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An Examination of the Creation of the United States Senate and its Intended Role in the
American Republic

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ABSTRACT

In the current political discourse, questions have been raised about the United States Senate and its place in our nation's government. Is the institution at odds with democracy? Is it outdated? With questions like this in mind, this thesis seeks to answer a few simple questions: How did the Senate end up as one of the political institutions bestowed to us via the Constitution of the United States and, why did the Framers of the Constitution feel that the Senate was a necessary institution for American governance? From the Constitutional Convention to the Ratification Debates, this thesis tracks the debate and philosophies that laid the foundation for one of the most notable pillars of American republicanism. Further, it will examine the ratification of the Seventeenth Amendment, its impact on the original framing of the Senate, and its relation to the original debates that occurred regarding the institution. In all, this thesis seeks to place the modern debate regarding the United States Senate within the larger historical debate that has existed since the creation of the institution.

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Introduction

The United States Senate is a foundational institution of the American Republic. It has played important roles in some of the most consequential moments in American history. It is tasked with the authority to conduct impeachment trials and to provide advice and consent to the ratification of treaties and the appointment of Supreme Court Justices.¹ However, many concerns have been raised over the Senate and its role in a democratic nation. Its embodiment of equal representation amongst states with vastly disproportionate populations has led to arguments that the Senate is actively anti-democratic. The truth is, these concerns with the Senate have a long history that are as old as the Senate itself. The Framers during the Constitutional Convention of 1787 intensely debated the construction of the Senate. What should representation look like in the chamber? Who should elect senators? Those initial debates carried over into the Ratification Debates of 1787-1788. The Federalists and Anti-Federalists battled over the Senate and its implications on the American government. Was it susceptible to aristocracy and detrimental to representative government? In the early 20th century, concern over the undemocratic nature of the Senate resulted in the 17th Amendment. Proponents of the amendment argued that the direct election of the Senate would help democratize an undemocratic institution. However, to fully appreciate this history of debate, it is important to first understand the background that ultimately gave rise to the United States Senate.

On July 4th, 1776 the Second Continental Congress approved the final draft of the Declaration of Independence and openly proclaimed the independence of the Thirteen American

¹ “Powers and Procedures,” United States Senate, accessed March 1, 2021, <https://www.senate.gov/about/powers-procedures.htm>

colonies from British. On November 15, 1777, the same body approved the final draft of the Articles of Confederation, the nation's first constitution. However, the document required unanimous consent of the thirteen colonies in order to take effect. Due to this requirement, the Second Continental Congress served as the official government of the American colonies for the next four years. Finally, on March 1st, 1781 the Articles of Confederation took effect after Maryland became the final state to ratify.² The document established a "firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare" amongst the states.³ Each state was represented in the unicameral national congress with one vote.

Following the Treaty of Paris and the official end of the Revolutionary War in 1783, a number of problems began arising with the government established by the Articles of Confederation. In "A Concise Guide to the Articles of Confederation as a source for Determining the Original Meaning of the Constitution" legal scholar Gregory Maggs identifies problems with the Articles included finances, foreign policy, and the shortcomings of the legislative, executive, and judicial power that Congress possessed.⁴ For many, these problems revealed the national government's ineffectual ability to respond to the dangers constituted by both the individual states and the people at large. Constructing a national government that could restrain the abuse of power amongst those two groups defined the debates that resulted in the Senate.

State tyranny was an issue often raised by critics of the Articles of Confederation. In the spring of 1787, James Madison wrote an essay title "Vices of the Political System of the United

² Gregory E. Maggs, "A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution," *George Washington Law Review* 85, no. 2 (March 2017): 412.

³ "Articles of Confederation: March 1, 1781." Avalon Project, Yale Law School.
https://avalon.law.yale.edu/18th_century/artconf.asp

⁴ Maggs, "Concise Guide to Articles of Confederation," 415-416.

States" which identified a number of problems connected to the national government's inability to rein in abuse amongst the states. Some of the problems Madison pointed to included, "Failure of the States to comply with the Constitutional requisitions," "Encroachments by the States on the federal authority," and "Trespasses of the States on the rights of each other."⁵ Under the Articles of Confederation, the national government was too weak to prevent states from disrespecting the authority of both the national government and other state governments. There was simply no power to check against misconduct committed by state governments. In March of 1787, George Washington wrote that the federal government needed to be altered so that, "Congress will upon all proper occasions exercise the powers with a firm and steady hand."⁶ The Articles of Confederation lacked that firm and steady hand necessary to check the states.

While fear of unchecked state power was foundational to criticisms of the Articles of Confederation, fear of unchecked power amongst the people was just as strong. That fear only intensified when Daniel Shays helped lead a group of farmers and former soldiers to revolt against high taxes in Massachusetts in late 1786.⁷ Shays' Rebellion was a reminder to many about the dangers of the "excess of democracy" and of a "headstrong democracy."⁸ Once the revolt had been put down, George Washington reflected and was hopeful that, "good may result from the cloud of evils which threatened, not only the hemisphere of Massachusetts but by

⁵ James Madison, "Vices of the Political System of the United States, April 1787," *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-09-02-0187>.

⁶ "From George Washington to James Madison, 31 March 1787," *Founders Online*, National Archives, <https://founders.archives.gov/documents/Washington/04-05-02-0111>.

⁷ "Shays' Rebellion," In *The Digital Encyclopedia of George Washington*, George Washington's Mount Vernon, Accessed December 20, 2020, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/shays-rebellion/#:~:text=A%20violent%20insurrection%20in%20the.states%20experienced%20similar%20economic%20hardships>.

⁸ Woody Holton, *Unruly Americans and the Origins of the Constitution*, (New York: Hill and Wang, 2007), 5, <https://hdl.handle.net/2027/dul1.ark:/13960/t2799cq9b>

spreading its baneful influence, the tranquility of the Union.”⁹ The cloud of evil that Washington feared would spread and threaten the peace of the nation was unchecked popular uprisings.

Following the Shays’ Rebellion, an anonymous author under the pen name “A Citizen” wrote that the participants were, “ever busy in sowing sedition, and stimulating the simple and unwary, under the specious pretence of redressing grievances, to destroy that government which alone protects them.”¹⁰ The revolt of farmers and militia men stoked fears that excessive democracy was susceptible to provocation of the masses and would ultimately threaten the entire system of government itself. These fears of state tyranny and excessive democracy drove the campaign to alter the Articles of Confederation.

In September of 1786, twelve delegates from five states convened in Annapolis, Maryland to discuss such alteration. The meeting was focused largely on commerce and trade amongst the states, and ways to seek uniform economic conditions. Following the convention, the delegates consequentially issued a report to Congress that recommended another convention be held in Philadelphia the following year to further address issues with the standing government.¹¹ The report recommended a convention that would:

Take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress Assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State will effectually provide for the same.¹²

⁹ The Digital Encyclopedia of George Washington, “Shays’ Rebellion.”

¹⁰ A Citizen, “To the Citizens of Massachusetts On Conventions,” *Worcester Magazine* 2 (August 1786): 262. ProQuest.

¹¹ “Annapolis Convention,” In The Digital Encyclopedia of George Washington, George Washington’s Mount Vernon, Accessed December 20, 2020, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/annapolis-convention/#1>

¹² “Annapolis Convention. Address of the Annapolis Convention, (14 September 1786),” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Hamilton/01-03-02-0556>.

In February of 1787, Congress authorized the Annapolis Convention's recommendation and issued that a convention should be held with the "purpose of revising the Articles of Confederation."¹³ On May 14th, 1787, James Madison and a handful of other delegates arrived at the Pennsylvania State House in Philadelphia to begin that convention.

Over the course of the convention, the framing of the Senate became a key development that represented the broad concerns that shaped the creation of the Constitution. The Senate's ultimate framework of equal representation and indirect election resulted from fierce debates over the role of the states and the people at large in the new federal government. Equal representation was an assurance to small states that they would be protected in the national legislature from the tyranny of larger states. The indirect election of senators ensured that the passions of the people would be checked against political wisdom and considered debate, which the Senate would embody. After the Constitution was signed by the delegates in Philadelphia, defending the new Senate became critical to defending the broader government established by the Constitution and winning its ultimate ratification.

Note on the Sources:

This paper heavily relies upon both Madison's *Notes on the Debates in the Federal Convention of 1787* and *The Federalist Papers* as sources for the debates during the Constitutional Convention and the Ratification Debates. Given this, I believe it is necessary to analyze the reliability of these sources as evidence for those debates. In her book, *Madison's Hand: Revising the Constitutional Convention*, Mary Sarah Bilder addressed the extent that

¹³ Roscoe R. Hill, ed., *Journals of the Continental Congress*, vol. 32, January 17-July 20, 1787 (Washington, DC: Government Printing Office, 1936), 71-74.

James Madison revised the notes he took during the Federal Convention in Philadelphia. Although stating that Madison revised his draft of notes numerous times following the convention, Bilder included that “The revisions do not detract from the manuscript’s significance; they enhance it.”¹⁴ The enhancement is that the notes allow readers to understand the meanings of the Constitution and the debates through the lens of James Madison. Bilder added that Madison “imposed his personality and preferences” and “intertwined the proceedings with his desires and disappointments.”¹⁵ Madison’s revisions to notes ultimately created a narrative about the Constitution and convention itself regarding “what he saw as significant in the Convention.”¹⁶ When utilizing Madison’s note as a source, it is important to understand how he influenced the document in those ways. Yet, while reliance upon Madison’s notes allows Madison’s perspectives to frame the debates in the convention, the actual issues of debate remain out of reach for Madison to fundamentally alter. The delegates did debate congressional representation and the process of electing the national legislature. They debated the competing interests and visions that underlaid the Virginia and New Jersey Plans. While the framing and presentation of the issues is certainly influenced by Madison, the actual issues that invoked debates can be trusted. Further, Madison’s Notes provide the most complete access to the full debates that occurred during the summer of 1787 and are a valuable resource because of it.

Regarding *The Federalist Papers*, Melvin Yazawa provided a solid overview of the influence of the essays during the Ratification Debates in his book *Contested Conventions*. In it

¹⁴ Mary Sarah Bilder, *Madison’s Hand: Revising the Constitutional Convention*, (Cambridge, Massachusetts: Harvard University Press, 2015), Introduction, Kindle.

¹⁵ Bilder, *Madison’s Hand*, Conclusion, Kindle.

¹⁶ Bilder, *Madison’s Hand*, Introduction, Kindle.

he wrote bluntly, “many contemporaries refused to follow its advice.”¹⁷ Yazawa’s point is largely that *The Federalist* is a much more influential source today than it ever was during the ratification of the Constitution. Some reasons for its lack of contemporary influence according to Yazawa include its uneven distribution outside of Federalist friendly New York and that it was simply “poorly written to win converts.”¹⁸ However, this characterization of the source does not impact its use in this paper. *The Federalist Papers* are not used in this source as an example of how the Ratification Debates were influenced one way or another, or how the ratification of the Constitution was eventually. Instead, it is used as an authority on the Federalist point of view and arguments utilized during the Ratification Debates on the Senate and the Constitution broadly.

¹⁷ Melvin Yazawa, *Contested Conventions: The Struggle to Establish the Constitution and Save the Union, 1787-1789*, (Baltimore: Johns Hopkins University Press, 2016), 181.

¹⁸ Yazawa, *Contested Conventions*, 182.

Chapter 1

The Constitutional Convention and the Creation of the Senate

The Constitutional Convention was scheduled to begin on May 14th, 1787.

Representatives from each of the states were to converge on the Pennsylvania State House in Philadelphia to reform and enhance the failing Articles of Confederation that had been governing the newly independent nation since 1781. Virginia Delegate to the Federal Convention James Madison began recording his notes on that day. It is a great resource to us that Mr. Madison recorded the daily in and outs of the meetings in Independence Hall that would come to define the young United States. Madison's *Notes on the Debates in the Federal Convention of 1787* is one of the few sources available to historians that shed a light on the secretive summer meetings that would birth a new form of government for the nation. While other delegates recorded notes that aid in our understanding of the events of the convention, Madison's *Notes* are the only source that cover the entirety of the convention and share the most information on the debates that took place within the meetings that would shape history.

Thanks in large part to the scrupulous record left to us by Madison, the debates and motivations that drove the convention throughout that historical Pennsylvania summer are available to us. The same is true for the motivations and debates that took place regarding the legislative body that today often claims to be the "greatest deliberative body in the world."¹⁹ Before the convention came to a close in September with the Senate as a feature of the new constitutional government, months of debate shaped that body. Disputes over representation, the

¹⁹ "Institution," United States Senate, accessed February 20, 2021, <https://www.senate.gov/history/origins.htm>

electoral process, and the structure of the legislature came to define the arguments of the convention and it was these debates that shaped the forging of the United States Senate. At the heart of the debates regarding the Senate were concerns about the dangers of concentrated, unchecked power resting amongst both the states and the people at large. The Senate's ultimate construction by the end of the convention was largely forged as a check against state and popular power. Its principle of equal representation ensured that larger states could not dominate the Federal Congress at the total expense of the interests of smaller states. Further, the election of senators by the state legislatures ensured that the institution provided a check against the interests of the popularly elected House of Representatives.

Although Madison's notes begin on the May 14th date, the convention itself did not. Madison records that, "On that day a small number only had assembled. Seven States were not convened till Friday 25 of May."²⁰ Seven states were necessary for a quorum to officially start the convention. Delegates from New Hampshire, the final delegation to arrive at the convention, would not arrive in Philadelphia until July 23rd.²¹ However, it was on the 25th of May that that quorum was reached and the convention was officially opened.

The convention began with a sense of agreement and harmony that would not last long. On May 25th, Robert Morris, delegate from Pennsylvania, opened the meeting by nominating General George Washington to preside over the convention. Madison recorded, "General WASHINGTON was accordingly unanimously elected by ballot, and...in a very emphatic manner he thanked the Convention for the honor they had conferred on him [and] reminded them

²⁰ James Madison, "Notes on the Debates in the Federal Convention," May 25th, 1787, Avalon Project, Yale Law School, https://avalon.law.yale.edu/subject_menus/debcont.asp

²¹ Gregory E. Maggs, "A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the US Constitution," *University of Illinois Law Review*, no. 2 (2009): 5.

of the novelty of the scene of business in which he was to act.”²² Madison recorded that Benjamin Franklin, delegate from Pennsylvania, was the only potential challenge to Washington’s election, but that Franklin himself would have nominated Washington had he not been housebound due to illness.²³ The agreement and concurrence among the delegates over the appointment of Washington quickly faded as the convention moved forward.

After officially convening the convention and setting the rules for the proceedings, debates on government reform began. In fact, the convention quickly turned from a focus on reforming the Articles of Confederation to a focus on crafting a suitable government to replace the government of the Articles. It became clear early on that the delegates at the Convention were poised to move beyond the mandate of the Annapolis Convention report that had sent them to Philadelphia in the first place. Madison himself was at the center of pushing the convention towards these ends. Before the convention even began, he had begun crafting his own plan for proper government for the United States.²⁴

However, Madison was not the only one to craft plans for the creation of a new structure of government. Four plans were presented, with only two being heavily debated, over the course of the summer of 1787. These plans were the Virginia Plan, the New Jersey Plan, the Hamilton Plan, and the Pinckney Plan. Each of these plans addressed different concerns and philosophies on proper government that would set the stage for debate over the course of the convention. At the center of debate was a struggle to create a framework that balanced democracy against the fears of abuse by the people and the states. The Virginia Plan proposed a bicameral legislature

²² Madison, “Notes,” May 25th.

²³ Madison, “Notes,” May 25th.

²⁴ Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, (New York: Signet Classics, 2003), 7.

with representation based on population. The New Jersey Plan countered with a proposed single chamber legislature based on equal representation, which was similar to the Congress under the Articles of Confederation. It was these two plans that received the highest level of debate during the convention. However, Charles Pinckney of South Carolina and Alexander Hamilton of New York also proposed plans that played lesser, but nonetheless important roles in shaping the course of the convention and the eventual draft of the Constitution. Pinckney's plan for a mixed style of representation between his bicameral legislature clearly influenced the final draft of the Constitution. Hamilton's Plan was the most unique and it called for a Senate elected by electors chosen by the people. While the plan received no debate and did little to directly influence the final draft of the Constitution, the proposal did play a key role in keeping the convention from completely falling apart.

The first plan proposed during the convention was the Virginia Plan, which was the design of James Madison. Governor of Virginia Edmund Randolph presented the plan to the convention on the 29th of May. The plan proposed a bicameral legislature composed of an upper and lower chamber. Members of the upper chamber were to be elected by the members of the lower chamber (who would be elected democratically). Members of the "second branch" were to serve "for a term sufficient to ensure their independency."²⁵ Under this plan, each branch would have similar (and thus competing) powers and responsibilities regarding national legislation.

After Randolph's presentation of the Virginia Plan, Charles Pinckney, delegate from South Carolina, presented his own plan for consideration. Similarly to James Madison, "It is widely believed that Pinckney arrived in Philadelphia with his draft already completed."²⁶ The

²⁵ Madison, "Notes," May 29th

²⁶ Jared McClain, "An Analysis of Charles Pinckney's Contributions at the Constitutional Convention of 1787," *Journal of Southern Legal History* 24 (2016), 6.

Pinckney Plan also proposed a legislature composed of two chambers. In this case, a Senate and a House of Delegates. The House of Delegates was to be based on population, with each seat representing 1,000 inhabitants (including 3/5th of the African American population). The Senate was to represent four legislative Districts and would be elected by the House of Delegates. These legislative bodies would combine to be given a great power, the authority to elect the president. Pinckney's plan proposed, "The Senate and H. D. shall by joint Ballot annually chuse (sic) the Presidt (sic) U. S. from among themselves or the People at large."²⁷ The Senate and House of Delegates would also have the power to regulate the laws of the states. The plan proposed, "no Bill of the Legislature of any State shall become a law till it shall have been laid before S. and H. D. in C. assembled and received their Approbation."²⁸ Although Pinckney presented his plan to the convention for consideration, "it was never formally debated."²⁹ Still, the proposal's bicameral legislature and its mixed mode of election became a defining aspect of the ultimate constitutional framework.

The debates recorded in Mr. Madison's notes reveal a clear dividing line amongst the delegates on several key issues over the two early proposals. At the heart of the division lay the national legislature and the mechanism in which its members would be elected. Questions over whether the national legislature should be chosen by the people at large or by the state legislatures were at the focus of debate. The question driving the debate was who could be trusted with the power to select the members of the national legislature: the people or the states? On one hand delegates like Elbridge Gerry and Charles Pinckney pushed for the election of the

²⁷ "The Plan of Charles Pinckney (South Carolina), Presented to the Federal Convention," 1787, Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/pinckney.asp.

²⁸ "The Plan of Charles Pinckney."

²⁹ McClain, "Analysis of Charles Pinckney's Plan," 6.

national legislature to be conducted by the state legislatures. Opposed to this idea were delegates such as George Mason and James Wilson who supported popular election playing a role in the formation of the national congress. From the earliest recorded debates over the election of national representatives, James Madison argued for a mixed mode of election. One branch of the legislature would be elected by the people at large. The other branch would be elected by the state legislatures. While other delegates were recorded as proposing similar electoral mechanisms, Madison's Notes display Madison as the delegate who provided the most in depth analysis and defense of such mechanisms. Madison had even flouted the possibility of a two branch national legislature to Washington in April of 1787.³⁰ Ultimately, this idea of a mixed mode election process for the national legislature represented a check against both popular and state power.

The debates over the popular election of the national legislature largely split among the delegations on the basis of state size. Due to this split, the Virginia Plan was met with fierce resistance from small states such as New Jersey.³¹ It became clear that the issue of political representation would dominate the proceedings of the convention. On May 31st, the convention took up debate over the clause, "that the members of the first branch of the National Legislature ought to be elected by the people of the several States"³² Delegates who argued against the popular election of the national legislature focused on concerns over the ability of the people to choose proper officials, the legitimacy of the national government, and the ability of the national and state governments to achieve common goals.

³⁰ James Madison, "Letter From James Madison to George Washington, 16 April 1787," Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/01-09-02-0208>

³¹ Maggs, "Concise Guide to the Records," 12.

³² Madison, "Notes," May 31st.

Elbridge Gerry, delegate from Massachusetts, argued strongly against popular representation on the basis that there was a real danger in entrusting the complete power to elect the national legislature to the people. Gerry was deeply concerned with the ability of the people to elect proper officials to serve in the national legislature. He claimed, “The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots.”³³ He argued that his home state of Massachusetts was an example of such inability. Gerry claimed that in the state of Massachusetts, “the worst men get into the Legislature. Several members of that Body had lately been convicted of infamous crimes. Men of indigence, ignorance & baseness, spare no pains, however dirty to carry their point agst. men who are superior to the artifices practised.”³⁴ At the time, both the Massachusetts House of Representatives and Senate were elected by the people.³⁵ Gerry’s concern was the people would place men into the national legislature that would corrupt the institution as had occurred in the Massachusetts legislature. Gerry then proposed another possibility for the election of the National Legislature. Madison recorded that Gerry was not opposed to the idea that the people would elect a number of “men of honor & character” who the state legislatures would then choose amongst to seat in the legislature. Again, Gerry was concerned with the people electing poor representatives due to their susceptibility to political deceit. However, New York delegate Robert Yates recorded in his notes that on June 6th Gerry argued, “If the national legislature are appointed by the state legislatures, demagogues and corrupt members will creep in.”³⁶ To avoid

³³ Madison, “Notes,” May 31st.

³⁴ Madison, “Notes,” June 7th.

³⁵ John Patrick Coby, *The Constitutional Convention of 1787: Constructing the American Republic* (New York: W.W. Norton & Company, 2017), Appendix D, 180.

³⁶ Robert Yates, “Notes on the Secret Debates of the Federal Constitution of 1787,” Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/yates.asp

this he again proposed a sort of middle ground. He proposal was that “the people should nominate certain persons in certain districts, out of whom the State Legislatures shd. make the appointment.” The election of the National Legislature would be best served if the state legislatures had the ability to *filter* the political will of the people at large. For Gerry, there needed to be a check against the people when it came to electing the federal congress.

Also arguing against the democratic election of the first house of the legislature was Roger Sherman, delegate from Connecticut and former member of the drafting committee for the Declaration of Independence. Madison recorded that Sherman argued, “The people...should have as little to do as may be about the Government. They want information and are constantly liable to be misled.” He proposed that the first branch of the National Legislature be elected by the state legislatures.³⁷ Both Sherman and Gerry held that the people were too susceptible to being misled, perhaps by false depictions of patriotism as Gerry feared or otherwise, to ably and properly elect the national legislature.

Another concern was in legitimizing the new federal government amongst the states. This had been a major issue at the heart of the failures of the Articles of Confederation. On June 6th, the delegates once again resumed debate around the mechanisms for electing representatives and Charles Pinckney led the argument against the popular election of the national legislature. He held that, “the people were less fit Judges in such a case, and that the Legislatures would be less likely to promote the adoption of the new Government, if they were to be excluded from all share in it.”³⁸ Madison had feared that without the involvement of the people in the election of the federal legislature, that the new government would fail to achieve political legitimacy. Pinckney

³⁷ Madison, “Notes,” May 31st.

³⁸ Madison, “Notes,” June 6th.

had similar concerns, but instead focused on the concern that the states, if left out of the political process, would view the national government as illegitimate. Having the state governments play a role in shaping the federal government would give them a vested interest in that government. Pinckney's hope was that states would view the national government as legitimate if their concerns were represented by and engaged with by the federal government.

A third concern addressed by the delegates opposed to the popular election of the first branch of the national legislature was regarding the goals of the federal government. If the federal government was to serve the same aims as the states, the states would need to have a strong connection to it. John Dickinson addressed such concerns when he argued in favor of election of the nation legislature by the states. He was not so worried as Madison was about the agency of the states towards the national government. Madison recorded that Dickinson, "was for a strong National Govt. but for leaving the States a considerable agency in the System."³⁹ However, Dickinson believed that the state and national legislatures should strive towards the same "views and measures" and that this would be achieved by the "national legislature flowing from the state legislatures."⁴⁰ Dickinson's concerns allude to the sense of national disunity that largely occurred under the Articles of Confederation. One state strived toward one goal while their neighbor strived towards another. To avoid this, Dickinson argued that a federal government tied directly to the concerns and goals of the states could help form a sense of unity among the levels of government.

On the other hand, many delegates argued for the first branch of the national legislature to be democratically elected. Delegates like George Mason and James Madison argued that

³⁹ Madison, "Notes," June 6th.

⁴⁰ Yates, "Notes on the Secret Debates."

popular elections of the national legislature were necessary for a free government. Other delegates, such as James Wilson, argued that the new government could only be legitimized if the people, not the states, felt a direct connection to it. However, it was James Madison who gave the strongest defense of the national legislature including some form of popular election by appealing to the ideals of the government philosophized by the Declaration of Independence.

A major concern of delegates favoring the popular election of the national legislature was a defense of free government. Virginia delegate George Mason argued, “strongly for an election of the larger branch by the people” and said that, “It was to be the grand depository of the democratic principle of the Govtt.”⁴¹ He also addressed the concerns laid out by delegates like Dickerson and Gerry and admitted that institutions made “too democratic” could raise issues. However, he did not want such concerns to result in the “opposite extreme” of creating a national legislature with no democratic election mechanism. Among Mason’s concerns recorded by Madison was that a lack of democratic elections would result in a superior class governing with indifference to the rest of the polity. He argued, “the indifference of the superior classes of society to this dictate of humanity & policy; considering that however affluent their circumstances, or elevated their situations, might be, the course of a few years, not only might but certainly would, distribute their posterity throughout the lowest classes of Society.”⁴² Mason was concerned that without the popular elections that form the basis of free government a aristocracy would eventually form in its place.

Other delegates, such as James Wilson, supported the popular election of the national legislature as the best way to legitimize the new government. Wilson, a delegate from

⁴¹ Madison, “Notes,” May 31st.

⁴² Madison, “Notes,” May 31st.

Pennsylvania, argued that election of the federal legislature by the people would help give legitimacy to the federal government by ensuring the “confidence of the people.”⁴³ He also engaged questions about the relationship between the states and the national government, a relationship that had been extremely contentious under the arrangement of the Articles of Confederation. Wilson believed that election of the National Legislature by the state legislatures would wrongly, “increase the weight of the State Legislatures.”⁴⁴ State indifference and even defiance to the authority of the national government had been at the center point of the political climate in the early years of the United States. Given this history, Mr. Wilson concluded that state governments themselves provided a greater challenge to the success of a new federal government than did the people at large. He reflected, “On examination it would be found that the opposition of States to federal measures had proceeded much more from the officers of the States, than from the people at large.”⁴⁵ In a debate over who could be trusted to properly elect members of the National Legislature, Mr. Wilson concluded it was certainly not the state legislatures (whose behavior had contributed to the necessity of such a convention).

Still, it was James Madison who provided the staunchest defense of the popular election of the national legislature. Madison raised concerns about the need to have the election of the national legislature be tied, in part, to the body politic. Madison held, “the popular election of one branch of the National Legislature as essential to every plan of free Government.”⁴⁶ Certainly the most important phrase of Madison’s contention is “one branch.” Popular election of the National Legislature was not essential to free government, but the popular election of one

⁴³ Madison, “Notes,” May 31st.

⁴⁴ Madison, “Notes,” May 31st.

⁴⁵ Madison, “Notes,” May 31st.

⁴⁶ Madison, “Notes,” May 31st.

branch of the National Legislature was. Madison believed that involvement of the people in important electoral processes would facilitate “sympathy” between the people and their “rulers and officers.”⁴⁷ While Madison supported “refining the popular appointments by successive filtrations”, he believed the election of the National Legislature without any input by the people was a step too far and should be reserved for the second branch of the legislature, the executive and the judiciary. He concluded, “the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.”⁴⁸

Madison believed that the “great fabric” (i.e., the legitimacy of the government) was better founded upon the people than the institutions of the government. He worried that without a branch of the national legislature being elected by the people, “the people would be lost sight of altogether” in regard to the national government. Madison believed deeply in the ability of institutions to refine the impulse of the people, but that the institutions had to be connected to the people. If the institutions of the national government were simply refining the will of state legislatures, rather than any aspect of the people’s political will, that the great fabric was on shaky grounds. Yes, the executive would best be elected through the filtration of the people. Yes, the second branch of the national legislature would be best composed through the filtration of the people. However, the national government had to remain connected to the response of the people in order to maintain legitimacy and for the institutions to properly function. Madison was assessing the political legitimacy of a new federal government in terms of the political philosophy espoused by the Declaration of Independence. The Declaration’s preamble states,

⁴⁷ Madison, “Notes,” May 31st.

⁴⁸ Madison, “Notes,” May 31st.

“Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁴⁹ Legitimate governments assume their political legitimacy by receiving the consent of the governed. The legitimacy of a new federal government required no less. That is why some aspect, one branch of the legislature, needed to be connected to be directly connected to the people at large.

William Pierce, delegate from Georgia was in support of Madison’s mixed mechanism of electing the national congress. He explained, “an election by the people as to the 1st. branch & by the States as to the 2d. branch;... means the Citizens of the States wd. be represented both individually & collectively.”⁵⁰ The interests of the people as a national collective would be accounted for by the House of Representatives. On the other hand, the Senate would allow their interests as members of their respective states to be represented.

After debate over the mode of electing the national legislature, a vote was held on the relevant clause. By an 8-3 vote the measure was struck down. After rejecting the election of the first branch of the National Legislature by the state legislatures, the delegates then took up debate over the election mechanism for the second branch. These debates took place on June 7th.

There was not much debate over the merits of electing the second branch, the Senate, by the state legislatures. By this point, most of the delegates agreed that it was proper to have the second branch be appointed by such a means and without the participation of the people at large. James Wilson is one of the few delegates recorded as disproving of the measure. Yates noted that Wilson argued that there would be considerable disagreement upon the two branches of the

⁴⁹ “Declaration of Independence, July 4, 1776,” Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/declare.asp

⁵⁰ Madison, “Notes,” June 6th.

legislature since they would be composed by different means.⁵¹ However the historical records available to us indicate that Wilson was in the minority in this regard. In fact, the delegations voted unanimously on June 7th to approve of the clause, “that the members of the 2d. branch ought to be chosen by the individual Legislatures.”⁵² By this point, most of the delegates came to the agreement that the power of the people within the federal legislature needed to be checked. Having the second branch elected by the state legislatures would provide that balance by allowing “considerable disagreement” amongst the branches.

By June 7th, the delegations in Philadelphia had largely accepted major outlines of the Virginia Plan. Importantly, the convention seemed poised to adopt a bicameral legislature with the lower house elected by the people and the upper house elected by the state legislatures. However, another facet of the Virginia Plan’s proposed legislature marked a major divide amongst the delegates that threatened to sink the entire convention.

That divide was over legislative representation and the role that population should play in representation in the national congress. Disputes between American colonists and the British Crown had a deep history before the American Revolution and the resulting Constitutional Convention that sought to create the government to secure that revolution.⁵³ The divide between the American colonies and the British Empire over representation carried over to the halls of the Pennsylvania State House. Most important to that divide was dispute over popular representation. How would states be represented in the new national legislature the framers were creating? Would the states have equal representation as they enjoyed under the Articles of

⁵¹ Yates, “Notes on the Secret Debates.”

⁵² Madison, “Notes,” June 7th.

⁵³ John Phillip Reid, *The Concept of Representation in the Age of the American Revolution*, (Chicago: University of Chicago Press, 1989), 31.

Confederation? These first two proposals gave a clear answer to the latter question: no. Both the Virginia Plan and the Pinckney Plan included clauses that aspects of representation in the national legislature would be based on population. The New Jersey Plan, which included the doctrine of equal representation in the national legislature, was eventually proposed to counter the Virginia Plan in favor of equal representation.

The defining characteristic of the New Jersey Plan, proposed by William Paterson, was that it called for a unicameral legislature in which each state had equal representation. While debate over exactly what the proportional representation under the Virginia Plan would look like was far from resolved (the counting of enslaved black Americans still to be settled), the simple proposal of proportional representation was met with resistance. Contentious debate over the mode of representation presented during the debates over the Virginia Plan impacted the equal representation found in the New Jersey Plan. During the debates of the Virginia Plan, delegates like James Madison and Edmund Randolph suggested that the representation be proportional to population. Randolph, with the support of Madison, motioned to include the phrase, “that the rights of suffrage in the national legislature ought to be proportioned.”⁵⁴

Resistance to proportion-based representation revolved around two key concerns. First, some delegates viewed proportional representation as too far beyond the mandate of the convention. Since the states enjoyed equal suffrage power in Congress under the Articles of Confederation, these delegates argued that instituting proportional representation into the national congress was not within their delegated authority. Equal representation was a keystone of the principles of the Articles of Confederation and could not be easily trampled over. Secondly, and perhaps more sincerely, “small” states worried that proportional representation

⁵⁴ Yazawa, *Contested Conventions*, 28.

would allow “large” states to dominate unchecked in the national legislature. Somewhat ironically, Madison had earlier referenced issues of state relationships in his *Vices of the Political System of the United States*. One of Madison’s highlighted deficiencies of the Articles of Confederation was that it allowed, “Trespasses of the States on the Rights of Others.”⁵⁵ Madison argued that, “The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and...are destructive of the general harmony.”⁵⁶ States had proven to reject practices conducive to national Union and adopted stances that abused the rights and wellbeing of other states. Even Madison, a proponent of proportional representation, saw it as a fundamental issue with the current political structure. It's easy to envision why small states would fear trespasses from unstrained larger states in a Congress composed of proportional representation. Small states, lacking the necessary representative power would be completely unable to balance the interests of the larger states and prevent practices “destructive of the general harmony.” George Read, delegate from Delaware, advised the convention to be wary of such. He argued that it “behooved the smaller states not to count on the “generosity or ideas of public justice” of the larger states” and to “trust nothing of consequence to them.”⁵⁷ Given these concerns, it is no surprise that delegates from small states immediately resisted Randolph’s clause calling for proportional representation. Instead, they positioned to have the clause state, “the rights of suffrage in the national legislature ought not to be according to the present system.”⁵⁸ This was

⁵⁵ James Madison, “Vices of the Political System of the United States, April 1787,” Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/01-09-02-0187>

⁵⁶ Madison, “Vices.”

⁵⁷ Yazawa, *Contested Conventions*, 30.

⁵⁸ Yazawa, *Contested Conventions*, 29.

not to outright reject the equal representation that constituted the national congress under the articles. Rather this was to allow flexibility in what the equal representation under a revised Articles would look like. The equal representation would not be the same one state-one vote system of the Articles, but small states continued to allow a path for some form of equal representation.

Delegates from Delaware were so committed to maintaining a doctrine of equal representation in the national legislature that they threatened to leave the convention if it was abandoned. They stated that, “If the majority decided to change the rule of suffrage, then the Delaware delegation might be obligated to retire from the convention. Similar to Patterson’s argument that the convention was bound to the doctrine of equal suffrage by its mandate, the Delaware delegation argued that they were likewise bound by the state that sent them. The Delegation held that they, “were restrained by their commission to assenting to any change of the rule of suffrage.”⁵⁹

Another fundamental point debated was over the makeup of representation. Paterson’s New Jersey Plan instituted equal representation in the national legislature. This was based on the fact that each state has one vote in the Congress under the Articles of Confederation. Article Five of the Articles of Confederation instituted that, “In determining questions in the United States in Congress assembled, each State shall have one vote.”⁶⁰ Again, Paterson tied this to the idea that government created by the delegates at the Convention should reflect the mandate given to them (improve the Articles, not override them). He argued, “If we argue the matter on the supposition that no Confederacy at present exists, it cannot be denied that all the States stand on the footing

⁵⁹ Yazawa, *Contested Conventions*, 29.

⁶⁰ “Articles of Confederation: March 1, 1781,” Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/artconf.asp

of equal sovereignty. All therefore must concur before any can be bound.”⁶¹ This contention was tied to the fact that the ratification of the Articles had relied upon the unanimous consent of the Thirteen Colonies. Paterson’s point was that if the convention was to fundamentally alter the Articles, then they required the unanimous consent of the states in order to do so. Since no such consent had been obtained, he believed the principle of equal representation in the national legislature needed to remain in whatever drafts the convention ultimately settled on.

Randolph and Madison led the push in favor of proportional representation and in attacking maintaining equal representation in the national legislature. Opponents of equal representation argued that proportional representation gave more popular justification to the government in wielding power. They also contended that equal representation was not a way to ensure true “fairness” amongst the states in the national legislature.

Randolph argued that proportional representation was necessary to afford the government the proper justification for addressing concerns like trade and for “crushing rebellion.”⁶² He argued that, “The powers for these purposes, can never be given to a body, inadequate as Congress are in point of representation, elected in the mode in which they are, and possessing no more confidence than they do.”⁶³ As evidenced by Shays’ Rebellion, many viewed the government of the Article of Confederation as ineffectual in responding to such a crisis. Randolph argued that if the mode of representation in the new national legislature remained similar to that under the Articles, then the government would remain crippled in the face of future crisis. Instead, a new formulation for the national Congress could only instill the popular trust necessary to wield such power through proportional representation.

⁶¹ Madison, “Notes,” June 16th.

⁶² Madison, “Notes,” June 16th.

⁶³ Madison, “Notes,” June 16th.

James Madison argued in favor of popular representation by reframing the supposed “fairness” of the equal protection proposed by the New Jersey Plan. He framed the argument of equal representation by stating, “It was admitted by both the gentlemen from N. Jersey [Mr. Brearly and Mr. Patterson] that it would not be just to allow Virga. which was 16 times as large as Delaware an equal vote only. Their language was that it would not be safe for Delaware to allow Virga. 16 times as many votes.”⁶⁴ Madison argued that while proponents of equal representation spoke of justice, it was really safety that they were concerned with. Small states would not be a secure, in their liberties or otherwise, if larger states dominated the national legislature. However, Madison pushed that a doctrine of equal representation was far too much of an advantage for the small states over the larger states, an advantage of power in the national legislature that the New Jersey Plan was supposedly trying to avoid. Madison continued, “If N. Jersey or Delaware conceived that an advantage would accrue to them from an equalization of the States...[it] would be obnoxious to many of the States, and...neither the inconveniency, nor the benefit of the expedient to themselves, would be lessened, by confining it to themselves.”⁶⁵ Madison immediately undermined the virtues of the position of equal representation. He argued that equal representation was not admirable to its supporters for its fairness. Treating a vastly more populated state with complete equality to a sparsely populated state could hardly be viewed as fair. Rather, equal representation was admirable for the safety it offered to smaller states. However, such a set up would retain the evils of benefiting some states immensely over others in the national legislature. In this case though, the benefit would be reserved for the smaller states.

⁶⁴ Madison, “Notes,” June 19th.

⁶⁵ Madison, “Notes,” June 19th.

In order to persuade proponents of equal representation, Madison attempted to calm the fear that small states would be overrun in the national legislature. He did so largely by appealing to the westward expansion of the United States. Madison argued that, “The prospect of many new States to the Westward was another consideration of importance. If they should come into the Union at all, they would come when they contained but few inhabitants. If they shd. be entitled to vote according to their proportions of inhabitants, all would be right & safe. Let them have an equal vote, and a more objectionable minority than ever might give law to the whole.”⁶⁶ One reassurance that Madison offered to the small states was that westward expansion of the Republic would bring more sparsely populated states into the Union. Those states would join into the ranks of “small states” alongside those like New Jersey and Delaware. Thus, the interests of the small states would be a growing one and would form an important bloc at the forefront of the strengthening of the Republic. However, if those states received equal representation, then the national legislature would be dominated by states representing a minority of the entire United States.

A final point of contention over the New Jersey Plan and Virginia Plan was regarding whether the national legislature should be unicameral or bicameral. The Virginia Plan proposal included a bicameral legislature while the New Jersey Plan proposed a single chamber legislature. Most pertinent to this thesis, that implicates that there would be no Senate under the New Jersey Plan. Rather, it kept the unicameral national legislature that had existed under the government of the Articles of Confederation. Still, aspects of the Senate were reflected in this chamber of the National Congress (equal representation).

⁶⁶ Madison, “Notes,” June 19th.

The primary debate over the structure of the national legislature revolved around the necessity of checks of legislative power. William Paterson believed that breaking up Congress into two branches to serve as such a check was unnecessary. He argued that party and faction within Congress would itself act as an appropriate check on the branch's power. Beyond that, there was a belief that Congress' power needed to be expanded, not debilitated by such an unnecessary check. Patterson argued that, "Do the people at large complain of Congs.? No, what they wish is that Congs. may have more power. If the power now proposed be not eno', the people hereafter will make additions to it. With proper powers Congs. will act with more energy & wisdom than the proposed Natl. Legislature; being fewer in number, and more secreted & refined by the mode of election."⁶⁷ The New Jersey Plan's proposed single legislature would improve Congress (as constructed by the Articles of Confederation) by adding to its power as the people had sought, not adding checks to its power to further limit it.

However, supporters of the Virginia Plan heavily attacked the retainment of a unicameral legislature in the plan. They argued that the powers of the legislature did need to be broken into two distinct chambers in order to check the branch. The legislature of Britain and its infringement of the rights of the American colonists was a stark reminder of the potential tyranny of an unchecked legislature. James Wilson alluded to that history when he argued, "Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single House there is no check, but the inadequate one, of the virtue & good sense of those who compose it."⁶⁸ Wilson's

⁶⁷ Madison, "Notes," June 16th.

⁶⁸ Madison, "Notes," June 16th.

argument centered on a sort of recency bias of the supporters of the New Jersey Plan. The weaknesses of Congress under the Articles had indeed made it necessary for a more powerful national legislature. However, Wilson's point was to remind the convention that government cannot be trusted with simple infusions of power without the necessary restraints to match it. If the convention were to create a more powerful national legislature, its new power needed to be checked by a measure more reliable than the good-hearted nature of the men serving in it. A Congress broken up into two competing and equally powerful chambers would serve as the necessary check.

By mid-summer, debate over the proposed plans was reaching a boiling point. The Delaware delegation had threatened to abandon the convention. The delegations were deeply divided over the mode of electing members to the national legislature, representation and the structure of the national legislature.

Eventually, questions over the mandate and the powers of the convention threatened to stale the deliberations. Paterson argued that the Virginia Plan went beyond the mandate that had resulted in the convening of the delegates in Philadelphia. Thus, regardless of the merits of the Virginia Plan it should not be considered because the delegates did not have the power to form such a government. Edmund Randolph on the other hand completely threw out Paterson's concerns regarding the power of the convention and cared not if the convention overstepped its mandate. He held, "When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary."⁶⁹ Randolph, like Madison and others, believed that the Articles of Confederation were so fundamentally broken that the delegates had a moral duty to replace them. If they didn't, the fate of the new Republic was doomed. Thus, the

⁶⁹ Ketcham, *Anti-Federalist Papers*, 46-47.

supposed mandate the convention had in maintaining the foundations of the Articles of Confederation were irrelevant.

On June 18th, Alexander Hamilton proposed a plan, the “Plan for National Government,” that would keep the convention moving forward and help salvage the debate over the national legislature. Hamilton’s proposal was extreme. It called for a massive expansion to the powers of the national government. The plan, like the Virginia Plan, called for “The Supreme Legislative power of the United States of America to be vested in two different bodies of men.”⁷⁰ These bodies would be the Assembly and the Senate. Under Hamilton’s plan Senators would be elected for life, or on “good behavior.”⁷¹ The supreme executive would have likewise served on “good behavior.”⁷² It is unlikely that Hamilton submitted such an extreme plan to the convention in earnest. The plan was so radical that it was never put up for consideration by the delegates because, “it seemed so far from the general tenor of the Convention.”⁷³ Instead, the Virginia Plan’s changes to the national government now paled in comparison to the extreme expansion of government power under Hamilton’s proposal. Concerns over violating the mandate of the convention quieted and the delegates returned their focus to the merits of the Virginia and New Jersey Plan. The delegations largely returned to an acceptance of the Virginia Plan’s bicameral legislature that would be elected in part by both the people and the state legislatures

However, the deep divides over the two plans were still strong. By July 2nd contentious deliberation over the plans had caused another impasse. The roadblock between the delegations from the “large” and “small” states remained. State representation in the national legislature

⁷⁰ Madison, “Notes,” June 18th.

⁷¹ Madison, “Notes,” June 18th.

⁷² Madison, “Notes,” June 18th.

⁷³ Ketcham, “*Anti-Federalist Papers*,” 58.

remained the dominant wedge between the delegations. Indeed, Pinckney reflected that “Some compromise seemed to be necessary.”⁷⁴ It was he who proposed that a committee of delegates from each state should be formed to reach a compromise over the issue of state representation in the national legislature. His proposal was accepted by the other delegates and from July 2nd-5th, “Mr. Gerry, Mr. Elseworth, Mr. Yates, Mr. Patterson, Dr. Franklin, Mr. Bedford, Mr. Martin, Mr. Mason, Mr. Davy, Mr. Rutlidge, [and] Mr. Baldwin” convened in an attempt to keep the convention moving ahead. On July 5th, the committee presented its plan for what is known today as the “Great Compromise.” The committee proposed that, “That in the 1st. branch of the Legislature each of the States now in the Union shall be allowed 1 member for every 40,000 inhabitants,” and that, “in the 2d. branch each State shall have an equal vote.”⁷⁵ On July 16 the delegations voted by a 5-4 margin to accept the committee’s proposal.⁷⁶

At the beginning of July, the Federal Convention in Philadelphia was on the brink of disaster. By the middle of the month, with some hesitant concessions, a compromise among the delegates had been reached that laid the foundation of the United States Senate. The national government of the young United States would include a bicameral legislature. Its upper house would be elected by the legislatures of the states that would enjoy equal representation with the chamber. The state legislatures would have the opportunity to appoint men of “character and honor” into the national legislature. The Senate would form an important legislative check against the popularly appointed House of Representatives. Most importantly, small state interests and liberties would receive equal concern and protection against those of the larger states within some capacity of the national government.

⁷⁴ Madison, “Notes,” July 2nd.

⁷⁵ Madison, “Notes,” July 5th.

⁷⁶ Yazawa, *Contested Conventions*, 55.

On September 17th, 1787 thirty-nine delegates of the fifty-five who attended the Philadelphia Convention signed the final draft of the United States Constitution. Article I section 3 of that draft stated that, “The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years: and each senator shall have one vote.”⁷⁷ After months of contentious debate, the United States Senate had been forged. However, the fight to ratify the Constitution would prove just as contentious. Central to winning over favor for the Constitution’s ratification would be in defending the newly created Senate.

⁷⁷ Madison, “Notes,” September 12th.

Chapter 2

The Ratification Debates

On September 17th, 1787, the draft of the document that had been crafted by the delegates over the summer was read to the convention. Benjamin Franklin, the revered elder statesman of the convention, then had his speech in defense of the new Constitution read by James Wilson. Franklin concluded, “I doubt too whether any other Convention we can obtain, may be able to make a better Constitution...[so] Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best.”⁷⁸ Franklin believed that the document produced by the delegates in Philadelphia was amongst the best plans for government that could be produced by ambition and prejudices. Given his support of the Constitution, Franklin motioned that the delegates should sign the document. However, not all delegates at the convention were as supportive of the final document as Mr. Franklin was. Delegates Edmund Randolph, George Mason, and Elbridge Gerry did not sign the document.⁷⁹ Even some who did sign it, such as Jered Ingersoll from Pennsylvania, argued that such an act did not equate to an unequivocal endorsement of the document. He stated that he, “did not consider the signing... as pledging the signers to support the Constitution at all events; but as a recommendation.”⁸⁰

Indeed, the Constitution signed by 55 framers on September 17th was a mere recommendation. The document held no legal power even after its signing. The creation of the document itself was far beyond the scope of the mandate given to the delegates of the convention

⁷⁸ Madison, “Notes,” September 17th.

⁷⁹ Randolph and Mason were from the Virginia delegation, while Gerry was from the Massachusetts delegation.

⁸⁰ Madison, “Notes,” September 17th.

by the congressional resolution of February 21, 1787 that had called for the “sole and express purpose of revising the Articles of Confederation.”⁸¹

The Philadelphia Convention not only failed to produce revisions to the Articles of Confederation, they created an entire new system of government. In order to implement that government, the framers knew the Constitution would have to be ratified by the individual states. James Madison himself believed that the Constitution was “of no more consequence than the paper on which it was written.”⁸² The Articles of Confederation had been unanimously ratified by the Thirteen Colonies (as the Articles required), with the finalization on March 1st, 1781. In that case, the document had been ratified by the legislatures of each of those colonies.

The ratification process for the new Constitution was much different. Ratification required only nine of the thirteen states. State conventions were called to ratify the document, rather than sending them to the state legislatures. On August 31st the delegates debated the means in which the new Constitution should be ratified. Gouverneur Morris argued that they should “strike out ‘Conventions of the’ after ‘ratifications,’ leaving the States to pursue their own modes of ratification.”⁸³ Rather than dictate that the Constitution had to be ratified by conventions of the states, Morris believed the states should be free to ratify the document by whatever means those states deemed appropriate.

Morris’s proposal was met with fierce opposition. Rufus King, delegate from Massachusetts, argued that by not requiring ratification by state conventions would undoubtedly doom the ultimate ratification of the document. Madison records Rufus arguing that, “striking out ‘Conventions’ as the requisite mode was equivalent to giving up the business altogether.

⁸¹ Yazawa, *Contested Conventions*, 99.

⁸² Yazawa, *Contested Conventions*, pg. 99

⁸³ Madison, “Notes,” August 31st.

Conventions alone, which will avoid all the obstacles from the complicated formation of the Legislatures, will succeed, and if not positively required by the plan, its enemies will oppose that mode.”⁸⁴ If ratification was left to the state legislatures, the process would end in failure for the framers. The Constitution would not be ratified.

James Madison agreed that ratification needed to be facilitated by calling state conventions and not leaving the process to the state legislatures. He believed that it was “best to require Conventions... [and that] The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.”⁸⁵ Madison believed that the people (really delegates chosen to represent the people at the state conventions) should ultimately have final say in the adoption of the new government rather than the state legislatures. Madison and Morris would get their way. Each state would hold ratifying conventions to debate the adoption of the Constitution.

These initial discussions over ratification point to the larger issue. The Constitution created by the delegates at the Philadelphia Convention over the summer of 1787 faced a substantial opposition. Large swaths of Americans throughout the various states did not support the new Constitution and did not want it to be ratified. With the signing of the Constitution by the delegates in Philadelphia, two factions quickly formed around the issue of final ratification. The design of the newly created Senate constituted an important aspect of the broader debate regarding the Constitution. Those who favored the new Constitution and who led the campaign to raise support for its adoption labeled themselves the Federalists. They argued that the Constitution laid out important checks and balances against both the power residing with the

⁸⁴ Madison, “Notes,” August 3 1st.

⁸⁵ Madison, “Notes,” August 3 1st.

states and with the people. The Senate, given its term length and electoral construction, would act as an important check against popular aims represented in the Federal Congress by the House. As such, the Constitution and the Senate were framed to promote good government, which to the Federalists meant the establishment of justice and the defense of liberty, not necessarily democracy. Among the most ardent Federalists included James Madison, Alexander Hamilton, and John Jay. Between October 1787 and May 1788 these three men, under the pseudonym Publius, collectively published eighty-five political essays in support of the Constitution known as *The Federalist* that provided a concise view of support for the new government.

Still, as evident by the refusal of some delegates to sign the document, opposition to the Constitution and its ratification was just as strong. According to the National Constitution Center “Opposition to the Constitution after the Philadelphia Convention began with Elbridge Gerry, Edmund Randolph, and George Mason, the ‘Three Dissenters’ who refused to sign the document. It then grew to include Patrick Henry, Samuel Adams, and Richard Henry Lee, heroes of the Revolutionary War who objected to the Constitution’s consolidation of power.”⁸⁶ As the opposition to the Constitution grew, its proponents were labeled as the Anti-Federalists. Regarding the Senate, many Anti-Federalists believed too much power resided in a body that was aristocratic by nature and detrimental to democratic government. Ultimately, the Constitution and its institutions like the Senate endangered the general liberty and will of the people. Like the Federalists, opponents of ratification wrote a series of essays and letters during

⁸⁶ Ugonna Eze, “The Anti-Federalists and their Important Role During the Ratification Fight,” National Constitution Center, last modified September 27, 2017, <https://constitutioncenter.org/blog/the-anti-federalists-and-their-important-role-during-the-ratification-fight>

the Ratification Debates that sought to undermine the ratification efforts of the new Constitution. Many of these essays are now collectively known as the *Anti-Federalist Papers*.

The Anti-Federalist objection to the newly proposed government centered on concerns over liberty and the Constitution's ability to defend it. Fundamentally, they rejected the argument that the Constitution struck a balance between vices and virtues of democratic government. Scholar Saul Cornell identifies the five major concerns of the Anti-Federalists as “the omission of a bill of rights, the consolidationist/nationalist character of the new government, the charge of aristocracy, concerns about taxation, and fears about the creation of a standing army.”⁸⁷ In November of 1787, Elbridge Gerry's opposition to the Constitution was published in the *Massachusetts Centinel* and it quickly became one of the most widely published and thus influential Anti-Federalist writings. In it he wrote:

My principal objections to the plan, are, that there is no adequate provision for a representation of the people—that they have no security for the right of election—that some of the powers of the Legislature are ambiguous, and others indefinite and dangerous—that the Executive is blended with and will have an undue influence over the Legislature—that the judicial department will be oppressive—that treaties of the highest importance may be formed by the President with the advice of two thirds of a quorum of the Senate—and that the system is without the security of a bill of rights.⁸⁸

Gerry's concerns: insecure elections, ambiguous government powers, and no declaration of rights laid out the Anti-Federalists' doubts regarding the supposed checks and balances of the Constitution promised by the Federalists. At the forefront of concerns was that the document framed by the convention contained no declaration of rights.⁸⁹

⁸⁷ Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*, (North Carolina: University of North Carolina Press, 1999), 28, <https://heinonline-org.ezaccess.libraries.psu.edu/HOL/Page?handle=hein.beal/othfundrs0001&id=1&size=2&collection=beal&index=beal>

⁸⁸ Cornell, *Other Founders*, 29.

⁸⁹ Cornell, *Other Founders*, 29.

It became almost immediately clear that the absence of a declaration of rights and a general uneasiness about a security of liberty under the Constitution was a primary obstacle for ratification. Patrick Henry spoke of such concerns before the Virginia Ratifying Convention. He framed the new government of the Constitution “a revolution as radical as that which separated us from Great Britain.”⁹⁰ The concerns over the scope of the framers' authority in simply drafting the Constitution that had threatened at times to derail the convention of 1787 remained strong among the Anti-Federalists. To those like Henry, the framers had undertaken a new revolution against the government of the Articles of Confederation that matched the upheaval of the one of 1776. While the revolution against Great Britain had left American liberty secure against tyranny, Henry objected that this new revolution left liberty unguarded. His objections to the Constitution invoked freedoms and protections that most Americans today readily identify the Constitution with. He argued, “The rights of conscience, trial by jury, and liberty of the press...are rendered insecure, if not lost, by this change so loudly talked of by some.”⁹¹ A Bill of Rights and the assurance that liberty would be protected from the newly formed government was the keystone of opposition to the Constitution.

While these objections were the largest voiced by the Anti-Federalists, they were not the only concern they had for the new government. Central to the argument of the Anti-Federalists opposition to the Constitution was a fear of aristocracy that threatened democratic government. At the forefront of that fear was the creation of the Senate. Particularly, the constitutional framework of the institution was deeply troubling to the opponents of the Constitution. The Anti-Federalists identified a number of their broader concerns toward the Constitution as being

⁹⁰ Ketcham, *Anti-Federalist Papers*, 200.

⁹¹ Ketcham, *Anti-Federalist Papers*, 200.

embodied by the new upper chamber of the national Congress. The Senate's six-year terms were deeply troubling to Anti-Federalists, who supported annual elections. Further, the Senate's structure of equal representation was viewed as counter to the principles of representative, democratic government. Ultimately, the Anti-Federalists viewed the Senate as an aristocratic body that threatened to influence the broader nature of the government framed by the delegates over the summer of 1787.

A primary Anti-Federalist concern with the Senate focused on the length in which Senators were to be elected. The six-year term lengths for Senators was a cause for deep concern amongst opponents to the Constitution. Anti-Federalists were strongly committed to the belief that annual elections were necessary for proper republican government. For them, annual elections were the only way to ensure that representatives remained accountable to the people. Anti-Federalists viewed government's accountability to the dictates of the people to be of the highest priority. As evidenced by a proposal issued at the Virginia Ratifying Convention, Anti-Federalists sought to ensure that representatives were the people's "*trustees* and *agents*, at all time amenable to them."⁹² In order to ensure that relationship, it was proposed that "the elections of representatives in the legislatures ought to be free and frequent."⁹³ Without such frequent elections, it was feared that the people would cease to have the ability to hold government officials accountable. Given this, a number of opponents to the Constitution critiqued the electoral structure of the Senate as dangerous to proper government over the course of the Ratification Debates.

⁹² Ketcham, *Anti-Federalist Papers*, 223.

⁹³ Ketcham, *Anti-Federalist Papers*, 223.

Mercy Otis Warren, under the pen name of “A Columbian Patriot” was one such author.

In 1788, she wrote a pamphlet that strongly criticized the new government formed by the Constitution while focusing on the newly created Senate. Warren wrote

A Senate chosen for six years will, in most instances, be an appointment for life, as the influence of such a body over the minds of the people will be coequal to the extensive powers with which they are vested, and they will not only forget, but be forgotten by their constituents—a branch of the Supreme Legislature thus set beyond all responsibility is totally repugnant to every principle of a free government.⁹⁴

For Anti-Federalists like her, a length of six years between elections would completely erode the relationship of Senators as agents of those who elected them. Rather, Senators would gain such power and influence through their office that it would render such a relationship void, if not inverse it. The Senate as designed would leave the people under the influence of its members, rather than its members being influenced by the people they were meant to represent.

Anti-Federalist John De Witt likewise wrote of concerns regarding the term length in the Senate and the likelihood that Senator’s would therefore lack restraints on their power. On the six year terms in the Senate he wrote, “This length of time will be amply sufficient of itself to remove any checks that he may have upon his independency...[and] Thus habituated to power... he may hold himself compleatly (sic) independent of the people, and at the same time ensure his election.”⁹⁵ Thus the six year terms increased the likelihood that Senators would spend their terms not concerned with re-election and properly representing the needs of the people, but rather on pursuing their own interests.

The Anti-Federalist writing as Cato further shared Anti-Federalist concerns with the breakdown of accountability due to extended term lengths. In a November 1787 essay Cato

⁹⁴ Mercy Otis Warren, “Observations of the New Constitution, and on the Federal and State Conventions. By a Columbian Patriot.” Boston, 1788. *Eighteen Century Collections Online*. Gale Primary Sources.

⁹⁵ Ketcham, *Anti-Federalist Papers*, 332.

wrote, “free cities by frequent elections of magistrates became nurseries of great and able men, every man endeavoring to excel others, that he might be advanced to the honor he had no other title to, than what might arise from his merit, or reputation.”⁹⁶ For Cato and other Anti-Federalists, governments in which representation was tied to popular accountability would produce representatives whose election would be based on merit and competence. However, Cato accuses the framers of the Constitution of abandoning that model. He continued, “the framers of this perfect government... have departed from this democratical principle, and established...sexennial [elections] for the senate, who are to be chosen by the legislatures of the different states.”⁹⁷ Two year House terms, six year Senate terms, and the election of the Senate by the state legislatures all undermined the system that best produced proper representatives for a Republic.

Throughout the Ratification Debates, the concerns regarding the absence of annual elections were broad and many opponents to the Constitution sought to have them implemented into the structure of the new government. The dissent of the minority at the Pennsylvania Ratifying Convention in December 1787 read that the “elections of representatives should be annual.”⁹⁸ Anti-Federalist Martin Luther wrote in January 1788 that, “for six years the senators are rendered totally and absolutely independent of their States, of whom they ought to be the representatives, without any bond or tie between them.”⁹⁹ The six year terms in the Senate were broadly condemned by opponents to the Constitution throughout the Ratification Debates.

⁹⁶ Ketcham, *Anti-Federalist Papers*, 339-340.

⁹⁷ Ketcham, *Anti-Federalist Papers*, 340.

⁹⁸ Ketcham, *Anti-Federalist Papers*, 247.

⁹⁹ “Luther Martin: Genuine Information IV, Baltimore Maryland Gazette, 8 January 1788,” *Center for Study of the American Constitution*, University of Wisconsin-Madison, <https://csac.history.wisc.edu/document-collections/constitutional-debates/senate/>

Luther's argument reveals the reason behind such condemnation. Luther worried that a senator serving for six years would be detached from the interests that he was supposed to represent because he did not have to be concerned with re-election. If senators could easily avoid faithfulness to such interests, the Anti-Federalists feared they would turn to their own interests.

Concerns of the Senate's electoral and representative structure formed the basis of one of the largest concerns the Anti-Federalists had with the Constitution. This concern was that the new Constitution created a government that was highly susceptible to aristocracy. The creation of the new legislative body known as the Senate was seen as proof amongst the Anti-Federalists that the new Constitution leaned toward aristocracy.

Anti-Federalist John De Witt wrote in the *Boston American Herald* in November 1787 about the concerns of the aristocratic Senate. He wrote, "If they are exactly balanced, the Government will remain perfect; if there is a prepondency, it will finally prevail."¹⁰⁰ The balance De Witt referenced was between the two legislative branches of the federal Congress. Indeed, the House and the Senate had been designed as such so that their interests would balance one another. De Witt took no issue with such a concept and even accepted the presence of such balance would be beneficial. However, De Witt's concern was that the design of the Senate (particularly six-year terms) would shift the balance towards the Senate so that the aristocratic interests of the Senate would reign supreme.

An Anti-Federalist writing under the pseudonym Cato wrote of similar concerns with the Senate. In the *New York Journal* in November 1787 Cato wrote, "in forming the senate; that the mode in which they are appointed and their duration, will lead to the establishment of an

¹⁰⁰ Ketcham, *Anti-Federalist Papers*, 332.

aristocracy.”¹⁰¹ Like De Witt, Cato argued that the lengthy election terms of the Senate would open up possibilities of the formation of an aristocracy. However, Cato also believed that the election of the Senate by state legislatures rather than the people would result in aristocratic tendencies by the body.

On the same day that Cato’s essay appeared in the *New York Journal*, an Anti-Federalist writing under the pseudonym Cincinnatus wrote an open essay to James Wilson in the same publication. With the belief that the Senate was an aristocratic body, Cincinnatus argued that the powers and influence of the Senate would ultimately overpower republicanism and the liberties enjoyed by popular governments. Like others, Cincinnatus believed the power of the Senate would overthrow the purported balance constructed by the framework of the Constitution. He wrote, “a senate so constituted is likely to produce a baneful aristocracy, which will swallow up the democratic rights and liberties of the nation.”¹⁰² The reason Cincinnatus thought the baneful aristocracy of the Senate would do so is because of the powers that the body held over the rest of government. By those powers, the aristocratic senate would be the prominent influence on the whole of government and help lean it towards aristocracy. Among these powers was the Senate’s role in trying impeachments and advising executive appointment of various federal offices. Cincinnatus believed such union between the executive and the Senate would allow the Senate to hold great influence over the workings of the executive. He wrote:

From the union of the executive with the legislative functions, they must necessarily be longer together, or rather constantly assembled; and in proportion to their continuance together, will they be able to form effectual schemes for extending their own power, and reducing that of the democratic branch. Their advice and consent being necessary to the

¹⁰¹ Ketcham, *Anti-Federalist Papers*, 339.

¹⁰² “Cincinnatus IV To James Wilson New York Journal 22 November 1787,” *Center for Study of the American Constitution*, University of Wisconsin-Madison, <https://csac.history.wisc.edu/document-collections/constitutional-debates/senate/>

appointment of all the great officers of state, both at home and abroad, will enable them to win over any opponents to their measures in the house of representatives, and give them the influence which, we see, accompanies this power in England; and which, from the nature of man, must follow it every where. The sole power of impeachment being vested in them, they have it in their power to controul the representative in this high democratic right; to screen from punishment, or rather from conviction, all high offenders, being their creatures, and to keep in awe all opponents to their power in high office. The union established between them and the vice president, who is made one of the corps, and will therefore be highly animated with the aristocratic spirit of it, furnishes them a powerful shield against popular suspicion and enquiry, he being the second man in the United States who stands highest in the confidence and estimation of the people.”¹⁰³

Since the Senate held such power over the functionality of the executive, Cincinnatus believed that the executive would scheme with the Senate in ways beneficial to the executive (and vice versa) that would benefit those bodies over the will of people (and the will of the popularly elected House). And given the electoral process for both the Senate and the executive, the people would be completely unable to prevent those schemes. The Senate election by state legislatures and the president’s election by the Electoral College mean that both those bodies are a step removed from the will of the people. Cincinnatus and others like him were worried that these bodies not directly connected to the people would override the will and concerns of the people represented by the House of Representatives (which was connected to the will of the popular body politic). With such a dynamic in mind Cincinnatus continued,

Is a body so vested with means to soften & seduce—so armed with power to screen or to condemn—so fortified against suspicion and enquiry—so largely trusted with legislative powers—so independent of and removed from the people—so tempted to abuse and extend these powers—is this a body which freemen ought ever to create, or which freemen can ever endure? Or is it not a monster in the political creation, which we ought to regard with horror? Shall we thus forge our own fetters? Shall we set up the idol, before which we shall soon be obliged, however, reluctantly to bow? Shall we consent to

¹⁰³ “Cincinnatus IV To James Wilson New York Journal 22 November 1787,” *Center for Study of the American Constitution*, University of Wisconsin-Madison, <https://csac.history.wisc.edu/document-collections/constitutional-debates/senate/>

see a proud aristocracy erect his domineering crest in triumph over our prostrate liberties?¹⁰⁴

The Anti-Federalists vehemently viewed consenting to the new Constitution and its Senate as a guaranteed way to produce an aristocracy and endanger the general liberty and will of the people. Since the Senate was so detached from the people, there was no assurance that the body would not abuse its powers and become a dreadful threat to free government.

During the Ratification Debates, the Anti-Federalists centered their opposition to the Constitution around concerns that the document endangered the general liberty and will of the people. They highlighted the Senate as a key institution of the new government that represented those general concerns. The institution's six-year terms and indirect election posed a threat of aristocracy that was poised to influence the general government of the Constitution. Ultimately, the Senate's aristocratic nature marked a key reason why the Anti-Federalists sought to prevent the ratification of the Constitution. Therefore in order to get the Constitution ratified, the Federalists had to push back against concerns that the Senate threatened to institute an aristocracy.

Thus, one of the primary challenges the Federalist had during the Ratification Debates was to defend the Senate and to quash fears of its aristocratic nature as a threat to the government of the Constitution. Still, even with aristocracy at the forefront of concern, it is hard to deny that forming an enlightened body of men was foundational to the Federalist's desire for the Senate. Allusions to ideas of natural aristocracy are littered throughout the Federalist Papers and other Federalist writing. John Adams wrote to Thomas Jefferson that, "We are now explicitly agreed,

¹⁰⁴ "Cincinnatus IV To James Wilson New York Journal 22 November 1787," *Center for Study of the American Constitution*, University of Wisconsin-Madison, <https://csac.history.wisc.edu/document-collections/constitutional-debates/senate/>

in one important point, That ‘there is a natural Aristocracy among men; the grounds of which are Virtue and Talents’.”¹⁰⁵ Most Federalists agreed with Adams and Jefferson that certain men of high virtue and talent would rise to positions of power in government not by despotic means, but naturally on account of their character. Still, Federalists approached the term aristocracy with different measures of caution. Adams often wrote openly about the natural certainty of aristocracy.¹⁰⁶ James Madison on the other hand tended to avoid the term. In defending the Senate during the ratification debates, the Federalist position suggests the desire for an enlightened body of men that could help facilitate good government and ultimate flourishing. The Senate’s role would be to provide balance against the will of the popular legislative branch. To the Federalists, such a check was necessary to secure the general liberty that the Anti-Federalists were concerned about. However, *The Federalist Papers* avoid designating the Senate as an aristocratic body. Instead, in a rhetorical maneuver the Federalists defend the Senate against concerns of *tyrannical* aristocracy. The choice to defend the Senate against concerns of tyrannical aristocracy, rather than plain aristocracy, displays how the Federalists believed the Senate (purposefully created in an aristocratic nature) was necessary for producing good government. Ultimately, the Federalist arguments during the Ratification Debates revealed that “good government” was the highest aim of the Constitution, not democracy.

It is necessary to position the Federalist’s defense of the Senate by establishing the meaning of “good government.” A strong idea of what the Federalists viewed as the outcomes of good government can be constructed by the preamble to the Constitution. Good government

¹⁰⁵ “From John Adams to Thomas Jefferson, 15 November 1813,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-6198>

¹⁰⁶ In 1813, Adams wrote to Thomas Jefferson that, “the unfeeling Cruelty of a majority of those (in all Nations) who are allowed an Aristocratical influence...I feel a Stronger disposition to weep at their destiny, than to laugh at their Folly.” “From John Adams to Thomas Jefferson, 15 November 1813.”

“establish[es] Justice”, “provide[s] for the common defence”, and “secure[s] the Blessings of Liberty” to the people now and indefinitely.¹⁰⁷ Further, Madison provides insight into the Federalist view of forming good government in Federalist No. 10. In that essay he argued, “it is that...democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”¹⁰⁸ In this view, unrestrained popular democratic government endangers the stability and liberty of a free society. Given that, Madison and the Federalists argued that republican government was necessary to:

refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.¹⁰⁹

To the Federalists, securing the public good, defending private rights, and ensuring government stability was essential to having good government. In their belief such government was instituted by republicanism, not unchecked popular democracy. As such democracy was not the highest good; good government was. Essential to the Federalist trust in republicanism to deliver good government was its ability check and balance dangers to good government. The Federalists believed that the people did indeed serve as the best check on government. However, they held that the people must likewise have a check on themselves in order to ensure good government. Speaking on these checks Madison famously wrote in Federalist No. 51 that:

¹⁰⁷ “Constitution of the United States: Preamble,” Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/preamble.asp

¹⁰⁸ Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers*, (New York: Sterling Publishing Co., 2017), 41-42.

¹⁰⁹ Hamilton, Jay, and Madison, *The Federalist Papers*, 42.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹¹⁰

The people themselves were not a foolproof check against government transgression.

Auxiliary methods of restraining government and ensuring good government was necessary. The Senate was one of those auxiliary precautions. The basis of defense for the Senate by the Federalist's is grounded in explaining how the institution is indeed a necessary institution for good government.

First, the Senate provides a check against an unjust legislature. The tyranny of a legislature composed of a single body remained at the forefront of concerns. Madison wrote in Federalist No. 63 that, "The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act."¹¹¹ A bicameral legislature decreased the odds that the legislative branch could abuse the power and trust placed in them by the people. Important to the bicameral legislature's ability to prevent such action was that it was composed of "separate and dissimilar bodies." If the Senate was composed in a like manner to the House of Representatives, then what good would the Senate be in preventing legislative tyranny? If the Senate was susceptible to the same dangers as the House of Representatives, then the dangers of a single legislative chamber would remain unchecked. There would be two chambers, but their similar natures would leave them open to similar corruption.

¹¹⁰ Hamilton, Jay, and Madison, *The Federalist Papers*, 238.

¹¹¹ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

Thus, the Senate's more aristocratic nature was necessary to provide a stopgap to any missteps by the House of Representatives. In Federalist 62 Madison wrote, "Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."¹¹² The Senate needed to serve as a check against any legislation that endangered good government. If legislation were able to pass with the majority support of the people and the states, it could be assured that only the most well-formed and popular legislation became law. Unlike the Articles of Confederation, the Senate provided a final opportunity to review and refine legislation. In this way, legislation that ultimately became law would have popular support (via the House) and majoritarian support amongst the states (via the Senate).

Still, the Federalists did not view the Senate as a body to indefinitely ensure legislation had wide support. In fact, the Senate was viewed as necessary in order to prevent popular wishes of the people when they were counter to good government. Madison wrote:

There are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?¹¹³

In the moments when passion and misguidance poison the body politic, the Senate must act as the last bulwark of considered and proper government. Madison argued that times would arise when the passions of the people made them susceptible to the pursuit of government that

¹¹² Hamilton, Jay, and Madison, *The Federalist Papers*, 282-287.

¹¹³ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

they would later regret and condemn. To avoid this occurrence, a body of men disconnected from the passions of the people was needed to check against the momentary passion of the people in order to ensure the fully considered will of the people. To the Federalists, checking the government was fundamental to good government. However, the people had to be checked as well in order to ensure the ultimate aims of government. If the people, and thus the House of their representatives, became clouded by passion and self-interest, the lack of the Senate would ensure disastrous results.

Importantly, in order to be able to carry out such a check, the Senate needed to be composed differently than the House of Representatives. The upper chamber required an aristocratic flair so that it could appropriately judge and filter the will of the people towards the ultimate aim of executing “good government”. Based on the Senate’s composition, the members of the Senate would exhibit the character necessary to fulfill such a role. John Jay referenced the expected high quality of character that would define the American Senator in Federalist No. 64.

In that essay he wrote:

As the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men...under thirty from [eligibility], it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle.¹¹⁴

Since the Senate would be elected by state legislatures, the Federalists were confident that only the best and most enlightened men would be placed in the Senate. The political wisdom possessed amongst the state legislatures would ensure that only the most well respected and

¹¹⁴ Hamilton, Jay, and Madison, *The Federalist Papers*, 294-298.

commendable officials would be elected to the Senate. The additional age requirements to become a US Senator would further restrict the possibility that Senators were selected from disingenuous, characterless men. Importantly, this is a support of the idea of a natural aristocracy. Jay makes no attempt to argue that the Senate won't function in an aristocratic manner, but rather that the just character of the Senators will provide an indispensable guide towards good government. In a sense, Jay's argument is that there is no need to fear the aristocratic aura of the Senate because the institution will be composed of men with the highest virtues and strongest commitment to good and considered government. A key to ensuring Senators are clothed with such ability and character is to place higher eligibility requirements for the Senate. Ensuring a Senator must be thirty years of age, allows the body politic and state legislatures to have a large body of work to evaluate when electing men to the Senate. Above all else, Jay focuses his assurances of the Senate on who will serve in the institution. He added, "senators so chosen will always be of the number of those who best understand our national interests...[and] who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence."¹¹⁵ Thus the Senate will be a vehicle for the checks required to ensure good government, not a body to fear for its potential for injustice.

A secondary defense of the Senate focused on legitimizing its term length. The Senate term length of six years was a fundamental flaw in the eyes of the Anti-Federalists that made the Senate susceptible to aristocracy. The Federalists mobilized around the extended term length in a few ways. First, Madison made references to the state of Maryland and its Senate as an example. He wrote, "The Senate of that State is elected, as the federal Senate will be, indirectly by the

¹¹⁵ Hamilton, Jay, and Madison, *The Federalist Papers*, 294-298.

people, and for a term less by one year only than the federal Senate.”¹¹⁶ Madison hoped to assuage fears of the federal Senate by highlighting how similar bodies already existed in the United States. More importantly he used Maryland as an example to show how such government not only was not dangerous, but actually produced desirable results. He continued:

If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union.¹¹⁷

If the institution of the Senate was truly as to be feared as the Anti-Federalists claimed, then how could a state with such an institution be so celebrated as Maryland was? Not only was the government of Maryland amongst the most reputable in the nation, it’s Senate also showed no signs of the concerns that the Anti-Federalists were arguing would appear if the Senate became part of the federal government.

Beyond providing an example of the harmlessness of the Senate, the Federalist’s made a key point around the necessity of the six-year term. The Federalists made a point to not only assuage the Anti-Federalist fear of the six-year term lengths, but also to argue why they were necessary for proper government. Madison wrote:

The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for

¹¹⁶ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

¹¹⁷ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years.¹¹⁸

Madison's point was that not all objects of government could be addressed properly in a short time frame. Government served to produce results that could not all easily be obtained within a yearly election cycle. In some pursuits, government needed to have a stable presence in order to fully realize the desired result. A national legislature made of assemblies that often fluctuated would be utterly incapable of serving those interests. In that way, the Senate and its term length offered stability and continuity to the federal government in the pursuit of those goals. Further, Madison argued that such a stable presence in the Senate would allow its actions to be better judged and accountable. He wrote, "It is sufficiently difficult to preserve a personal responsibility in the members of a NUMEROUS body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents."¹¹⁹ As such, "The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects."¹²⁰ The Senate would be the legislative chamber where those long developing interests could be actuated over time. The six-year term would give Senators the ability to fully realize the objects they pursued in the interest of the nation. And because they had capable time to complete those pursuits, their actions could be better judged by taking a wider view of what they were able to produce while in office. At the close of six years, state legislatures would have a clear picture of the character of a Senator and their commitment to the pursuit of good government.

¹¹⁸ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

¹¹⁹ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

¹²⁰ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

Jay added to this by discussing the deficiencies that a short election span in the Senate would have on its ability to produce those results. If the Senate term was to be short like that of the House of Representatives, Jay argued that the upper chamber would then be incapable of fulfilling its ultimate role. He wrote:

such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country.”¹²¹

A six-year term in the Senate would allow long consideration and deliberation over the just course of action on the highest issues of government. Senators would have the time and ability to gather information and wisdom on an issue before moving ahead. Open and considered debate could be engaged in over issues that there was simply no time to do so in the House of Representatives. Further, a seasoned Senator would have an expansive view of the national character by witnessing numerous sessions of government. In these ways the Senate would serve as a chamber of political wisdom, thoughtful deliberation, wide consideration of the national character, and ultimately a servant to the pursuit of good government.

Still, the Federalists could not ignore the multitude of concerns that the Senate would be positioned against the will of the people and the public good. To address these fears, Madison articulated why the Senate would not become a tyrannical aristocracy. Again, the importance here is that Madison argued that the Senate would not produce tyranny. He did not necessarily make the argument that the Senate would not produce aristocracy.

¹²¹ Hamilton, Jay, and Madison, *The Federalist Papers*, 294-298.

At the forefront of Madison's argument is that the system of checks and balances throughout the constitutional system proposed will utterly prevent such an occurrence. Under the constitution the Senate's power and influence will be checked by other entities. Just as the Senate allows for a check against the House of Representatives, the House will provide a check against the Senate. He wrote,

To this general answer [that the Senate will produce tyrannical aristocracy], the general reply ought to be sufficient, that...Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that coequal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself that the proposed Senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition, through all these obstructions?"¹²²

In Madison's calculation, the steps necessary for the Senate to slide into tyranny would require a complete transformation of government far beyond the Senate's scope of power. In fact, the state governments along with the federal government would each have to slide into tyranny in order for the Anti-Federalists' fears of the Senate to actuate. Further, corrupting the government at both the state and federal level wouldn't even be enough. The people themselves would have to become corrupted in order to prevent a response to the Senate in the House of Representatives. Madison's assurance is that if the Senate fell into tyranny, other bodies of government would respond accordingly. State legislatures would simply elect new Senators. The

¹²² Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

House of Representatives, a body equal to the Senate, would simply obstruct any measures by the Senate.

Madison assured critics of the Senate that if the body ever tilted toward aristocracy that:

the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.¹²³

Just as the Senate was constructed to balance the popular House, the House and ultimately the will of the people would be powerful enough given the constitutional framework to correct the deviations of the Senate. If the Senate ever did achieve the ability to betray the public good in favor of allegiance to an aristocratic class, the people and general government simply would move to invalidate the body of its constitutional authority until its return to proper form. If the Senate ultimately lost the consent of the people of the United States, then it would ultimately lose its just power derived from that consent until such faith was restored.

The Federalists ultimately did not strive to deny the Anti-Federalist accusations that the Senate was aristocratic in nature. Instead, they focused on defending the checks and balances that the Senate provided in the defense of good government and the precautions in place to ensure that the Senate would never produce aristocratic tyranny. The Senate acted as a check against the popular House. It would ensure that legislation had broad support that existed beyond times of increased passion amongst the people. It would be equipped to provide such a check because of the Senate's electoral framework. Elections by the state legislators would ensure insulation against the direct influence of the passions of the people. Six-year terms would ensure that

¹²³ Hamilton, Jay, and Madison, *The Federalist Papers*, 287-293.

Senators were able to oversee the broad aims of government in an enlightened, measured capacity. And ultimately, the constitutional framework ensured similar checks against abuse in the Senate to prevent the fears of the Anti-Federalists from ever corrupting the overall government. Ultimately, the Senate would not be an embodiment of democracy or aristocracy. Rather, its framework would be crucially positioned within a system of checks and balances aimed at promoting good government.

As the debates between Federalists and Anti-Federalists played out in newspapers and ratifying conventions across the country, states began ratifying the new Constitution. Delaware, Pennsylvania, and New Jersey each ratified the Constitution in December of 1787 with Georgia and Connecticut quickly following in January 1788.¹²⁴ On June 21, 1788 New Hampshire became the consequential 9th state to ratify.¹²⁵ With this vote, it was made certain that the Constitution would become the framework of the government of the United States. However, the Anti-Federalists did not go down without a fight. When the Federal Government first convened in March 1789, North Carolina and Rhode Island had yet to accept ratification and were not a part of the federal union.¹²⁶ Further, the Anti-Federalists won securing a Declaration of Rights, which had been a central issue during ratification. Virginia became the final state to ratify the Bill of Rights (written by Madison) on December 15, 1791.¹²⁷ However, Anti-Federalist concerns over the aristocratic nature of the Senate were defeated with the ratification of the Constitution.

¹²⁴ Yazawa, *Contested Conventions*, Appendix C.

¹²⁵ Yazawa, *Contested Conventions*, Appendix C.

¹²⁶ North Carolina ratified the Constitution on November 21, 1789 and Rhode Island would not ratify until May 29th, 1790. Yazawa, *Contested Conventions*, Appendix C.

¹²⁷ “Bill of Rights (1791),” Bill of Rights Institute, accessed February 12, 2021, <https://billofrightsinstitute.org/primary-sources/bill-of-rights>

The Federalist vision of an enlightened body of men in the federal Congress remained intact. A body of federal legislators would be elected by state legislatures and serve six-year terms. The framework forged at the Federal Convention and defended by the Federalists during the Ratification Debates became part of the new federal government. That framework would ultimately dictate the nature of the federal government of the United States. At least for a while anyway.

Chapter 3

The 17th Amendment and the Direct Election of Senators

On March 4th, 1789 the 1st United States Congress convened at Federal Hall in New York City.¹²⁸ Among this Congress was the first class of United States Senators, all of whom were appointed by the legislatures of the states they represented. This first class of senators featured a handful of Framers from the Federal Convention of 1787 including George Read (Delaware), William Paterson (New Jersey), Rufus King (New York), and Robert Morris (Pennsylvania).¹²⁹ For the next 125 years, Senators of the United States were elected in the same manner. However, on March 4th, 1915, the 64th United States Congress convened in Washington DC. This class of incoming Senators was the first to be entirely elected directly by the people of the state they represented. By March 4th, 1919, the entire United States Senate was composed of members directly elected.

The reason for this change was the ratification of the Seventeenth Amendment in 1913. With this amendment, a federal institution was being changed from its 1787 construction via the amendment process. Monumental constitutional amendments were nothing new by 1913. The Bill of Rights and the Reconstruction Amendments were foundational additions and alterations to the text of the Constitution. The Twelfth Amendment altered the election of the Vice President.¹³⁰ However, something far more fundamental occurred with the ratification of the 17th Amendment. The Senate was designed by the Framers in 1787 with a specific purpose that was

¹²⁸ “Origins and Development,” United States Senate, Accessed January 11, 2021, https://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm

¹²⁹ “Chronological list of US Senators”, United States Senate, Accessed January 11, 2021, <https://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf>

¹³⁰ “12th Amendment,” Legal Information Institute, Cornell Law School, Accessed January 17, 2021, <https://www.law.cornell.edu/constitution/amendmentxii>

forged from intense debate and compromise. The Senate was to represent the equal interests of the states, it was to be elected by the state legislatures to ensure that that interest was represented, and to ensure a check against the directly elected House of Representatives. Despite opposition from the Anti-Federalists on these grounds, such a framework remained intact when the Constitution was ultimately ratified. However, the 17th Amendment marked a significant alteration to that framework. Now the upper chamber of the Federal Congress would be elected, as the lower chamber was, directly by the people. This chapter seeks to place the effects of the ratification of the 17th Amendment into the historical debate that occurred between the Federalists and the Anti-Federalists. It will narrowly examine the connections between the 17th Amendment and the legacy of the Ratification Debates.¹³¹

Calls for reforming the Senate existed from time to time between the ratification of the Constitution and the ultimate passage of the 17th Amendment. Failed resolutions calling for the direct election of the Senate had been proposed by 1826.¹³² Problems and disputes regarding the filling of Senate seats resulted in an 1866 Congressional law that regulated the appointment of senators.¹³³ However, the biggest shift towards reforming the electoral process in the Senate came in the early 20th century. The official Senate website states that, “A turning point came in 1906, when publisher William Randolph Hearst, a proponent of direct election, hired novelist David Graham Phillips to write a number of articles on the subject...[that] offered an unsympathetic (and largely fictionalized) account of senators as pawns of industrialists and

¹³¹ This chapter does not seek to examine the 17th Amendment by a 19th and 20th century context, but rather seeks to analyze it through the lens of the 18th century debates that focused on the Senate’s creation. (ie How would the Anti-Federalists and Federalists view the amendment and its changes to the institution?).

¹³² “Landmark Legislation: The Seventeenth Amendment to the Constitution,” United States Senate, Accessed January 4, 2021,

<https://www.senate.gov/artandhistory/history/common/generic/SeventeenthAmendment.htm#:~:text=The%20Seventeenth%20Amendment%20restates%20the,authority%20of%20each%20state%2C%20if>

¹³³ United States Senate, “Landmark Legislation.”

financiers...[and] galvanized public support for reform.”¹³⁴ In 1911, Kansas Senator Joseph Bristow proposed a resolution calling for the direct election of the Senate. His resolution passed Congress and on April 8th, 1913, Connecticut ratified the amendment fulfilling the 3/4ths requirement of the ratification process laid out in Article Five of the Constitution.¹³⁵ The 17th Amendment was ratified. The Senate would now be elected directly by the people.

With such a significant change, it is important to understand the impact of the Seventeenth Amendment on the framework of the Senate that was crafted by the Philadelphia Convention, and ratified in 1789 following the Ratification Debates. The first issue to address is whether or not the 17th Amendment did indeed even have an influence on the institution as drafted in 1787. The obvious answer is yes. The 17th Amendment did have an impact on the Senate that intentionally changed the original institution as drafted by the Framers in Philadelphia in 1787 and as ratified in 1789. The amendment was written to fundamentally alter the electoral process regarding the Senate so that it was more responsive to the people.¹³⁶ The Anti-Federalist objections to the aristocratic nature of the Senate were now addressed. However, while the 17th Amendment seems to be a fulfillment of the Anti-Federalist wishes regarding the Senate, the actual effects of the 17th Amendment are not so straightforward.

Despite being a realization of the Anti-Federalist arguments, the effects of the 17th Amendment can be seen as a validation of the Federalist position. First, the 17th Amendment freed senators from the influence of state politics and made it more likely that incumbents in the Senate would run for re-election. Such a development connected to concerns that the Senate

¹³⁴ United States Senate, “Landmark Legislation.”

¹³⁵ United States Senate, “Landmark Legislation.”

¹³⁶ William Bernhard and Brian R. Sala, “The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness,” *The Journal of Politics*, Vol. 68, No. 2 (May., 2006), 345.
<https://www.jstor.org/stable/10.1111/j.1468-2508.2006.00411.x>

would become a permanent aristocratic body. Second after the 17th Amendment passed, senators were more likely to change their behaviors prior to elections. While this development can be seen as the Senate becoming more responsive to voters, it can also be seen as the fruition of the Federalist fears of politicians playing to the people in order to gain power. Finally, the 17th Amendment removed political expertise from the selection of US Senators and decreased the likelihood that senators could be held fully accountable to the interests they represented.

The 17th Amendment did change the Senate in a manner so that it aligned more closely to the Anti-Federalist vision of the institution. The amendment made senators the direct agents of the people of their states, rather than the agents of the states themselves. Scholars Sean and Jeffrey Jenkins wrote in “Agency Problems: the 17th Amendment and Representation in the Senate” that “voters no longer had to rely on an imperfectly controlled intermediary to hold a further downstream agent to account for them. Instead, they themselves could select new U.S. Senators and try to induce desired behaviors from sitting senators with any given ideology, based on their own preferences.”¹³⁷ A US Senator became accountable and responsive to the people alone. State legislatures could not insulate a senator from the political responsiveness and ultimate desires of the people living in the states that they were tasked with representing. However there are questions to the extent of the change in responsiveness that occurred in the body with the amendment. Scholars Wendy Schiller and Charles Stewart wrote in *Electing the Senate: Indirect Democracy Before the Seventeenth Amendment* that, “When we consider that a major impetus for changing the U.S. Constitution to elect U.S. senators directly was to improve the quality of Senate representation, it is striking to see the institution fail to function in ways so

¹³⁷ Sean Gailmard and Jeffery A. Jenkins, “Agency Problems, the 17th Amendment, and Representation in the Senate,” *American Journal of Political Science*, Vol. 53, No. 2 (Apr., 2009), 328.
<https://www.jstor.org/stable/25548121>

similar to the period of indirect elections.”¹³⁸ Regardless, the old Anti-Federalist concern of aristocracy in the senate was accounted for as the people gained direct and final say over who would serve in the Senate. However, while this direct link induced some change in responsiveness towards the public electorate, it did not fully justify the Anti-Federalist position. Instead, it largely vindicated the Federalists’ arguments.

First, the 17th Amendment made it more likely for incumbent Senators to seek re-election, which accelerated the Anti-Federalist concern that election to the Senate would end up being an appointment for life. Even though the Anti-Federalists believed that the indirect election of senators would act as a measure ensuring that the same body of men remained in power over a long period of time, direct election actually made such an occurrence more likely. In “The Remaking of an American Senate: the 17th Amendment and Ideological Responsiveness,” William Bernard and Brian R. Sala examined how direct election impacted the likelihood that senators would run for re-election. They found that, before the 17th Amendment, the decision to run for re-election in the Senate was influenced by the state legislators.¹³⁹ If the senator’s party held the majority in the state legislature, that senator would often choose to run for re-election. However, if the state legislature’s majority was unfriendly senators would rarely run for re-election.¹⁴⁰ In this way, the state legislatures were the dominant force in the election of the senator. Senators knew they could not win re-election unless they accurately represented the interests of the state that could be gauged by the makeup of the state legislature. Yet, with the passage of the 17th Amendment, such composition played a much lesser role in determining if a

¹³⁸ Wendy J. Schiller and Charles Stewart III, *Electing the Senate : Indirect Democracy Before the Seventeenth Amendment*, (Princeton: Princeton University Press, 2014), 214, ProQuest Ebook Central.

¹³⁹ Bernhard and Sala, “Remaking of an American Senate,” 346.

¹⁴⁰ Bernhard and Sala, “Remaking of an American Senate,” 346.

senator ran for re-election. According to Bernhard and Sala, “Regardless of whether the incumbent’s party held a majority in the state legislature, post-1914 senators were more likely to run for reelection than pre-Amendment senators.”¹⁴¹ If one wished to avoid election to the Senate becoming a permanent position, one would hope to see the chances of senators seeking re-election increase. At the very least, increasing the incentive to seek re-election would be avoided. The Anti-Federalists believed that the indirect election of senators would increase the risk of senators remaining in their positions for extended amounts of time. To avoid this, the election of senators needed to be directly tied to the people. However, direct elections of senators ended up making it more likely that senators would seek to remain in power regardless of state politics.

Second, the 17th Amendment caused senators to moderate their behaviors leading up to elections, which reinforces the Federalist’s concern that those seeking office may attempt to dupe the people into voting for them. According to Bernhard and Sala, “The 17th Amendment provided incentives for senators to moderate their late-term public ideologies.”¹⁴² One could view such a development in two distinct ways. Senators changing their behavior and moderating their ideologies could be viewed as an example of how the 17th Amendment made senators more responsive to the people. However, because these modifications occurred generally late in a senator’s term, it could be viewed that the 17th Amendment incentivized catering to the people only to win re-election. Indeed Bernhard and Sala wrote, “incumbents faced more incentives to move from more partisan to less partisan legislative behaviors as the general election period approached.”¹⁴³ Further, there is evidence that this moderation did not translate to the composition of the Senate in general. Schiller and Stewart found that polarization has actually

¹⁴¹ Bernhard and Sala, “Remaking of an American Senate,” 347.

¹⁴² Bernhard and Sala, “Remaking of an American Senate,” 354.

¹⁴³ Bernhard and Sala, “Remaking of an American Senate,” 356.

increased since the days when the Senate was elected indirectly. They wrote, “Polarization... was high under indirect elections, then decreased after the adoption of the Seventeenth Amendment, but increased again starting in the late 1970s, and has now become greater than it was during the indirect election era.”¹⁴⁴ This increase in polarization over time is a further sign that moderation amongst senators may just be a ploy to get re-elected rather than an actual change in behavior molded by the electorate. Therefore, if the amendment only incentivized senators to respond to the people when an election was approaching, can it be seen as incentivizing the senator to actually govern in a way that is responsive to the people? With such modifications amongst senators occurring only as they seek re-election, such responsive governance seems unlikely. This not only reinforces the belief of the Federalist’s that ambitious politicians would seek to play off of the electorate in order to remain in office, but it also harkens back to the original arguments for indirect election of the senate from the Federal Convention. The idea that ambitious politicians would seek to mislead the people in order to remain in power formed a crucial argument in favor of indirect election. The effects of the 17th Amendment give evidence to that belief. While senators moderating close to elections does not equate attempting to mislead voters, it does show that senators did only begin to tailor their behavior to win favor with the people when they sought to remain in power. If the 17th Amendment had made senators more responsive throughout their term rather than just near election time, then the argument of the Anti-Federalists would strengthen. However since the modifications occurred at the end of their terms, it reinforces the Federalist position that direct election opened the door for ambitious politicians to potentially deceive voters.

¹⁴⁴ Schiller and Stewart , *Electing the Senate*, 155.

Finally, the 17th Amendment removed the political expertise of the state legislatures from the electoral process which made it more difficult for senators to be held accountable regarding the interests they represented.¹⁴⁵ This is even more important given the implications just discussed. In “Agency Problems,” Gailmard and Jenkins wrote, “While the 17th Amendment did create a direct agency relationship, it also eliminated both the informed selection and monitoring of U.S. Senators by relative political experts, state legislators.”¹⁴⁶ Anti-Federalists would see this new relationship as a win. However as Gailmard and Jenkins point out, political expertise was lost both in the process of choosing representatives to serve in the senate and also in the ability to monitor their performances. The argument is not that the people directly are less capable of competently fulfilling those roles, but rather that state legislatures are more equipped with political knowledge and practice unavailable to the people that allows them to handle those tasks with more expertise. With that in mind Gailmard and Jenkins argue that:

Of course, the information needed for that level of accountability was probably not as easily accessible by voters as by state legislators. Voters can use cues, opinion leaders, and heuristics to get a reasonable general idea of the position and actions of politicians (both prospective and sitting ones), but because of both "rational ignorance" and lack of practice they are probably not as precise in their estimations as politicians are about each other. That lack of information, or lack of context for the information that is available, attenuates control and reintroduces scope for agency losses through a different route. Whereas senators before the 17th Amendment might have been well selected according to the "wrong" standard, after the

¹⁴⁵ Instead of being the representatives of the state legislatures (and the indirect representatives of the people of the state), senators became the direct representatives of the people of the states.

¹⁴⁶ Gailmard and Jenkins, “Agency Problems,” 324.

amendment they have been more loosely constrained to the "right" standard, due to weaker selection and monitoring.¹⁴⁷

The authors make no attempt to argue against the Anti-Federalist belief that the people should directly elect senators. However, their findings do undermine the argument that direct election was ultimately a better way to elect trustworthy senators and to hold them accountable. Indeed, the Federalist argument that state legislatures provided more political insulation against unfit senators than direct election seems to be proved by the 17th Amendment. Gailard and Jenkins also note that, "We can only say that senators appear to be less constrained by factors in their state political scene after the 17th Amendment than they were before it, and this is the implication of eliminating delegated monitoring by political expert"¹⁴⁸ The Senate was meant to represent the interests of the people of their state. However, the 17th Amendment and direct election made senators less constrained to the political environment of their states, not more so. Given that development, it's hard to argue that the amendment made them more accountable to the constituency they were tasked with representing.

One could see the passage of the 17th Amendment as a victory for the Anti-Federalists of long ago. The 17th Amendment made those running for Senate office directly accountable to the people. They had to moderate to win the will of the people when it came time for elections. Maintaining the relationship of representatives as the agents of the voters was a top priority for the Anti-Federalists. But beyond this, the Seventeenth Amendment is far from an Anti-Federalist victory. The principle of equal representation for unequally populated states remains. The Senate term length remains at six years, still far from the Anti-Federalist desire of annual elections.

¹⁴⁷ Gailard and Jenkins, "Agency Problems," 328.

¹⁴⁸ Gailard and Jenkins, "Agency Problems," 334.

Moreover, the greatest Anti-Federalist fear of the Senate, aristocracy, remains even with direct election. As discussed, the 17th Amendment even seems to encourage such tendencies. Senators are now more likely to run for re-election. Senators have shown the willingness to change behavior, but only in relation to electability. Further, senators are less constrained by political expertise in relation to the interests they are supposed to represent. The Senate has increasingly become, as Mercy Otis Warren feared, “an appointment for life” without a strong increase in accountability.

This all has arguably given the Federalist writings more veracity. The Federalists did not fear the Senate establishing aristocratic tendencies because the auxiliary precautions made sure that only the “best men” became a United States Senator. The state legislatures would possess the political wisdom and capital to ensure that. However, since the passage of the 17th Amendment that check has disappeared. Now, the people are entirely responsible for electing and monitoring the entire Federal Congress. As Gailmard and Jenkins thought, it may be true that the people should be entirely responsible for those things. However, there is no longer a safeguard to help guide such processes along. And as the effects of the 17th Amendment show, perhaps that safeguard really did play the important role that the Federalists had always intended it to.

Conclusion

On January 20th, 2021, the final US Senators were sworn in for the 117th United States Congress.¹⁴⁹ Over 200 years after the Federal Convention in Philadelphia, the United States Senate remains a keystone institution of the American Republic. Battles over winning a majority in the chamber remain a priority in American politics.¹⁵⁰ Since the 17th Amendment's ratification in 1913, the American people have been directly electing their senators. However, the Senate remains largely true to the design of the framers in 1787. The Senate remains a bulwark of equal representation amongst the states. Most importantly, the debates over the Senate that defined the Constitutional Convention and the Ratification Debates leave a lasting legacy on the American political landscape. It was this legacy that forged the 17th Amendment. And it is this legacy that drives the current questions over the relationship between the Senate and democracy, and the institution's fit within a democratic nation. The Anti-Federalist legacy is poised to call for more democracy in the Senate. Meanwhile, the Federalist legacy will assuredly counter that the Senate is not intended to foster democracy, but rather it is to serve as a necessary check against it.

When the Federal Convention of 1787 opened, reforming the government of the United States was the priority. When it closed, an entirely new government had been forged by intense debate and timely compromise. The Senate was a defining aspect of the new government. The

¹⁴⁹ Barbara Sprunt, "With New Georgia Senators Sworn In, Democrats Officially Control The Senate," NPR, Accessed February 10, 2021 <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958531015/new-georgia-senators-sworn-in-democrats-now-officially-control-the-senate>

¹⁵⁰ Noah Berlatsky, "A 2020 Biden election win will mean less if the Senate majority stays Republican," NBC News, Accessed February 10, 2021 <https://www.nbcnews.com/think/opinion/2020-biden-election-win-will-mean-less-if-senate-majority-ncna1246508>

Federal Congress of the new government would be split into competing chambers with competing natures and interests. The House of Representatives, directly elected by the people and its population-based representation, would represent the concerns of the people. The Senate, elected by the state legislatures and its equal representation, would represent the equal concerns of the states. Together the chambers would check those interests against one another. Only those policies that had popular support among both the representatives of the people and the states would become federal law.

The debates that took place from 1787-1788 over the ratification of the Constitution revealed the opposing views over the nature of the Senate amongst Americans. Anti-Federalist were fearful of its aristocratic nature. They condemned the six-year term limits in the Senate and believed annual elections were necessary to ensure government faithfully remained representatives of the people. On the other hand, the Federalists argued that the Senate was necessary to ensure good government by checking the excesses of popular government. Further, they reassured opponents that the other checks and balances built into the Constitution were an assurance that the Senate could not become an agent of aristocratic tyranny. Ultimately the ratification of the Constitution was defined by compromise, but not regarding the Senate. The Anti-Federalists ended up winning the declaration of rights that they had fiercely argued for, but the Federalist vision of the Senate remained with ratification.

The original framing of the Senate remained in place until the 17th Amendment implemented the direct election of senators. While on its face this change is a victory for the Anti-Federalist legacy, a deeper look reinforces Federalist arguments. The amendment made senators more likely to run for re-election, which adds upon Anti-Federalist fears that election to the Senate would become lifetime appointments. It also revealed a willingness among politicians

to play to the electorate around election time, something the Federalists argued politicians would take advantage of to remain in office. Finally, the 17th Amendment removed political expertise from the Senate election process and made it more difficult to fully hold senators accountable to the interests they represented.

After all these years since the Constitutional Convention, Ratification Debates, and the ratification of the 17th Amendment debate over the nature of the United States Senate continues. There is no shortage of newspaper articles or journalistic blogs arguing over the Senate and its place in modern America. Unsurprisingly, the debate remains fundamentally influenced by the legacy of the earliest debates during the Federal Convention and the Ratification Debates. The legacy of the Anti-Federalists and Federalists remains particularly powerful.

The Anti-Federalist legacy continues to question the undemocratic nature of the Senate. Prior to the 2020 elections, the Senate majority represented less than 50% of the American electorate.¹⁵¹ Questions over the doctrine of equal representation remain important to the political discourse. Is it fair that a state like Wyoming, with an estimated population under 600,000 people, has an equal amount of representation and voting power in the Senate as California and its estimated population of 39 million people?¹⁵² That's certainly more than a slight difference from the population inequalities that existed between the states of Virginia and New Jersey in 1790.¹⁵³ Over the years, scholarship has questioned the role of the Senate in modern America. Scholars Lynn A. Baker and Samuel H. Dinkin addressed the modern

¹⁵¹ Lee Drutman, "The Senate Has Always Favored Smaller States. It just Didn't Help Republicans Until Now," FiveThirtyEight, Accessed January 24, 2021, <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/>

¹⁵² "State Population Totals and Components of Change: 2010-2019," United States Census Bureau, Accessed February 3, 2021, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html>

¹⁵³ "United States Resident Population By State: 1790-1990," New Jersey Department of Labor and Workforce Development, Accessed February 3, 2021 <https://www.nj.gov/labor/lpa/census/1990/poptrd1.htm>

implications of the institution in their 1997 work, “*The Senate: An Institution Whose Time Has Gone?*” In that work they argued that “our nation would be better served by a federal legislature...which afforded the states representation solely in proportion to their shares of the nation’s population.”¹⁵⁴ The 17th Amendment addressed the electoral structure of the Senate. Perhaps now it is time to address the representative structure of the Senate to make it even more democratic?

Still, the Federalist legacy remains just as strong. Most important to this legacy is the idea that the Senate is intentionally undemocratic to check the excesses of democracy. C.H. Hoebeke reiterated this point in his book *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*. Hoebeke argued that the Senate “was considered instrumental in keeping popular government on an even keel.”¹⁵⁵ With that considered, reform to democratize an institution that was never intended to be an agent of pure democracy is foolish. He offered the 17th Amendment as an example and wrote that it, “offered more democracy to cure the evils of democracy. Hence, the changes it brought have generally exasperated the problems they were intended to solve.”¹⁵⁶ Therefore, more attempts to address the remaining undemocratic aspects of the Senate just ensures the advancement of the excesses of democracy that the Senate was constructed to alleviate.

Regardless of whether new compromises over the Senate are struck, the Anti-Federalist and Federalist legacies will remain. The undemocratic nature of the Senate is poised to remain at the forefront of concern with the institution. Attempts to democratize the Senate are likely to

¹⁵⁴ Lynn A. Baker; Samuel H. Dinkin, "The Senate: An Institution Whose Time Has Gone," *Journal of Law & Politics* 13, no. 1 (1997): 23.

¹⁵⁵ C.H. Hoebeke, *The Road to Mass Democracy: Original Intent and the 17th Amendment*, (New York: Routledge, 2014), 3, Kindle.

¹⁵⁶ Hoebeke, *The Road to Mass Democracy*, 172.

garner pushback centered on the original intentions that the Senate should be an institutional check on democratic government. Ultimately, debate over the Senate and its role in the American Republic will go on. The Constitutional Convention, Ratification Debates, and Ratification of the 17th Amendment are testaments to that.

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