

Chapter 2 of Article the first of the Bill of Rights

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This chapter highlights the fundamental role of the representation ratio at the Constitutional Convention and the founders' support for the compromise. On 17 September 1787, George Washington publicly declares his support for representing We the People in Congress at the ratio of "one for every thirty Thousand". Washington also acknowledges the representation ratio as "among the exceptionable parts" of the Constitution.

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Representation and our Constitution

1

The ratio as a measure of constitutional representation was created out of the belief that a strict democracy, with every citizen voting on every proposed law, was impractical for a large nation. The ideal of all voting for all is not functional. Our reality would be all politics. Given this un-enthusiasm for continual politicking, the idea of "a representative" for the group was adopted.

Constitutional representation was not a colonial government invention, but it did fuel the well-named *Spirit of '76*. One of the most popular slogans during the revolution was "No Taxation Without Representation." As discussed in the first chapter, one of the main issues was that the colonies were being taxed by London, but, through the theory of virtual representation, the colonies did not send a representative to Parliament. The more London attempted to control policy, the more the colonists grew irritated. Patrick Henry declared the common sentiment in simple terms – "*Taxation without Representation is Tyranny.*"

However, as the Constitutional Convention began in Philadelphia on 25 May 1787, such revolutionary slogans had fallen aside and into disuse. Instead there was an unease and even pessimism of revolutions. After winning one, they wanted things to calm down, and taxation *without* representation became a necessity for those concerned with wealth, property, citizenship, and all the other questions created by a republican form of government.

In *Public and Republic: Political Representation in America*, Alfred de Grazia used the terms "aristocratic-democratic and mass-democratic" to explain the evolution in representation. This political tension, rather than revolutionary tension, led to differing views of representation after the war. It was apparent that "We the People" held a different meaning depending on who was talking. But, as de Grazia pointed out, they still shared their opposition to virtual representation:

A summary of the currents of thought on representation during the Revolutionary-Constitutional Period shows a vigorous conflict growing up between the *aristocratic-democratic and mass-democratic* ideas. Originally both parties agreed that the essential element in representation

was to be found in the relationship between the representative and his constituents. They agreed that that relationship must be direct and must contain as much of the contractual connection of agent with principal as possible. The chief reason for this agreement was that the major objects of attack were similar in both cases – the unrepresentative monarchy, a lack of consensus between American and British political conditions, and the theory of *virtual representation*.¹

Shared opposition to unrepresentative monarchy and virtual representation fueled the revolt. In the transformation from a revolutionary to a constitutional period, the most famous slogan did survive to animate the Constitutional Convention: Life, Liberty, and the Pursuit of Happiness.

2

In the early days of the convention, 16 June 1787, James Wilson, an influential delegate from Pennsylvania, spoke about a common human question:

With *regard to the sentiments of the people*, he conceived it difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice.²

His characterization is still true today: we often take the familiar for the general, which is not always the case. The founders were aware of this problem and attempted to build a system that addressed the localization of knowledge and the sentiments of the people. Their solution was the representation ratio and the House of Representatives.

Wilson also discussed Britain's form of representation, referring to it as "a poison contaminating every branch of" Britain's government, and the poison was most apparent in small gatherings:

The political liberty of that Nation, owing to the inequality of representation is at the mercy of its rulers. He means not to insinuate that there is any parallel between the situation of that country & ours at present. But it is a lesson we ought not to disregard, that the smallest bodies in Great Britain are notoriously the most corrupt.³

Wilson's point is timeless: small gatherings of power are more easily corrupted. The concept is based on the premise that it is easier to control many by controlling a few. Wilson also pointed out that the new Congress would *not* be a guarantee against despotism:

Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the

¹ De Grazia, 110-111. Italics added.

² *Farrand's Records* 1:253.

³ *Ibid.*, 254.

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.⁴

During this time period, as the founders were discussing terms for a new government, there was a particular momentum to the talks. Imagine, all at once, a group of independent states – diverse in almost all ways but a shared rebellion against Britain – discussing a whole new form of government, and you can see the dynamic. Today with fifty states, it might be impossible. And a look to Afghanistan or Iraq, and you can sense how complex constitutional change can be. Constitutionalism, as a virtue, is not easily adopted.

As mentioned, the thirteen colonies had become the thirteen independent states. Under their first government, *The Articles of Confederation and Perpetual Union*, each state had been equal and had one vote: this was called “equal representation.” This meant there was no difference in voting power between large population states, such as Virginia, and small population states, such as Delaware. The states were represented equally.

The Articles of Confederation were in effect from 1 March 1781, when Maryland became the final colony to ratify the Confederation, until 4 March 1789, when the first Congress met and the ratified Constitution took effect. During this time, the assembly of states referred to themselves as “The United States In Congress Assembled.” The Congress was considered ineffective, and, over time, there grew a call for reform. This call for reform became the Constitutional Convention of 1787.

The gathering in Philadelphia took a turn that some thought too much: instead of working on “fixing” or reforming the current government – the Articles of Confederation – the mood and momentum turned toward a new form of government altogether. You can see this change in the records from the convention. The convention began on 25 May. By 11 June, the first major change was underway. That was when the founders first passed a resolution on changing from the old system, equal representation and one state, one vote, to a new system and the “ratio of representation”:

Resolved that the right of suffrage in the first branch of the national Legislature ought not to be according to the rule established in the articles of confederation; *but according to some equitable ratio of representation.*⁵

The resolution passed. Seven states were for the change, three against, and the Maryland delegation divided. (That accounts for 11 of the 13 votes – as Rhode Island and New Hampshire did not have delegates present on this day.) In less than three weeks, the convention had made a fundamental change in the distribution of power: the new government would be based on “*some equitable ratio of representation.*”

This was not the first time a ratio had been proposed in the colonies for representation. On 7 October 1777, the Continental Congress, discussing the terms of the Articles of Confederation, had voted against two proposed representation ratios. One

⁴ Ibid., 254.

⁵ *Farrand's Records*, 1:192. Italics added.

proposed ratio was one representative for every 50,000 inhabitants; the other was one for every 30,000 inhabitants. On this day, the newly independent states agreed to a third proposal for representation – the one state, one vote compromise – with only Virginia in dissent.⁶ So the concept of a ratio for representation was familiar to the founders in 1787.

Two other votes of interest that day included one on ‘who was to be counted and how?’ as well as ‘what to do with the second branch of the national legislature?’ On the first question – Who counted and how? – They passed a resolution stating, “that the right of suffrage in the first branch be according to the whole number of white and three fifths of the other inhabitants.” This passed with nine for and two against – the states voting against were Delaware and New Jersey. The “three fifths” concept was also familiar to the founders: it had appeared in the Second Continental Congress, 18 April 1783, in an act to amend the Articles of Confederation. They used the measure to tax slaves as property. In effect, they created a 40 percent exemption by allowing “two fifths” of a slave to not be taxed as property.⁷

At the time, the influential Elbridge Gerry of Massachusetts offered a clear criticism of counting slaves in representation. Many other northerners would do the same. The slave representation, until its removal by the Fourteenth Amendment, would play the pivotal role in the federal government. From the beginning, some saw the problem. Here Gerry was forthright:

The idea of property ought not to be the rule of representation. Blacks are property, and are used to the southward as horses and cattle to the northward; and why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north?⁸

This is a concise critique: the convention did address slavery even if the word is absent from the final document. Gerry and others were openly critical of counting property, slaves, in representation. In terms of power, this was a clear benefit to the slave states. It added “three fifths”, or 60 percent, to their total state representation. In terms of representation, slaves meant more power.

After Gerry spoke, it was Madison’s turn: he deflected. Madison, a slave owner, as were many others in the room, said he was of the “opinion at present, to fix the standard of representation, and let the detail be the business of a subcommittee.”⁹

On the second question – How to represent the second branch? – They voted for a resolution making the right of suffrage in the second branch just like the first – based on an equitable ratio. It passed with a vote of six for and five against. The equitable ratio for the second branch, the future Senate, became the one we are familiar with – two Senators per each state in the Union.

⁶ See de Grazia, 84.

⁷ Joseph Story, ed., *Commentaries on the Constitution of the United States*, (Boston: 1833; rev. ed. 1991.), 2:641. Available online on The Founders’ Constitution website: Philip B. Kurland and Ralph Lerner, eds., University of Chicago Press, 2000.

⁸ *Farrand’s Records*, 1:205-206.

⁹ *Ibid.*

Once the decision had been made to change the system of representation, the convention had a new direction. For instance, they discussed in detail what a constitution was intended to do. In a report from that summer, the Committee of Detail found two things that deserve the most attention in drafting a constitution:

1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events, and
2. To use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states.¹⁰

We can see examples of these items in the Constitution. An essential principle would be the ratio of representation. An example of simple and precise language would be “one for every thirty Thousand.”

We will discuss in chapter 4 why this was not enough – why words alone do not possess power. Even when President Washington tried to enforce the representation ratio, he lost the political battle. His loss in 1792 was the first of many losses for the ratio. But the principle and means to represent We the People, the ratio itself, remains. The power is not gone, just forgotten. The United States is a powerful government. The question, constitutionally, is how the power of We the People is divided. The only constitutional means is the ratio. Power, as all republican forms of government agree, comes from the people. Power may be wielded by others, but it begins and ends with the people. The Constitution is the designed process for that power to be expressed through representation. Until replaced or amended, a constitution, with its general principles and simple and precise language, is supreme.

By 6 August 1787, the convention, following a report from the Committee of Detail, had decided on an equitable ratio. The committee proposed that the ratio for representation be “at the rate of one for every forty thousand.”¹¹ That was the ratio – one for every forty thousand – until the last day of the convention – at which time George Washington weighed in on the issue.

On the last day of the convention, 17 September 1787, the founders were ready to wrap things up.¹² The Constitution was complete. It was read to the convention. Benjamin Franklin then presented a speech that was also read aloud, asking for unanimous support for the new form of government.

After Franklin’s speech was read, something remarkable happened, though history has not given it much notice. Nathaniel Gorham, a delegate from Massachusetts, rose and made a proposal. Gorham had been the 8th president under the Articles of Confederation

¹⁰ *Farrand’s Records*, 2:137.

¹¹ *Farrand’s Records*, 2:178.

¹² See *Farrand’s Records*, 2:641-650 for the complete proceedings of 17 September 1787. They are available online on the Library of Congress website “A Century of Lawmaking.”

and had served during the convention as Chairman of the Committee of the Whole. At this time, the last day, he proposed a change in the representation ratio, the key constitutional compromise from early June. Here is how Madison recorded it:

Mr. Gorham said if it was not too late he could wish, for the purpose of lessening objections to the Constitution, that the clause declaring “the number of Representatives shall not exceed one for every forty thousand – ” which had produced so much discussion, might be yet reconsidered, in order to strike out 40,000 & insert “thirty thousand.” This would not he remarked establish that as an absolute rule, but only give Congress a greater latitude which could not be thought unreasonable.¹³

Gorham stated two points of interest. First, that lowering the ratio would help pass the Constitution. By lowering the ratio to thirty thousand, he was proposing a 25 percent *increase* in representation: in effect, a better representation of We the People. For perspective: if the current House of Representatives, with 435 members, increased representation by 25 percent, they would have to add 109 new Representatives.

Second, Gorham noted the ratio was not an absolute rule. This implies two things: it is a rule, but not absolute. As a rule, it is something you can change (or break). As a constitutional number, it is amendable but not absolute.

Gorham also counsels that the increased representation would, “give Congress a greater latitude.” Here latitude is interpreted to mean extent (magnitude, range) and breadth. In this context, Gorham’s motion increased the extent of representation.

Then, without discussion, two other delegates seconded Gorham’s motion.

The next thing that happened is the remarkable moment: Washington addressed the convention, something he had not done all summer. This was no small matter. As one scholar has put it, “Everyone at Philadelphia understood that Washington’s name alongside Franklin’s on the bottom of the proposed Constitution might be the key to ratification.”¹⁴

Instead of just asking the delegates to vote, he spoke to them of his opinions regarding Gorham’s proposal. Here is how Madison recorded the moment:

When the President rose, for the purpose of putting the question, he said that although his situation had hitherto restrained him from offering his sentiments on questions depending in the House, and it might be thought, ought now to impose silence on him, yet he could not forbear expressing his wish that the alteration proposed might take place. It was much to be desired that the objections to the plan recommended might be made as few as possible – The smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the exceptionable parts of the plan; and late as the present moment was for admitting amendments, he

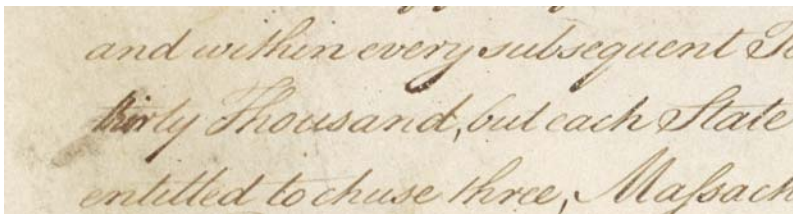
¹³ *Farrand’s Records*, 2:643-644.

¹⁴ Akhil Reed Amar, *America’s Constitution: A Biography*, (New York: Random House, 2005), 134. See also 76-81.

thought this of so much consequence that it would give much satisfaction to see it adopted.¹⁵

This is not the first time Washington took advantage of big moments. From his years at war, to the drafting of a new government, he acted in big moments. And this wasn't just a random act, as we will see, he shows this same commitment to the ratio during his first presidency – and his and the nation's first veto. That should be expected, as he said, he considered it “among the exceptionable parts of the plan.”

The motion to change the ratio to thirty thousand passed unanimously, with no debate recorded. The word *thirty* replaced the word *forty* in the Constitution. If you look closely at the original, you can see the smudge on the Constitution from the change. There, in Article 1, Section 2, Clause 3, someone (Madison or the secretary of the convention, William Jackson) erased the “fo” in the word *forty*. Then “thi” is attached to the “rty” remaining from the original word *forty*. In the image below of the US Constitution, it reads *thirty*:



This is an interesting moment. The future first president of the United States, the one referred to as His Excellency, speaking on “his wish” to see the people better represented – 25 percent better. Given Washington’s skill for performing on a grand stage – in war and now in peace – this is no small moment for him and our country. According to his sentiments, some delegates in the room felt “the smallness of the proportion of Representatives” to be an “insufficient security for the rights & interests of the people.” Washington said of the representation ratio “that it had always appeared to himself among the exceptionable parts of the plan.”

This day, 17 September 1787, is portrayed in two Howard Chandler Christy paintings. The first, completed in Independence Hall in 1937, is called *Signing* (Picture 1). The five by seven foot painting shows Washington addressing the convention with the spirit of “Liberty, Peace, and Justice” allegorically portrayed over the signing.

With the critical success of his first painting, the federal government commissioned Christy to paint a second interpretation of 17 September. The second painting, *Signing of the Constitution*, is 20 by 30 feet and considered one of the best portrayals of the founding (Picture 2). It hangs in the east stairway of the House wing in the US Capitol and again highlights the signing with Washington standing before the convention.

¹⁵ Farrand’s *Records*, 2:644. See also Amar, *The Bill of Rights: Creation and Reconstruction*, (New Haven & London: Yale University Press, 1998), 12-13.

Picture 2. *Signing of the Constitution*, by Howard Chandler Christy¹⁶

We, the citizenry, read ourselves into or out of such historical moments. If, for example, we only see the mistake of the three-fifths compromise in a moment like the signing on 17 September, then that is what we will see. Or we can see the increase in representation as a signal to the importance of We the People. On that day, the representation ratio worked in favor of the slave states and gave them more power: today, the ratio, if adhered to, would work in favor of We the People, constitutionally speaking, by giving the people more power.

5

Given how history turned out, with the ratification of the Constitution, it is easy to see the victors. But at the time, it was not clear the people would ratify the Constitution. Edmund Randolph, a delegate from Washington's home state, Virginia, predicted defeat for the Constitution minutes after Washington had spoken: Randolph warned that "Nine States will fail to ratify the plan and confusion must ensue."¹⁷

To Randolph's pessimism, Alexander Hamilton spoke the language of realism: he did not see any alternative to supporting ratification of the Constitution. Hamilton questioned whether it is "possible to deliberate between anarchy and Convulsion on one side, and the chance of good to be expected from the plan on the other."¹⁸

The convention was a lesson in compromise. Compromise involves necessity by creating its own demand. To the founders, this final day of the Constitutional Convention was important. They knew this would be their last best chance to send a message. To use some modern language for an 18th century event, the closing of the Constitutional Convention was a media event. Individual founders were delivering messages for the stories that would be told about the signing. These 18th century leaders knew how people communicate: through stories. In the ratification debates immediately following, the stories from the convention would enter the newspapers and then the "talk" of the people. Americans have always talked politics, and what happened on 17 September 1787, was a political event, 18th century style. The founders, as representatives of We the People, knew the importance of what was being said and why.

With compromise, it is rare to find all sides happy. That was true even at the founding. At the end of the convention, on the last day, we have Franklin's speech regarding unanimity, Gorham's motion to increase representation by 25 percent, Washington's acknowledgement of the "exceptionable part" of the representation ratio and "his wish" to see the amendment adopted, and then a discussion of the meaning of signing the Constitution and its possibility of success. Even after the actions of Franklin, Gorham, and Washington, and the speeches from distinguished others, there were three delegates who, as Madison put it, "declined giving it the sanction of their names."

The three were Randolph and George Mason of Virginia, and Gerry of Massachusetts. Their declining to sign was significant. Mason would campaign for a "declaration of rights" after the convention and is credited with developing Virginia's Bill of Rights. Mason would also have a falling out with Washington because of their

¹⁶ The Christy paintings are online on the "Teaching American History" website.

¹⁷ Ibid., 2:645.

¹⁸ Ibid., 2:645-646.

differing positions – one working for a bill of rights, the other as soon-to-be chief executive.

Gerry went on to serve in the federal government that he withheld his signature from. He served Massachusetts in the First Congress in the House of Representatives (1789-1793); then years later as Vice President of the United States under President Madison (4 March 1813 to 23 November 1814). He died in office and is buried in the Congressional Cemetery.

He is also the “Gerry” from the political term “gerrymandering.” Gerrymandering is when the political party in power draws oddly shaped districts in order to keep or gain power. This term developed because of his support for a redistricting plan while governor of Massachusetts (1810-1812). In noting his reasons for not signing the Constitution, Gerry spoke of the fear of civil war – which is what happens when representation fails. Madison recorded his dissent:

Whilst the plan was depending, he had treated it with all the freedom he thought it deserved – He now felt himself bound as he was disposed to treat it with the respect due to the Act of the Convention – He hoped he should not violate that respect in declaring on this occasion his fears that a Civil war may result from the present crisis in the U.S. – In Massachusetts, particularly he saw the danger of this calamitous event – In that State there are two parties, one devoted to Democracy, the worst he thought of all political evils, the other as violent in the opposite extreme. From the collision of these in opposing and resisting the Constitution, confusion was greatly to be feared.¹⁹

Well, Gerry was correct about the forces of civil war, just that it was to be south against north and some seventy years later. He was also correct in pointing out the conflicting values. Note his fear of “*Democracy, the worst he thought of all political evils.*”

In his wording, one can parse out the future political problem. It is an inherent problem of constitutional theory: mob below, mob above. To Gerry, the mob below, democracy, was tempered by the fear of the mob above – mainly, monarchy and all its trappings. He saw a tension, a compromise, and an accommodation that he did not foresee as viable.

Today’s world is little different: citizens do not worry about a monarchy, but the United States does have a ruling elite. The same political force, power, is at work – now modernized and sophisticated. Our federal government has never been larger or more expensive or more entwined in our everyday lives. The simple process put into place on 17 September 1787, the one premised on constitutional representation, has been forgotten.

¹⁹ *Farrand’s Records*, 2:646-647.