup>272</sup>

#### CONCLUSION: AMENDMENT POLITICS

In H.G. Wells's classic science-fiction novel, *When the Sleeper Wakes*,<sup>273</sup> an ordinary Englishman awakens from centuries in suspended animation to discover that he has become a messiah-like figure in a stratified future society, the focus of blind devotion by the lower classes. Resisting the blandishments of the ruling elite, he lends his support to a working-class revolution, only to die (as does the society he is fighting) in the cataclysmic war he has helped unleash upon the world. The compensation amendment has long been the "Sleeper" of American constitutional history, but the effects its "awakening"—that is, ratification—will have are far from certain, though they probably will not be so catastrophic as those of its fictional human counterpart. Specifically, the Amendment's success poses a host of uncomfortable questions for practitioners of "amendment politics," an increasingly popular theme of modern constitutional government.

#### A. *Defining Amendment Politics*

The last successful constitutional amendment to be proposed was the Twenty-sixth Amendment, protecting the right of Americans eighteen years of age or older to vote.<sup>274</sup> Since then, Congress has proposed two other amendments—the Equal Rights Amendment<sup>275</sup> and the D.C. Statehood Amendment<sup>276</sup>—only to see both go down in flames.

The three proposed amendments that succeeded in clearing the congressional hurdle represent less than one-tenth of one percent of the

271. *Id.*

272. *Id.* For a brief discussion of proposals to amend Article V, see Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* app. 1, at 321-31 (1990).

273. H.G. Wells, *When the Sleeper Wakes* (1899).

274. U.S. Const. amend. XXVI. Proposed on March 23, 1971, the Twenty-sixth Amendment was ratified on July 1, declared to be in effect on July 5, and published in the *Federal Register* on July 7. See 36 Fed. Reg. 12,725 (1971).

275. Proposed on March 22, 1972 with a deadline of seven years (extended in 1978 by three years), the ERA failed on March 30, 1982. See Richard H. Davis, *Congressional Research Serv. No. 85-36 GOV, Proposed Amendments to the Constitution of the United States of America Introduced in Congress from the 91st Congress, 1st Session, Through the 98th Congress, 2nd Session, January 1969-December 1984*, at 223, 263-64 (Feb. 1, 1985).

276. Proposed on August 22, 1978 with a seven-year time limit, the D.C. Statehood Amendment failed on August 22, 1985. See *id.* at 265-66.

3,491 introduced in Congress between January 1969 and December 1990.<sup>277</sup> The extraordinary failure rate of amendments has not deterred advocates of amendments. Indeed, pressure to add a host of proposed amendments to the Constitution has increased, not decreased, with each failure.

Because many scholars fear the minefield of unresolved issues surrounding Article V, they are reluctant to contemplate formal constitutional change, viewing the amending process in general, and specific proposed amendments, with suspicion and dread.<sup>278</sup> In part, they are all too aware of the intimidating practical obstacles posed by the amending process.

But something more is going on here. Article V induces constitutional vertigo. Invoking the amending process is as threatening to modern politicians and scholars, and as fraught with risk, as calling up demons would have been to medieval alchemists. The question is not, "But what if we fail?" It is, "But what if we *succeed*?"

For this reason, many observers have found especially alarming the willingness of right-wing politicians to reach for Article V as if it were a fire-ax on the wall.<sup>279</sup> The 1980s let loose a flood of suggested amendments to the Constitution. Would-be framers of various proposed amendments sought to give the President a line-item veto over appropriations measures; to require a balanced budget; to define human life as beginning at the moment of conception (thereby outlawing abortion as a matter of federal constitutional law); to authorize Congress and the states to prohibit the burning of the American flag (thereby overturning recent Supreme Court decisions); and to impose a limit on the number of terms that a Representative or Senator can serve in Congress or on the number of years that a federal judge can hold office.

President Ronald Reagan and other officials of his administration endorsed many of these proposals and encouraged the underlying assumption that these proposals have in common—that the constitutional system, unable to function to their liking as now organized, requires overhaul through the amendment process. President George Bush has been at least as assiduous as his predecessor in championing amendments, including the line-item veto, balanced-budget, flag-burning, school prayer, and term-limit proposals, and Vice President Dan Quayle has loyally supported the Bush Administration's constitutional agenda.<sup>280</sup>

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277. Daryl B. Harris, Congressional Research Service No. 92-555 GOV, Proposed Amendments to the U.S. Constitution: 99th-101st Congresses (1985-1990), at 3 (July 9, 1992); Davis, *supra* note 275, at 268.

278. See Wilbur Edel, *A Constitutional Convention: Threat or Challenge?* (1981).

279. For a thoughtful and elegant statement of this view, see Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. Ark. Little Rock L.J. 677 (1989-1990). Judge Ginsburg is a member of the U.S. Court of Appeals for the District of Columbia Circuit.

280. When he was a Republican Representative from Texas, George Bush proposed

Article V's newfound popularity in American politics was fueled by the remarkable success rate of amendments proposed between 1960 and 1971. Right-wing partisans increasingly came to believe that they, too, were entitled to make use of Article V after the amendment successes garnered by the left during those years—namely, the Twenty-third, adding the District of Columbia to the Electoral College for Presidential elections; the Twenty-fourth, abolishing the poll tax in federal elections; and the Twenty-sixth, lowering the voting age to eighteen.<sup>281</sup>

The "Stop ERA" campaign between 1978 and 1982, which blocked ratification of the proposed Equal Rights Amendment even after Congress had extended its built-in time limit, reinforced the growing appeal of amendment politics among right-wing groups. "Stop ERA" gave right-wing activists a crash course in the workings of Article V. The hands-on familiarity they thus acquired instilled in them a renewed appreciation of its potential as an instrument to achieve their constitutional agenda.<sup>282</sup> The "Stop ERA" campaign helped to catalyze the Reagan Administration's affinity for demanding constitutional change when the processes of "normal politics" did not yield the results they and their ideological allies desired.

In a development paralleling the multiplication of specific proposed amendments, talk of a second convention—more often to propose a specific amendment than to rewrite the entire document—resurfaced for the first time in a generation.<sup>283</sup> By October 1989, thirty-two states—only two short of the thirty-four required under Article V's convention method—had adopted calls for a second convention; meanwhile, however, several states had rescinded their applications.<sup>284</sup> Again, President

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three amendments: one in 1969 to permit prayer in public buildings, another in 1969 to establish mandatory retirement ages for members of Congress and federal judges, and a third in 1970 on equal rights for women. See Davis, *supra* note 275, at 16, 23, 40 (Bush proposals).

During his years as a Republican Representative from Indiana, Dan Quayle proposed five amendments—one in 1977 establishing term limits for President, Vice President, members of Congress, and federal judges (reintroduced in two different versions in 1979), one in 1979 to require a balanced budget, and another in 1980 to command a balanced budget with a three-fifths supermajority needed to raise taxes. See *id.* at 115, 135, 136, 141, 142 (Quayle proposals).

281. See the excellent discussion in Stephen L. Schechter, *Amending the United States Constitution: A New Generation on Trial*, in *Redesigning the State: The Politics of Constitutional Change in Industrial Nations* 160, 160-202 (Keith G. Banting & Richard Simeon eds., 1985).

282. On the defeat of the Equal Rights Amendment, see Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution* (1986); Jane J. Mansbridge, *Why We Lost the ERA* (1986); and Gilbert Yale Steiner, *Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment* (1985). On the successes of the 1960s and their consequences for later amendment politics, see Schechter, *supra* note 281.

283. See Caplan, *supra* note 259, at vii; Huckabee, *supra* note 259.

284. See the chronology presented in Huckabee, *supra* note 259, at 9-12. On the relevance of the Twenty-seventh Amendment to Article V convention issues, see *supra* note 259. On the problem of judicial review of convention issues, see *supra* note 232.

Reagan and other government officials embraced calls for a second convention; they argued that the normal processes of government were incapable of responding to the needs of the nation. Thus, "amendment politics"—the increasing tendency to resort to formal changes in the Constitution to resolve political problems—has conferred new importance on the amending process.<sup>285</sup>

But the failure rate of amendment campaigns in the 1980s and 1990s is becoming increasingly embarrassing. If anything, the success of the Twenty-seventh Amendment when so many other proposals with so much distinguished and powerful backing have failed should prompt us to question just how serious modern amendment campaigns have been.

### B. *The Twenty-Seventh Amendment and Amendment Politics*

Why should the Twenty-seventh Amendment—a provision proposed in 1789 and consigned to limbo for over two hundred years—have succeeded when, in the more than twenty years since 1971, all other efforts to amend the Constitution have failed?

The first reason is its pedigree. Madison's role as its proposer, combined with its place as one of the twelve amendments making up the original Bill of Rights, gave the Twenty-seventh Amendment an authority and persuasiveness it might not otherwise have had.

The second reason is its plausibility. The Amendment is both credible and unthreatening. Unlike so many other proposed amendments, which would produce major alterations in the constitutional system that their opponents are able to transform into dreadful prospects,<sup>286</sup> the change the Twenty-seventh Amendment effects in the extant constitutional system seems modest, reasonable, and appropriate. Its ratifications in 1873 and in the years since 1978 also suggested its continuing relevance, despite the other dramatic changes that have swept the United States. Finally, the arguments against the amendment focused on arcana of the amending process and the stratospheric complexities of constitutional

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285. This definition is far broader than the conventional view of amendment politics as the web of political arguments and events surrounding the adoption or rejection of the specific amendments. See Grimes, *supra* note 216, at 25-26, 96-97, 121-22, 153-54.

286. For example, a balanced-budget amendment would radically revise the collection of revenue and the methods of deciding on public spending measures codified in the Constitution, and thus would upset the current balance of powers between the executive and legislative branches—especially if combined with the proposed line-item veto amendments called for by Presidents Ronald Reagan and George Bush. A term-limit amendment would alter the role played by seniority in the current Senate and House of Representatives and might perhaps cut back on the pool of experienced and expert national legislators. The proposed amendments authorizing Congress and the states to make burning the flag a crime would be the first restricting the coverage of the Bill of Rights—in particular, the First Amendment. Finally, the various proposed "Human Life Amendments" would, to varying degrees, preclude whatever judicial protection now exists for the constitutional right to privacy first identified in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and given its most expansive reading in *Roe v. Wade*, 410 U.S. 113 (1973).

law; of all those who mounted arguments against the amendment, none dismissed it on its merits. Unlike the Equal Rights Amendment, which was doomed by a determined and superbly organized right-wing campaign emphasizing its supposed ghastly consequences, there simply was no "parade of horrors" (whether real or feigned) that might have resulted from the compensation amendment's adoption.

The third reason for the success of the Twenty-seventh amendment is its unique history. Having emerged from Congress (albeit in 1789 rather than closer to the present), the compensation amendment already had overcome the filter that strains out most proposals to amend the Constitution. Moreover, any analysis of the reasons for the adoption of this amendment must acknowledge the determination and tactical brilliance of its "stepfather," Gregory Watson.

In the bleak light cast by the success of the Twenty-seventh Amendment, amendment politics appears to be something different from the aforementioned definitions.<sup>287</sup> Rather, the recent history of proposed amendments suggests the utility of a new understanding of the phrase: the growing tendency to use the amending process either as an alibi for not solving major political problems through the ordinary political process or as a means to distract the electorate from more pressing issues.

The prime example of "Article V as alibi" is the campaign by the Reagan and Bush Administrations—and by Senators and Representatives of both parties—to add a balanced-budget amendment to the Constitution.<sup>288</sup> Some of those who seek such an amendment sincerely believe that it is the only means to compel the federal government to break its addiction to deficit spending. As their critics point out, however, using the amending process, with its inherent delays and supermajority requirements, only postpones the day of reckoning should the amendment ever become part of the Constitution. Moreover, all the proposals for a balanced-budget amendment further delay the effective date of the constitutional requirement by several years, further putting off the eventual budgetary crisis to a time so far in the future that virtually all present incumbents will have safely retired. Most disturbing of all, invoking the amending process creates the comforting but illusory impression that the government is grappling with the problem, rather than sealing it in a constitutional time vault that only defers the political fallout of a budgetary crisis.<sup>289</sup>

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287. See *supra* note 285 and accompanying text.

288. See John B. Gilmour, *Reconcilable Differences?: Congress, the Budget Process, and the Deficit* (1990); Thomas J. Nicola, *Congressional Research Serv. No. 87-445A, Constitutional Amendments to Balance the Budget and Limit Federal Spending in the 100th Congress: A Table of Features* (Apr. 13, 1987); James V. Saturno, *Congressional Research Serv. 89-4GOV, Congress and a Balanced Budget Amendment to the U.S. Constitution* (Jan. 3, 1989); James D. Savage, *Balanced Budgets and American Politics* (1988); Joseph White & Aaron Wildavsky, *The Deficit and the Public Interest: The Search for Responsible Budgeting in the 1980s* (1989).

289. The House Joint Resolution states in pertinent part:

The prime example of "Article V as distraction" is the flurry of excitement in 1989 and 1990 over an amendment to protect the American flag from "desecration," and thus to overturn the Supreme Court's decisions in *Texas v. Johnson*<sup>290</sup> and *United States v. Eichman*.<sup>291</sup> Again, many advocates of a flag protection amendment acted out of a genuine reverence for the flag and an equally forthright belief that the amending process was the only way to nullify objectionable Supreme Court decisions. However, the amending furor provided politicians of both major parties a distraction that they used to divert the public's attention from the serious issues confronting the nation.

We may now be approaching yet another instance of "amendment politics," as some citizens' advocates, political commentators, and high public officials tout the merits and desirability of amending the Constitution to impose term limits on members of Congress.<sup>292</sup> But is this yet another case of "Article V as alibi"—with politicians fumbling with the amending process in order to persuade their constituents that something useful is being accomplished—or "Article V as distraction"—with politicians drawing the voters' attention away from hard issues by stressing the need to adopt another amendment?

Politicians may well resort to even these forms of amendment politics in good faith, seeking to transfer persistent, intractable political quandaries to the seemingly nonpolitical level of constitutional change represented by the amending process. Resorts to amendment politics, under

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This article shall take effect beginning with fiscal year 1998, or with the second fiscal year beginning after its ratification, whichever is later.

H.R.J. Res. 290, 102d Cong., 1st Sess. § 8 (1991). On June 11, 1992, this proposed amendment, introduced on June 26, 1991, by Representative Charles W. Stenholm (Democrat-Texas), failed to win the two-thirds vote needed to emerge from the House; see also Greg Steinmetz, *Balancing Act: Unable to End Deficit Spending, Congress Tries to Push Constitutional Amendment on Itself*, N.Y. *Newsday*, May 24, 1992, at 88 (comments of James Jones, chairman of American Stock Exchange and former chairman, House Budget Committee).

290. 491 U.S. 397 (1989).

291. 496 U.S. 310 (1990).

292. The case for a term-limit amendment is made with most plausibility in Will, *supra* note 209; see also Kick the Bums Out, *supra* note 209 (for a discussion of arguments for term limits). But see Garry Wills, *Undemocratic Vistas*, *The New York Review of Books*, Nov. 19, 1992, at 28-34 (vigorous critique of George Will's book on historical, constitutional, and intellectual grounds).

President George Bush adopted the cause of a term-limit amendment, citing the perceived disparity between a Presidency limited to two terms, U.S. Const. amend. XXII, § 1, and a Congress whose members can serve an indefinite, unlimited number of terms (if their constituents agree). See, e.g., *Transcript of 2d TV Debate Between Bush, Clinton and Perot*, N.Y. *Times*, Oct. 16, 1992, at A11, A12 (Bush endorses term limits in second 1992 presidential debate).

Ironically, President Bush's claimed mentor, former President Ronald Reagan, has endorsed not the campaign for congressional term limits but the repeal of the Twenty-second Amendment. See President Ronald W. Reagan et al., *Restoring the Presidency: Reconsidering the Twenty-second Amendment* (1990). For a valuable study refuting the case for term limits, see Linda Cohen & Matthew Spitzer, *Term Limits*, 80 *Geo. L.J.* 477 (1992).

this view, are natural—perhaps even reasonable—responses to the citizenry's prevailing disdain for politics;<sup>293</sup> indeed, they are a special case of the general demand for nonpolitical solutions to these problems that appear to outstrip the capacities of the political system.

Nonetheless, the contrast between the adoption of the Twenty-seventh Amendment and the consistent failure of all efforts at amendment politics after 1978 should make Americans wary of modern attempts to tout the amending process as a panacea for national ills. Politicians and other amendment advocates are all too susceptible to the political temptation to use the amending process as a means to deflect political heat or to avoid institutional and personal responsibility for making the hard choices of American public policy. Yet, as the pace of change in American life continues to accelerate, and as American legal and political ingenuity spurs the raising of new issues under the Constitution for which the document provides no clear solutions, pressures to amend the Constitution will continue.

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293. See E.J. Dionne, Jr., *Why Americans Hate Politics* (1991); Ehrenhalt, *supra* note 209; William Greider, *Who Will Tell the People? The Betrayal of American Democracy* (1992).

