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How Law Employs Historical Narratives: The Great Compromise as an Example

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Abstract

Although historians base their interpretations on facts, they often use the same facts to tell a variety of stories. Of the varying stories, which gain acceptance by society and the courts? To explore this question, this Article examines the historiography of the Great Compromise.

At the 1787 Constitutional Convention, the deputies debated how to elect members of the House and Senate. Should each state have equal representation or should each state have representation based on its population? The heavily populated states wanted population-based (proportional) representation while the less populated states wanted a one-state-one-vote system. After difficult debates, the Convention, by a narrow vote, chose proportional representation in the House and equal representation in the Senate—the Great Compromise.

The historians' stories acknowledge that the issue of representation sparked sharp debates. One historian observed that no other question at the Convention evoked the same range of responses: "[E]verything from heavy-handed threats and poker-faced bluffs to heartfelt pleas for accommodation, from candid avowals of interest to abstract appeals for justice."[1] *Yet, historians disagree on how the deputies dealt with disagreements and how they*

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1. Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 424 (1987).

dealt with the close vote on the Great Compromise. Some found a convention that favored a search for conciliation. Others found a convention focused on a political theory, while others saw a pragmatic compromise, and still others found conspiratorial deals. This Article discusses which of these accounts a court will employ in its opinions.

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I. INTRODUCTION

A delegate from Connecticut, Roger Sherman, proposed a two-house legislature, consisting of a Senate and a House of Representatives. The Senate would have an equal number of representatives from each state. This would satisfy the states with smaller populations. The House of Representatives would include one representative for each 30,000 individuals in a state. This pleased states with larger populations.

This two-house legislature plan worked for all states and became

known as the Great Compromise.[2]

> The vote of this morning (involving an equality of suffrage in 2d. branch) had embarrassed the business extremely. All the powers given in the Report from the Come. of the whole, were founded on the supposition that a Proportional representation was to prevail in both branches of the Legislature . . . .[3]

The record of the Constitutional Convention is quite compact. Max Farrand's 1911 compilation,[4] updated with James Hutson's 1987 supplement,[5] collects all the available documents. Although some have questioned the objectivity of Madison's notes on the Convention's proceedings,[6] his record remains the primary source of our knowledge on the subject.[7] Based on this record, historians have found a variety of ways to interpret the Convention's debates and votes.[8] As for the Great Compromise, they find Edmund Randolph's words more reflective of the Convention's complex narrative than Congress for Kids might suggest.[9]

The various interpretations of historians have a practical effect. Courts and society in general draw on them to construe the Constitution and also to find ways of thinking about political structure and national spirit. The

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2. CONGRESS FOR KIDS, THE DIRKSEN CONGRESSIONAL CENTER, *The Great Compromise*, https://www.congressforkids.net/Constitution_greatcompromise.htm (last visited Jan. 8, 2018).

3. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17 (Madison's Notes) (Yale Univ. Press ed. 1911) [hereinafter 1 FARRAND, 2 FARRAND, 3 FARRAND (3 volumes)]. The alternative version of the text is GAILLARD HUNT & JAMES SCOTT BROWN, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1920), *in* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Adrienne Koch ed., rev. ed., 1985) [hereinafter KOCH].

4. *See generally* FARRAND, *supra* note 3.

5. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987).

6. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015). This recent book documents the technical and substantive revisions that James Madison made to his notes throughout his life. *See id.* Scholars have long been aware that Madison revised his notes later in life. *See, e.g.*, James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1, 24–35 (1986). Bilder, however, shows that some of these revisions were significant. BILDER, *supra*, at 179–201. This scholarship, however, does not change the accepted documentary story of the Great Compromise as it relates to the present analysis. *Id.*

7. BILDER, *supra* note 6, at 1.

8. *See, e.g.*, CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 31–34, 200 (1988); DAVID BRIAN ROBERTSON, THE CONSTITUTION AND AMERICA'S DESTINY 9–10 (2005).

9. *Id.*

different interpretations of this fundamental event give the American people different ways to think not just about the Convention but also about the structure and spirit of their country. Interpretations that cast the Constitutional Convention in a positive light encourage formalistic fidelity, that is, narrowly adhering to the Constitution's text. However, interpretations that view the Convention in a less favorable light or as the result of political pragmatism may encourage more willingness to depart from a strict reading of the words. They may permit exercising more freedom and imagination in interpreting the Constitution and in understanding its legislative history.

The present study looks at the variety of ways in which historians have characterized the Convention. To focus the examination, we study how historians have interpreted one of the central controversies that the deputies faced: should the Senate accord the states equal representation or should the Senate base membership on population, that is, observe the principle of proportional representation? The resolution of the debate has acquired the name the "Great Compromise," sometimes called the "Connecticut Compromise."[10]

In analyzing the Great Compromise, a historian may accept one of several narratives. Historians may find a narrative of deputies striving for a conciliatory solution.[11] Alternatively, they may find that the deputies focused on the interests of their states and reached a politically pragmatic result.[12] They also might find that the deputies resolved the issue by wrestling with principles of political philosophy.[13] In addition, they may find that the deputies, representing a wealthy class, devised a solution that would protect their economic interests.[14]

Our inquiry differs from the originalist inquiry. That inquiry seeks to ascertain the original meaning of the text's words or to find original meaning in vague or abstract language.[15] Here, however, we accept the clear meaning

10. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 558–59 (1969); ROBERTSON, *supra* note 8, at 129. After the Convention deputies voted for an "equitable ratio of representation" in the first branch of the legislature, Roger Sherman of Connecticut unsuccessfully proposed giving each state one vote in the second branch. *See* 1 FARRAND, *supra* note 3, at 192–93. Hence the proposal, ultimately successful, acquired the additional name, the "Connecticut Compromise." ROBERTSON, *supra* note 8, at 129.

11. *See infra* Part III.

12. *See infra* Part III.

13. *See infra* Part III.

14. *See infra* Part III.

15. *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 645–46 (2013) (exploring these two constitutional interpretation inquiries and dividing originalism into "interpretation proper" and "constitutional construction").

of the text at issue and identify differing historical interpretations of how the deputies overcame differing arguments to arrive at the final wording of the Constitution. An originalist inquiry may analyze the events leading up to the text's adoption.[16] We, however, focus on the events and how historians[17] and courts[18] interpret them. Our project, moreover, does not seek to ascertain which historical interpretation is most accurate. Rather, it engages in a historiographical study to identify the various interpretations and to see how the law employs them.[19]

This Article begins by recounting the factual story of the Great Compromise as reported by James Madison.[20] It then summarizes different historical interpretations of the event by highlighting the efforts of selected American historians.[21] The Article continues with reviews of selected Supreme Court cases that discuss the Great Compromise as it relates to those decisions.[22] The cases illustrate how a court can invoke different historical interpretations of the Convention narrative to support its decision.[23] Finally, the Article discusses which historical narratives a court is most likely to accept.[24]

II. THE RECORDED HISTORICAL NARRATIVE

A. *The Issues and the Players*

In this narrative, I provide a neutral, factual presentation to enable the reader to better understand the historical interpretations that follow.[25] I recognize however, that any narrative inevitably presents a point of view. I necessarily omit the many issues that the Convention encountered as it wrestled with the central issue of representation in the two houses of the legislature.

16. *Id.* at 691–93.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part IV.
20. *See infra* Part II.
21. *See infra* Part III.
22. *See infra* Part IV.
23. *See infra* Part IV.
24. *See infra* Part IV.
25. Numerous authors have provided narratives of these events. *See, e.g.*, RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 86–225 (2009); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57–81 (1996); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 169–96 (1966); Rakove, *supra* note 1, at 424.

The goal is to offer a manageable narrative of the debates leading to the Great Compromise.

The story of the Great Compromise begins at the founding of the nation. The Continental Congress agreed that each colony should have one vote in a unicameral legislature because it had no method to determine the comparative "weight" of each colony.[26] The Congress left "weight" undefined; the word could have referred to a colony's wealth or population. After a debate in which the heavily populated states failed to gain more power, the Congress agreed to continue this scheme in the Articles of Confederation.[27] Leading figures, dissatisfied with the Articles, successfully urged the Confederation Congress to authorize a convention designed to amend the Articles.[28] The Convention's leading voices, however, used the venue to draft a new constitution.[29]

At the Constitutional Convention, the large states exerted control in the early weeks.[30] The deputies saw the states divided into two camps. First were "large states" such as Virginia, Pennsylvania, and Massachusetts, the states with the largest populations, and coupled with those states were three southern allies, North Carolina, South Carolina, and Georgia, states expected to grow in population.[31] They referred to the remaining states as the "small states," although those states varied in population: Connecticut, New York, New Jersey, Delaware, and Maryland.[32] Rhode Island, a small state, did not send deputies to the Convention.[33] Deputies from New Hampshire, also a small state,

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26. *See* 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 25 & n.1 (Worthington Chauncey Ford ed., 1904).

27. *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1776, at 681 (Worthington Chauncey Ford ed., 1906); MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 140–45 (1970) (recounting the debate). Article V of the Articles of Confederation states: "[i]n determining questions in the United States in Congress assembled, each State shall have one vote." ARTICLES OF CONFEDERATION of 1781, art. V, para. 4. Article X authorizes a committee of states or any nine states to exercise certain limited legislative powers when Congress is in recess. *Id.* at art. X.

28. *See* 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1786, at 494–98 (Worthington Chauncey Ford ed., 1906).

29. *See, e.g.*, BEEMAN, *supra* note 25, at 52–56 (describing the drafting of a new constitutional scheme during the seven days prior to the Convention).

30. *See, e.g.*, RAKOVE, *supra* note 25, at 54–55 (noting that Madison believed the small states "would 'yield to the predominant will'").

31. *See* RAKOVE, *supra* note 25, at 54–55. *See also* ROBERTSON, *supra* note 8, at 37–45 (providing a more detailed examination of specific state interests).

32. *See id.; see also* BEEMAN, *supra* note 25, at 218–20.

33. *Rhode Island's Ratification of the Constitution*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/HistoricalHighlight/Detail/35264 (last visited Jan. 8, 2018).

did not arrive until July 23, after the Great Compromise took place.[34]

On behalf of the large states, Edmund Randolph of Virginia presented a proposal for a strong central government.[35] As for the issue of representation, he proposed "that the members of the first branch of the National Legislature ought to be elected by the people of the several states . . . ."[36] He further proposed "that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual [state] Legislatures . . . ."[37]

The main issue was how strong the central government should be.[38] The most divisive issue, however, was whether the states with large or growing populations would dominate the new government.[39] This issue underlaid the debates over bicameralism, the size of the Senate, and how to allocate representation by the states in the legislative branches.

B. The Committee of the Whole Deliberates

For three weeks, the Convention met as a committee of the whole and spent most of the time considering Randolph's proposal, also known as the Virginia Plan.[40] The Committee included all deputies as members and enabled them to proceed under relaxed rules of order designed to promote free discussion.[41]

The Committee readily agreed that the national legislature should have two branches.[42] In the brief ensuing debate over who should choose members of the first branch, popular election won by a 6-2-2 vote.[43] Randolph's plan

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34. *See* 2 FARRAND, *supra* note 3, at 87.

35. 1 FARRAND, *supra* note 3, at 20.

36. *Id.*

37. *Id.*

38. *See* EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 157 (2005).

39. 1 Farrand, *supra* note 3, at 20–23.

40. *See* LARSON & WINSHIP, *supra* note 38, at 8.

41. *See* FRED BARBASH, THE FOUNDING: A DRAMATIC ACCOUNT OF THE WRITING OF THE CONSTITUTION 64 (1987) (explaining the decision to meet as a "committee of the whole").

42. *See* 1 FARRAND, *supra* note 3, at 48.

43. *See id.* at 50. Massachusetts, New York, Pennsylvania, Virginia, North Carolina, and Georgia voted for popular election. *Id.* New Jersey and South Carolina voted against the proposition, and the deputies from Connecticut and Delaware divided. *Id.* The New Hampshire delegation did not arrive until well after the Great Compromise. *See* 2 FARRAND, *supra* note 3, at 87. Rhode Island did not send deputies to the Convention. *See Rhode Island's Ratification of the Constitution*, *supra* note 33.

for electing the second branch sparked debate over the degree that the plan's proposal would deprive the state legislatures of power in the new government.[44] In that debate, Rufus King of Massachusetts raised a new issue: if the Senate's size was based on population, then, in order to give representation to the small states, the large states would have to have a large number of senators, making the size of the Senate unacceptable.[45] The proposal failed by a 3-7 vote.[46] Madison wrote: "[s]o the clause was disagreed to [and] a chasm left in this part of the plan."[47]

On June 6, the Committee of the Whole once again addressed the method of electing members of the first legislative branch.[48] A motion empowering the state legislatures to elect the representatives failed by a 3-8 vote.[49] The next day, John Dickinson of Delaware proposed election of senators by the state legislators.[50] The issue remained: should states have equal representation or should the Senate follow the proportionality principle? Madison summed up the dilemma: "if the motion (of Mr. Dickinson) should be agreed to, we must either depart from the doctrine of proportional representation; or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient."[51]

Madison emphasized that the Senate would perform its function better if it were a small body: "The use of the Senate is to consist in its proceeding with more coolness, with more system, [and] with more wisdom, than the popular branch. Enlarge their number and you communicate to them the vices which they are meant to correct."[52]

The deputies voted on a motion to postpone Dickinson's motion and to consider election by the people.[53] The motion failed overwhelmingly.[54]

44. *See* 1 FARRAND, *supra* note 3, at 49–52.
45. *See id.* at 51–52.
46. *See id.* at 52.
47. *Id.*
48. *See id.* at 131–32.
49. *See id.* at 137–38.
50. *See id.* at 148–49.
51. *Id.* at 151.
52. *Id.*
53. *See id.* at 155
54. *Id.* According to Farrand and the official journal, only Pennsylvania voted for the motion. *Id.* According to the transcript of Madison's Notes in the Library of Congress, all states cast negative votes. *See* KOCH, *supra* note 3, at 87 n.49.

Dickinson's motion then passed unanimously.[55]

On June 8, Charles Pinckney and John Rutledge, both from South Carolina, proposed a new way to provide for roughly proportional representation in the House:

> that the States be divided into three classes, the 1st. class to have 3 members, the 2d. two. [and] the 3d. one member each; that an estimate be taken of the comparative importance of each State at fixed periods, so as to ascertain the number of members they may from time to time be entitled to.[56]

The debate on proportional representation continued on the next day with no resolution.[57] June 11 saw several proposals on the subject.[58] Roger Sherman of Connecticut proposed that in the lower branch, each state should have representation in proportion to the number of free inhabitants, and in the upper branch, a single vote.[59] John Rutledge of South Carolina then proposed that representation in the lower house should be in proportion to the state's financial contribution to the central government.[60]

Rufus King of Massachusetts and James Wilson of Pennsylvania then offered a more generalized proposal: that suffrage in the first branch should not be according to the method in the Articles of Confederation but should be "according to some equitable ratio of representation."[61] The debate, however, continued to focus on the relevance of a state's financial contribution, and thus, indirectly, its ability to pay.[62]

Benjamin Franklin then attempted to provide a compromise, albeit unsuccessfully: each state should contribute as much as the poorest state could afford.[63] If the central government needed more money, it would seek voluntary contributions from the wealthy states.[64] Franklin also noted that the present Confederation rule of one-state-one-vote stemmed from the 1774 Congress'

55. *See* 1 FARRAND, *supra* note 3, at 156.
56. *Id.* at 169.
57. *Id.* at 174–75.
58. *Id.* at 192–95.
59. *See id.* at 196.
60. *See id.*
61. *Id.*
62. *Id.* at 196–97.
63. *See id.* at 199.
64. *See id.* at 199–200.

inability "to procure materials for ascertaining the importance of each Colony."[65]

The Committee of the Whole then adopted the proposal of King and Wilson but added words after "equitable ratio of representation"—words that would become controversial in a later era:

> '[I]n proportion to the whole number of white [and] other free Citizens [and] inhabitants of every age sex [and] condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State.' this being the rule in the Act of Congress agreed to by eleven States, for apportioning quotas of revenue on the States. and requiring a census only every 5–7, or 10 years.[66]

The debate then turned to the subject of representation in the Senate.[67] By a 6-5 vote, the Committee agreed to apply the same method of representation to the Senate as it had to the House, that is, proportional representation.[68] Thus, after considerable debate, the position of the large states prevailed: proportional representation in both houses of the legislature.[69]

On June 13, the Committee concluded its deliberations and reported its proceedings to the House.[70] On June 15, James Patterson of New Jersey, on behalf of the small states, submitted several proposals that served as an alternative to the revised Randolph Plan that the Committee of the Whole had submitted to the House.[71] The plan presumed the continuation of a unicameral legislature with each state having a single vote.[72] The next day, the House again resolved itself into a Committee of the Whole to consider what has become known as the Patterson Plan or the New Jersey Plan.[73] After a lengthy debate, the proposal failed, and the Committee re-reported the revised

65. *Id.* at 200 (quoting the Resolution of September 6, 1774).
66. *Id.* at 201.
67. *Id.* at 202.
68. *Id.*
69. *Id.*
70. *See id.* at 224.
71. *See id.* at 241.
72. *See id.* at 243.
73. *See id.* at 248–56.

Randolph Plan to the Convention.[74]

C. The Convention Deliberates and Votes

Although the Committee of the Whole had seemingly resolved the major issues concerning the legislature, the small states insisted on continuing the debate.[75] When the Convention reconvened, John Lansing of New York returned to the legislative issue and moved "that the powers of Legislation be vested in the U. States in Congress," that is, in a unicameral legislature.[76] His motion failed to receive consideration by a 4-6-1 vote;[77] however, the narrow vote demonstrated that the Convention had yet to resolve these issues.

In considering the Randolph Plan, the Convention voted for a bicameral legislature by a 7-3-1 vote.[78] It then voted that legislators in the first branch should be elected by a popular vote[79] for two-year terms.[80]

On June 25, the Convention turned to the matter of the second legislative branch.[81] After dealing with numerous related issues, it focused on the issue of suffrage.[82] After days of heated debate, the Convention rejected a motion that would have given each state an equal vote in the second branch (5-5-1).[83] General Charles Coatesworth Pinckney of South Carolina saw the need to break the deadlock and successfully moved that the Convention appoint a committee—a "grand committee," as Robert Yates called it—with a representative of each state to fashion a compromise.[84]

After deliberating, the grand committee proposed proportional representation in the first branch and one-state-one-vote in the second branch, with the condition that all money bills originate in the first branch.[85] As committee chair, Elbridge Gerry of Massachusetts explained that committee members

74. *See id.* at 322.
75. *Id.* at 336.
76. KEVIN R. C. GUTZMAN, JAMES MADISON AND THE MAKING OF AMERICA 100 (2012).
77. *See id.* at 344.
78. *See id.* at 358.
79. *See id.* at 360.
80. *See id.* at 362.
81. *See id.* at 395–97.
82. *See id.* at 404–09.
83. *See id.* at 510.
84. *See id.* at 511, 522.
85. *See id.* at 526. Madison noted that Franklin made the successful proposal in the committee and that the representatives of the small states barely acquiesced in accepting it. *See id.* at 527.

had differing opinions but "agreed to the Report merely in order that some ground of accommodation might be proposed."[86] Thus, opponents of an equality of votes in the second house agreed only conditionally.[87] Representatives of the large states strongly opposed the proposal, rejecting the implicit compromise that representation in the upper house would not be based on population and that having money bills originate in the lower house would benefit the populous states.[88]

During the debate, the Convention committed to a new, five-member committee the task of fixing the number of representatives that each state would have in the lower house.[89] On the question of money bills, the Convention accepted the grand committee's report by a 5-3-3 vote.[90] When that committee later reported its proposal, many states were dissatisfied with the number of representatives that the committee had allotted them.[91] The Convention then appointed another committee to adjust the numbers.[92]

After that committee reported it proposal, the Convention made further adjustments and accepted the amended result.[93] The Convention also agreed to require a periodic census to ascertain changes in population so that adjustments in representation could be made.[94] It further agreed that direct taxation imposed on a state ought to be in proportion to its representation.[95]

The Convention also voted to accept the grand committee's proposal that each state receive an equal vote in the upper house by a 6–3–2 vote.[96] The vote was to let the proposition stand as part of the committee report; the entire report would be the subject of a later vote.[97] Madison noted that the expectation of a later vote explained some of the affirmative and divided votes; that is, presumably, some of those states might oppose the entire report later.[98]

86. *Id.* at 527.
87. *See id.*
88. *Id.*
89. *See id.* at 540, 542.
90. *See id.* at 547.
91. *See id.* at 543–47.
92. *See id.* at 562.
93. *See id.* at 570.
94. *See id.* at 588. The Convention also agreed to count a slave as three-fifths of a person for purposes of calculating representation. *Id.*
95. *See id.* at 589–97.
96. *See id.* at 551.
97. *See id.*
98. *See id.*

Nevertheless, the debate on the issue continued.

On July 14, the Convention returned to the issue of voting in the upper house.[99] Perhaps seeing that the position of the large states was in jeopardy, Charles Pinckney of South Carolina proposed a compromise: a thirty-six-member upper house in which states would have proportional representation.[100] In a smaller body, the representatives of the large states would not so heavily outnumber the representatives of the small states.[101] It failed by a 4-6 vote with three members of the large state coalition voting against the proposal—Massachusetts, North Carolina, and Georgia.[102] The vote demonstrated that the dominating large state coalition had collapsed.[103]

The time had arrived to conclude the debate. On July 16, the Convention voted in favor of the amended grand committee report by a 5-4-1 vote.[104] The report included the provision that each state would have an equality of votes in the upper house.[105] Of the large states, North Carolina voted for the motion, apparently seeing the need for compromise.[106] The deputies from Massachusetts were equally divided.[107] Voting for the report were Caleb Strong and Elbridge Gerry, who had chaired the grand committee proposing the motion as a compromise.[108] Maryland, which often cast a divided vote, voted for the proposal.[109]

Although the vote had enormous implications for the nature of the new government, the deputies proceeded to other issues.[110] Then, Edmond Randolph of Virginia interrupted and noted:

> The vote of this morning (involving an equality of suffrage in 2d. branch) had embarrassed the business extremely. All the powers given in the Report from the Come. of the whole, were founded on

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99. 2 FARRAND, *supra* note 3, at 1.
100. *See id.* at 5.
101. *See id.*
102. *See id.* at 11.
103. *See id.* at 9–10. "It seemed now to be pretty well understood that the real difference of interests lay, not between the large [and] small but between the N. [and] Southn. States." *Id.*
104. *See id.* at 15.
105. *See id.*
106. *See* BEEMAN, *supra* note 25, at 219–20 (offering this explanation of North Carolina's vote).
107. *See id.* at 219.
108. *Id.*
109. 2 FARRAND, *supra* note 3, at 15
110. *See id.* at 17.

> the supposition that a Proportional representation was to prevail in both branches of the Legislature—When he came here this morning his purpose was to have offered some propositions that might if possible have united a great majority of votes, and particularly might provide agst. the danger suspected on the part of the smaller States, by enumerating the cases in which it might lie, and allowing an equality of votes in such cases.[111]

However, observing that the small states had triumphed by a bare majority, Randolph "wished the Convention might adjourn, that the large States might consider the steps proper to be taken in the present solemn crisis of the business, and that the small States might also deliberate on the means of conciliation."[112] His motion for adjournment passed.[113]

Madison reported that the next morning, deputies from the large states and a few deputies from the small states met before the Convention began, but the deputies from the large states could not agree on a course of action.[114] Later that day, Gouverneur Morris of Pennsylvania moved for a reconsideration of the July 16 vote; however, his motion failed for lack of a second.[115] According to Madison, the motion "was probably approved by several members, who either despaired of success, or were apprehensive that the attempt would inflame the jealousies of the smaller States."[116] The refusal of the large state deputies to support Morris might be viewed as the true "great compromise." The small states prevailed when the large states broke ranks due to the changed votes of a few deputies.[117] At that juncture, the large states realized that they had lost.[118]

III. HOW HISTORIANS INTERPRET THE NARRATIVE

Historians' stories acknowledge that the issue of representation sparked sharp debates.[119] One historian has observed that no other question at the

111. *Id.* at 17.
112. *Id.* at 18.
113. *Id.* at 19.
114. *See id.* at 19–20.
115. *See id.* at 25.
116. *Id.*
117. *See* BEEMAN, *supra* note 25, at 220–21.
118. *Id.* at 222–24.
119. *See infra* notes 120–241.

Convention evoked the same range of responses: "[E]verything from heavy-handed threats and poker-faced bluffs to heartfelt pleas for accommodation, from candid avowals of interest to abstract appeals for justice."[120] Yet, historians disagree on how the deputies dealt with disagreements and how they dealt with the close vote on the Great Compromise. Here, we view the interpretations of four groups of historians. Some historians found a convention that favored a search for conciliation. Others found a convention focused on a political theory, while others saw a pragmatic compromise. Still others found conspiratorial deals.

A. *Conciliation Stories*[121]

Conciliation became a major theme in the vote to endorse the Convention proposal and the ensuing campaign to ratify the Constitution.[122] In an effort to encourage the deputies to approve the Convention's final document, Benjamin Franklin argued that even if a deputy was dissatisfied with some provision, he should endorse the document and thus enhance its chance for ratification.[123] In his letter referring the Convention's proposal to the Articles of Confederation Congress, Washington stated that the deputies reconciled the diverse interests of the states with sacrifices propelled by "a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."[124]

During the ratification debates, the Federalists emphasized compromise, civility, and sacrifice at the Convention to counter reports of divisions and

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120. Rakove, *supra* note 1, at 424.

121. I use the word "story" advisedly. Although storytelling is currently a significant trend in legal scholarship, legal scholars have barely acknowledged that legal history is a central type of storytelling. On storytelling in law, *see, e.g.*, PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014); RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 1 (2012); Linda H. Edwards, *Speaking of Stories and Law*, 13 LEGAL COMM. & RHETORIC: JAWLD 157 (2016); Cathren Koehlert-Page, *Come a Little Closer So That I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399 (2011); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L. J. 459 (2001).

122. *See, e.g.*, Peter B. Knupfer, *The Rhetoric of Conciliation: American Civic Culture and the Federalist Defense of Compromise*, 11 J. EARLY REPUBLIC 315, 315–18 (1991).

123. *See* 2 FARRAND, *supra* note 3, at 642–43.

124. *See id.* at 667.

political bargains.[125] According to historian Peter Knupfer, compromise became "a vital theme in early republican political culture."[126] Additionally, historian Clinton Rossiter noted that the Convention was "acclaimed as a superlative example of goal-setting and decision-making for a proud, ambitious people through the processes of frank, reasoned discussion and alert, disciplined bargaining."[127] He further noted that the result was essential to the success of the new republic.[128] Thus, compromise easily became a favorite theme in the later narratives of the Convention.

The story evincing the greatest degree of conciliation is based on a partly apocryphal tale involving Benjamin Franklin.[129] In late June, the delegates were at loggerheads over whether each state would have equal representation in the Senate or whether each state's population would determine how many senators it would have.[130] Franklin attempted to promote conciliation by proposing that the Convention hire a chaplain to begin each daily session with a prayer:

> I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.[131]

Although the deputies were polite in their response, they were not interested and did not vote on the proposition.[132] On his manuscript of the speech, Franklin wrote, "[t]he Convention except three or four Persons, thought Prayers unnecessary!!"[133] The debate continued until the deputies voted for the

125. *See, e.g.*, Knupfer, *supra* note 122, at 319.
126. *Id.* at 321.
127. ROSSITER, *supra* note 25, at 15.
128. *See id.* at 193.
129. 1 FARRAND, *supra* note 3, at 451–52. For a full account of the incident and the subsequent narrative that developed, see Louis J. Sirico, Jr., *Benjamin Franklin, Prayer, and the Constitutional Convention: History as Narrative*, 10 LEGAL COMM. & RHETORIC: JALWD 89, 89–124 (2013).
130. 1 FARRAND, *supra* note 3, at 444–50.
131. *Id.* at 452.
132. *See id.*
133. From Benjamin Franklin: Convention Speech Proposing Prayers (unpublished) (June 28, 1787), *in* PACKARD HUMANITIES INSTITUTE: THE BENJAMIN FRANKLIN PAPERS, 1787–88 (Yale Univ. ed., 1954). According to this authoritative collection of Franklin's papers, Franklin placed two exclamation points at the end of the sentence. *Contra* 1 FARRAND, *supra* note 3, at 452 n.15 (not including

Great Compromise more than two weeks later.[134]

So far, the story is correct. However, in 1825, William Steele wrote a letter to his son relating an account that he claimed he received from John Dayton, a deputy to the Convention from New Jersey.[135] According to that account, the Convention hired a chaplain and then took a three-day recess to observe Independence Day.[136] During that time, they engaged in "a free and frank interchange of sentiments."[137] When they resumed deliberations, "every *unfriendly feeling* had been expelled; and a spirit of conciliation had been cultivated, which promised, at least, a *calm* and *dispassionate reconsideration* of the subject."[138] Thus, according to Steele, the Convention adopted the Great Compromise under Franklin's guidance.[139]

Although Steele's letter has no credence, it still gains an audience in some conservative political and religious circles and occasionally surfaces in court opinions and related documents.[140] It seems too inviting and comforting a story to dismiss. Even the most famous nineteenth century historian, George Bancroft, asserted that after Franklin's proposal, the deputies began giving up "the dominion of selfish interests. In the next meeting the members were less absorbed by inferior motives."[141]

Although he did not directly address the Great Compromise, Frank Harmon Garver authored one of the most conciliatory accounts.[142] He argued that the resolve "to make the best possible constitution, having in mind the necessity of getting it ratified, produced a practical and workable document . . . . It is not too much to say that the convention which framed our excellent constitution was the greatest deliberative assembly in American history."[143]

According to Garver's analysis, several conditions combined to achieve

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the exclamation points).

134. *See* 2 FARRAND, *supra* note 3, at 13–15.

135. *See* Letter from William Steele to Jonathan D. Steele (Sept. 1825), *in* 3 FARRAND, *supra* note 3, at 467–73.

136. *Id.*

137. *Id.* at 472.

138. *Id.* (emphasis in original).

139. *Id.* at 473.

140. *See id.* at 467 n.1 (detailing publication history of the letter in popular press).

141. 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 59 (1882).

142. Frank H. Garver, *The Constitutional Convention as a Deliberative Assembly*, 13 PAC. HIST. REV. 412, 424 (1944).

143. *Id.*

conciliation and a favorable result: the relatively small size of the deliberative body in which all members can express their views;[144] the presence of a serious crisis;[145] the seriousness of the subject matter, namely the constitution and the government;[146] the Convention's orderly and sensible procedural rules;[147] the ability to debate in secrecy, which promoted true deliberation;[148] and the Convention presidency of the highly respected George Washington.[149]

Even beyond these factors, Garver found that the deputies had open minds and "a willingness to be convinced" by the debates.[150] He noted that "[t]he debates [were] replete with references to agreement, accommodation, conciliation, and a hope of unanimity."[151]

William Nelson has described a convention in which reason and compromise prevailed.[152] He made three arguments.[153] First, he argued that the delegates had "conciliatory habits of mind"[154] and adopted procedural rules that encouraged the deputies to accommodate the various factions.[155] Thus, he argued that the deputies rejected Madison's argument that dividing up society into competing factions would prevent creating a majority that would threaten minorities.[156] Rather, he argues, the deputies believed that compromise would lead to "a single homogeneous community."[157]

Second, Nelson noted that the deputies did not spend most of their time on the conflicts that concerned the various interest groups.[158] Rather, they spent it in measured deliberations on how best to achieve the public good—"instrumental-reasoning disputes," to use Nelson's terminology.[159] Examples of these disputes include how to structure and empower the national

144. *See id.* at 412–14.
145. *See id.* at 412–13.
146. *See id.* at 413.
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.* at 418.
151. *Id.* at 419.
152. *See* William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787–1801*, 44 WM. & MARY Q. 458, 458–83 (1987).
153. *Id.* at 460–83.
154. *Id.* at 461.
155. *See id.* at 461–66.
156. *See id.* at 462.
157. *Id.*
158. *See id.* at 466–74.
159. *See id.*

executive[160] and the judiciary,[161] Congress's ability to produce paper money,[162] and state authority to impair the obligation of private contracts.[163] Because these issues did not affect perceived interest groups, he argued, the deputies losing the vote on these issues could accept the results.[164] Therefore, conciliation could prevail.[165]

Third, Nelson argued that if we view the Convention in the context of the early national period, 1787–1801, it is one example of an era in which the politics of instrumental reason and compromise predominated.[166] For other examples, he pointed to the ratification debates,[167] which included proposals for a variety of amendments.[168]

As for the Great Compromise, although Nelson acknowledges that the issue caused a bitter disagreement, he noted that several prominent deputies strongly spoke up for concession and compromise.[169] Thus, even in a hotly contested controversy that involved the self-interests of the states, the deputies recognized the value of compromise.[170]

Derek Webb has offered an analysis very similar to Nelson's.[171] He added another dimension by suggesting that efforts at conciliation took place not just in the formal setting of the Old State House hosting the Convention but also outside its walls.[172] Because they lived, dined, and socialized in a small neighborhood, he argues, they must have carried on Convention business in these informal and often convivial surroundings.[173] Their interactions enabled them to sustain the era's tradition of civil discourse in their deliberations.[174]

In his discussion of the Great Compromise, Webb described a conflict of

160. *See id.* at 468–71.
161. *See id.* at 472–73.
162. *See id.* at 473–74.
163. *See id.*
164. *See id.* at 474.
165. See id.
166. *See id.* at 474–83.
167. *See id.*
168. *See id.* at 477–82.
169. *See id.* at 463–64.
170. *See id.*
171. *See* Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 191–92 (2012).
172. *See id.* at 192–93.
173. *See id.*
174. *See id.* at 191–93.

interests that was too intractable for reasoned debate to resolve.[175] Rather, Webb argued that the deputies came to understand that only concession and compromise could lead to a negotiated settlement.[176]

These historians, then, find differing reasons to justify a conciliatory view of the Convention's decision-making process. The reasons range from an accommodating spirit by the deputies, to formal procedures for conducting the Convention, to a setting for the deliberations that made compromise easy to achieve.

B. Political Theory Stories

Historians debate whether political theory was the central theme of the Convention debates or whether practical issues and interests were primary. At one end of the spectrum is Martin Diamond, who argued that "the Convention supplies a remarkable example of . . . how theoretical matters govern the disposition of practical matters."[177] For him, the underlying question was whether political power should be assigned to state and local authorities or to the national government.[178] He thus viewed the debate over the Constitution as "a climactic encounter between two rival political theories of how the ends of democratic consent, liberty, and competent government can best be attained."[179]

As for the Great Compromise, Diamond conceded that the deputies were not "disembodied intellects seeking only the light of truth."[180] He argued, however, that practical politics must presuppose an underlying theoretical agreement or else the compromise must fail.[181] In the case of the Great Compromise, the agreement was that the new government must be partly national and partly federal.[182]

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175. *See id.* at 209–18 (specifically noting the total breakdown in negotiations from June 27 to July 17).
176. *See id.* at 211–16.
177. MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 30 (1981).
178. *See id.* at 22–34.
179. *Id.* at 54.
180. *See id.* at 32.
181. *See id.* at 30.
182. *See id.* at 31 (citing Oliver Ellsworth).

C. Pragmatism Stories

Contrary to Diamond, in an often-cited article, *The Founding Fathers: A Reform Caucus in Action*, John P. Roche argued that the Framers were "*political men*—not metaphysicians, disembodied conservatives or Agents of History . . . ."[183] Rather, they were pragmatists—some nationalists, and some focused on state and parochial concerns—hammering out a compromise within a democratic framework.[184] He thus found that the Constitution "was a patch-work sewn together under the pressure of both time and events by a group of extremely talented democratic politicians."[185]

With respect to the Great Compromise, Roche observed that in these deliberations, or in previous ones, no deputy had introduced theoretical arguments for state rights or a federalist separation of powers.[186] Rather, he described the debate as a practical one over governmental structure: the final struggle for "a unitary state with parliamentary supremacy."[187] As evidence of the pragmatic nature of the proceedings, Roche pointed out that after their defeat at the Great Compromise, the strongest nationalists simply moved forward to advance the Convention's central mission.[188]

Two prominent historians of our day—Richard Beeman and Jack Rakove—view the Great Compromise as primarily a story of pragmatic deliberation, though with philosophical principles embedded in the decision making.[189] Without the compromise, the Convention would have failed.[190]

In *Plain Honest Men*, Richard Beeman stated that most deputies "were motivated by self-interested calculations of their states' relative power within the new government . . . ."[191] For example, Southern states wanted to ensure

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183. John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 799 (1961).

184. *See id.*

185. *Id.* at 815.

186. *See id.* at 809.

187. *Id.* at 810.

188. *See id.*

189. *See infra* notes 191–202 and accompanying text. One authority has written:

> But anyone familiar with the politics of large, complicated policy decisions will recognize that politicians in these situations tether their individual decisions to deeply held political objectives and strategies. These strategies are flexible and hard to uncover in isolation, but they become more evident in close scrutiny of the *pattern* of choices that make up a complex political product like a constitution.

ROBERTSON, *supra* note 8, at 9–10.

190. *See* Webb, *supra* note 171, at 211–12.

191. BEEMAN, *supra* note 25, at 223.

that the system of slavery would remain intact,[192] and some New England states wanted to increase their hold on the shipping industry.[193] However, he also acknowledged that the views of some were shaped "by considerations that transcended petty squabbling over imagined threats to state power."[194]

Beeman also found principled positions in the debates.[195] With respect to the Great Compromise, he noted that although James Madison and James Wilson were from the most populous states (Virginia and Pennsylvania), they also believed that representative government demanded proportional representation and that state governments should not have excessive and authority within the national government.[196] And although deputies from the small states certainly wanted to protect their states' interests, some also viewed states as indispensable units of political society.[197]

Jack Rakove described the deliberations as involving "an unconventional and complex interplay of ideas and interests . . . ."[198] According to Rakove, the large states did not attempt to compromises; rather, they unsuccessfully sought to break the resistance of the small states with rational arguments and appeals to principle.[199] However, he found that the small states proved to be "better bluffers" than their large state counterparts.[200]

Rakove argued that the large states proved unable to dismiss the importance of states as elements of the nation's government or their importance in maintaining civic loyalty, nor could they overcome the fear of the small states that the large states would conspire against them.[201] In addition, the large state argument for a representative Senate paid only minimal attention to the principle of proportional representation; it was primarily an argument designed to establish a Senate that would have independence from state legislatures needed to guard national interests.[202]

192. *See id.* at 318–30.
193. *See id.* at 327–28; *see also* BARBASH, *supra* note 41, at 357–58.
194. BEEMAN, *supra* note 25, at 223.
195. *See infra* notes 196–97 and accompanying text.
196. *See* BEEMAN, *supra* note 25, at 330–31.
197. *See id.* at 330–32.
198. Rakove, *supra* note 1, at 457 (1987).
199. *See id.* at 427.
200. Steve Munzel, *Jack Rakove and Original Meanings: An Interview*, VARSITY TUTORS, http://www.varsitytutors.com/earlyamerica/early-america-review/volume-3/jack-rakove-and-original-meanings-an-interview (last visited Oct. 24, 2017).
201. *See* RAKOVE, *supra* note 25, at 78.
202. *See id.* at 78–79.

In developing another pragmatic argument, Calvin Jillson employed the political scientist's tool of roll call vote analysis to examine shifting coalitions of states. He divided the Convention's timeline into periods in which states realigned themselves into three differing coalitions.[203] The three periods were (1) the initial debate over whether the Convention should propose a powerful, independent national government, (2) the debate over commerce and the slave trade, and (3) the debate over the proper balance of power among the Executive, the Senate, and the States.[204] The debate over representation, including representation in the House and Senate, falls in the first realignment.[205] Within that period, the large states—heavily populated or expecting to become heavily populated—aligned against the small states, those with less population.[206] Still, during the debate leading up to the Great Compromise, the coalitions shifted somewhat as Pennsylvania and Virginia cast independent votes on some issues.[207]

Jillson further found that political theory ("higher" level choices) dominated during some parts of the Convention and interest group politics ("lower" level choices) dominated at other times.[208] During the debate over representation, he argued that the deputies were making lower level choices.[209]

According to his argument, a critical event was the Convention's decision on June 12 to count slaves as three-fifths of a person in determining representation in the House in exchange for requiring states to count slaves this way in calculating a state's tax obligation—the tax burden being based on a state's population.[210] Moreover, with the decision to tie representation in the House to a regular census, the Southern states presumed that they would be the centers of population growth and could look forward to majority power in the near future.[211] At this point, the Southern states enjoyed increased political power in the House and were less opposed to a reduction of power resulting from equal representation in the Senate.[212]

Jillson's argument has problematic elements. He relied on roll call votes

203. *See* JILLSON, *supra* note 8, at 31–34, 200.
204. *See id.* at 31–34.
205. *See id.* at 27–34.
206. *See id.* at 33, 200.
207. *See id.* at 33.
208. *See id.* at 15–16.
209. *See id.* at 64.
210. *See id.* at 77, 96–99.
211. *See id.*
212. *See id.*

without distinguishing between votes on major issues and votes that were procedural or noncontroversial and thus of limited significance.[213] As for his reliance on the debates, there is considerable speculation involved. It is unclear whether the deputies' speeches and votes prove intentional machinations to achieve an end or whether they show only coincidental events or events only loosely connected.

Also employing a highly sophisticated roll call analysis, political scientists Jeremy Pope and Shawn Treier proposed a connection between the Convention's decision to count slaves as three-fifths of a person in calculating representation and its vote on the Great Compromise.[214] They focused on the two critical votes at the Great Compromise: the 2-2 divided vote of the Massachusetts delegation and North Carolina's vote in favor of equal representation in the Senate.[215]

As for Massachusetts, they suggest that the Convention debates persuaded two of the deputies to moderate their positions.[216] However, recognizing the limitations of their analysis and of the documentary record, they offer the suggestion without a firm commitment to it.[217] As for North Carolina, they find a high probability that its deputies were swayed by the Convention's decision to count a slave as three-fifths of a person for purposes of determining how many representatives a state would have in the House.[218] They concede that because of its limitations, the methodology does not rule out other hypotheses.[219]

Although the statistical analyses of Jillson, Pope, and Treier support a pragmatic interpretation of the Great Compromise, they do not address a

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213. *See id.* at 29–30.

214. *See* Jeremy C. Pope & Shawn Treier, *Reconsidering the Great Compromise at the Federal Convention of 1787: Deliberation and Agenda Effects on the Senate and Slavery*, 55 AM. J. POL. SCI. 289, 294–304 (2011).

215. *See id.* at 289–90.

216. *See id.* at 299.

217. *See id.*

218. *See id.* at 303–04.

219. *See id.* at 292 n.4.

> We recognize that there are other possible versions of deliberation at the convention. It is certainly possible that individual delegates may have come to believe that some compromise was necessary to ensure an agreement on a new constitution and voted accordingly on the final vote without leaving any other trace of their altered thinking in the roll call record. But this is not clearly a falsifiable hypothesis and is, therefore, beyond the scope of what roll call analysis can illuminate.

Id.

critical aspect of the decision. The day after the Convention vote, the deputies of the large states chose not to seek a reconsideration.[220] Insights into this decision would be valuable; however, a roll call analysis does not address it.

D. Conspiracy Stories

The most prominent and controversial story of a conspiratorial scheme lies in Charles Beard's *An Economic Interpretation of the Constitution of the United States*.[221] In his 1913 book, Beard argued that wealthy property owners drafted the Constitution to protect their own interests to the detriment of small farmers and the lower classes.[222]

With respect to the structure of government, he found that the design would permit "little probability of a common interest to cement these different branches in a predilection for any particular class of electors."[223] Different groups would control each branch.[224] The people would control the House, the state legislatures would control the Senate, and popularly chosen electors would select the Executive.[225] He noted that in 1787, the Senate was elected by state legislatures whose membership was "almost uniformly based on property qualifications . . . ."[226]

This arrangement had an economic corollary: "[p]roperty interests may, through their superior weight in power and intelligence, secure advantageous legislation whenever necessary, and they may at the same time obtain immunity from control by parliamentary majorities."[227] Thus, the new government's structure would prevent any danger to the propertied minority from the majority.[228] According to Beard, it was "drawn with superb skill by men whose property interests were immediately at stake . . . ."[229]

Beard, however, denied that he was asserting an intentional conspiracy.[230]

220. *See* 2 FARRAND, *supra* note 3, at 19–20.
221. *See* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).
222. *See id.*
223. *Id.* at 160.
224. *See id.* at 161–62.
225. *See id.*
226. *Id.* at 161.
227. *Id.*
228. *Id.*
229. *Id.* at 188.
230. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED

In his introduction to the 1935 republication, he stated that economic determinism "was never in my mind; nor do I think that it is explicit or implicit in the pages which follow. . . . In [the field of history] I find, what Machiavelli found, *virtu*, *fortuna*, and *necessita*, although the boundaries between them cannot be sharply delimited."[231]

Although Beard charted this economic narrative, he neglected to support his thesis with an investigation of the critical Convention votes. Such an inquiry would have offered a richer explanation of the delegates' conduct.

Not until the late 1950s and 1960s did professional historians dissect Beard's research and analysis in detail and declare them wanting. Forrest McDonald's *We the People: The Economic Origins of the Constitution*[232] and *E Pluribus Unum*[233] are the most notable works. According to Gordon Wood, perhaps the most prominent current historian of that era, the Beard thesis "in a narrow sense is undeniably dead" and "so crude that no further time should be spent on it."[234] Still, Beard has his defenders, at least for the proposition that we should acknowledge that the Framers were largely affluent and concerned with constructing a government that would limit the excesses of democracy.[235]

Forrest McDonald also entangled himself in another conspiracy story. In his 1965 book, *E Pluribus Unum*, he laid the success of the vote on the Great Compromise to a secret bargain hatched between Roger Sherman of Connecticut and John Rutledge of South Carolina and later including eight other

STATES xvi (1935).

231. *Id.*

232. FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958).

233. FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776–1790 (1965).

234. WOOD, *supra* note 10, at 626.

> It seems obvious by now that Beard's notion that men's property holdings, particularly personalty holdings, determined their ideas and their behavior was so crude that no further time should be spent on it. Yet while Beard's interpretation of the origins of the Constitution in a narrow sense is undeniably dead, the general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution.

Id.; *see generally* G. Edward White, *Charles Beard and Progressive Legal Historiography*, 29 CONST. COMMENTARY 349 (offering an account of how historians have viewed Beard's thesis).

235. *See* WOOD, *supra* note 10, at 626.

delegates.[236]

In this bargain, Sherman and his fellow Connecticut delegates agreed to extend the slave trade for twenty more years, and the Southerners agreed to guarantee Connecticut's title to lands it claimed in the Western Reserve.[237] As a result, both states gained important concessions and had no trouble accepting the Great Compromise.[238]

The linchpin of McDonald's thesis was a description of the dinner where the conspirators sealed the deal; however, proof that the dinner occurred rested on questionable evidence.[239] Moreover, the Articles of Confederation Congress had already ratified Connecticut's western claim, and that claim did not seem vulnerable to being overturned.[240] In the face of criticism, McDonald later modified his position and suggested only that "it seems certain that . . . some kind of negotiations among the delegates from Connecticut, North Carolina, and South Carolina were involved."[241]

IV. HOW COURTS EMPLOY HISTORICAL NARRATIVES

The question remains: which stories of the Great Compromise do courts adopt when construing the Constitution? To some degree, courts are constrained by the Constitution. Article V states, "Provided that . . . no State without its Consent, shall be deprived of its equal Suffrage in the Senate."[242] As for the allocation of representatives in the House, a rejection of

236. *See* MCDONALD, *supra* note 233, at 289–302. In reviewing *E Pluribus Unum*, Gordon Wood wrote, "It is probably not exaggerating to say that no work of history has ever expressed such a thoroughly cynical view of human nature. Almost everyone was out to get his own, seeking his 'share of the loot,' forever with his 'hand in the public till.'" Gordon S. Wood, *Book Review*, 39 NEW ENG. Q. 122, 123 (1966).

237. *See* MCDONALD, *supra* note 233, at 290–92, 301–02.

238. *See id.*

239. *See* James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411, 416 (1987).

240. *See id.*

241. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 237 n.42 (1985).

242. U.S. CONST. art. V.

> Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

proportional representation would require a constitutional amendment.[243]

Thus, for constitutional reasons as well as pragmatic reasons, courts must accept the legislative arrangement. The Constitution constrains them from doing otherwise.[244] The question, however, remains: to what extent does the constitutional constraint limit them; that is, how broadly or narrowly can they construe the document? How does the historical narrative that a court adopts influence the extent to which a court is willing to exercise its discretion?

Supreme Court opinions and briefs reflect the differing historical narratives of the Great Compromise, though not explicitly referring to the relevant historians. We might assume that the lawyers, clerks, and Justices possessed backgrounds in this field, but neglected to cite to their sources. More realistically, we have to assume that they relied more heavily on what they retained from their academic backgrounds or from limited additional research.

We might view the historical knowledge of the Court members as "historical memory,"[245] that is, how society remembers the past, not necessarily how the past actually unfolded. As this analysis shows, in discussing the Great Compromise, different Justices invoke differing memories of the event. Each version reflects how different historians and other Americans understand it.

The historical narratives, then, likely echoed what academia and perhaps popular trade books taught the Justices and their staffs, however faintly remembered. The stories that the briefs and opinions tell are stories of consensus. Either they assume that the deputies strived for consensus from the start, or they find that after a period of conflict, the deputies moved to a consensus mode. It is unsurprising that the Justices tell no stories of conspiracies. The Great Compromise is too embedded in our history and historical memory as a positive landmark to permit a government body to speak ill of it.

The following are three examples of cases demonstrating how the Court has viewed the Great Compromise. Two are classic reapportionment cases,

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243. *See id.* (providing the procedure for amending the Constitution).

244. *See id.*

245. Katherine Hite, *Historical Memory*, in 1 INT'L. ENCYCLOPEDIA. POL. SCI. 1078, 1078–81 (Bertram Badie et al. eds. 2011).

> The concept of "historical memory," often expressed as "collective memory," "social memory," or for political scientists, "the politics of memory," refers to the ways in which groups, collectivities, and nations construct and identify with particular narratives about historical periods or events. Historical memories are foundational to social and political identities and are also often reshaped in relation to the present historical–political moment.

Id. at 1078.

and the third deals with a related matter.[246]

A. *Wesberry v. Sanders*

Wesberry v. Sanders[247] followed the leading reapportionment cases of *Baker v. Carr*[248] and *Gray v. Sanders*.[249] *Baker* opened the door to judicial review by declaring apportionment controversies to be justiciable and not political questions.[250] The following year, the Court took the next inevitable step of invalidating an apportionment scheme. In *Gray v. Sanders*, it rejected Georgia's method of allocating voting power in elections for governor, United States Senator, and officers elected for statewide positions.[251] Under its method, rural counties had more power than the heavily populated counties.[252] In finding the system a violation of the Equal Protection clause, Justice Douglas took a slogan from the civil rights movement and employed it to encapsulate the constitutional rule: "one person, one vote."[253]

In *Wesberry*, the Supreme Court extended its holding in *Gray* to declare

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246. *See infra* notes 247–88 and accompanying text. Other Supreme Court cases expressly discussing the Great Compromise include U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 459 (1992) (finding that allocating the number of House representatives to a state was a "principle solemnly embodied in the Great Compromise") (quoting Wesberry v. Sanders, 376 U.S. 1, 14 (1964)); I.N.S. v. Chadha, 462 U.S. 919, 950 n.15 (1983) (stating that the Great Compromise resolved the conflicting interests of the large and small states by structuring the bicameral legislature); Myers v. United States, 272 U.S. 52, 110–11 (1926) (referring to the Great Compromise in discussing the method of appointing the President and the method of appointing executive officers). Since 1970, seven opinions in the United States Courts of Appeal have expressly discussed the Great Compromise, accepting its role in allocating legislative power and often acknowledging its role in providing a compromise between the interests of the large and small states, but not delving any more deeply into historical analysis. *See* Sissel v. U.S. Dep't of Health & Human Servs., 799 F.3d 1035, 1051–52, 1055 n.3 (D.C. Cir. 2015); Igartua v. United States, 626 F.3d 592, 596 (1st Cir. 2010); City of New York v. U.S. Dept. of Commerce, 34 F. 3d 1114, 1126–27 (2d Cir. 1994), *rev'd sub nom.* Wisconsin v. City of N.Y., 517 U.S. 1 (1996); Nevada v. Watkins, 914 F.2d 1545, 1556–57 (9th Cir. 1990); Consumer Energy Council v. Fed. Energy Regulatory Comm'n., 673 F.2d 425, 464 (D.C. Cir. 1982); Bode v. Nat'l Democratic Party, 452 F.2d 1302, 1307–08 (D.C. Cir. 1971); Jackson v. Ogilvie, 426 F.2d 1333, 1335 (7th Cir. 1970).

247. 376 U.S. 1 (1964).

248. 369 U.S. 186 (1962).

249. 372 U.S. 368 (1963).

250. *See Baker*, 369 U.S. at 198–204.

251. *See Gray*, 372 U.S. at 376–81.

252. *See id.* at 379.

253. *Id.* at 381. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.*

that Georgia's Congressional Districts did not accord with the one-person-one-vote principle and therefore violated the Constitution.[254] In one district, which included the city of Atlanta, the number of voters was two to three times as great as in other districts.[255] Thus, the voters in the former district had only one Congressional representative and lacked the same degree of representation as the voters in other districts.[256]

In *Gray*, Justice Douglas looked to the Equal Protection clause to invalidate malapportionment in state elections.[257] In *Wesberry*, however, Justice Black, writing for the majority, looked to Article 1, Section 2 of the Constitution, which mandates, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."[258] He construed "by the People" to require proportional representation in Congressional districts.[259] In so doing, he noted the wording in Article 1, Section 2, Clause 3: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."[260]

In *Wesberry*, Justice Hugo Black looked to the history of the Great Compromise and found a heated conflict that ended in conciliatory compromise.[261] He noted that the debate over constituting the national legislature "precipitated the most bitter controversy of the Convention."[262] Though his words are somewhat ambiguous, Justice Black seemed to see the resolution coming from a move toward conciliation promoted by Benjamin Franklin:

> Some delegations threatened to withdraw from the Convention if they did not get their way. Seeing the controversy growing sharper and emotions rising, the wise and highly respected Benjamin Franklin arose and pleaded with the delegates on both sides to "part with some of their demands, in order that they may join in some accommodating

254. *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964).
255. *See id.* at 2, 8.
256. *See id.* at 2.
257. *See Gray*, 372 U.S. at 376.
258. *Wesberry*, 376 U.S. at 3 (citing U.S. CONST. art I, § 2).
259. *See id.* at 7–9.
260. *See id.* at 7 n.9 (quoting U.S. CONST. art I, § 2, cl. 3).
261. *See id.* at 10–18.
262. *Id.* at 10.

proposition.[263]

In Justice Black's version of the history,[264] Franklin's plea proved successful:

> At last those who supported representation of the people in both houses and those who supported it in neither were brought together, some expressing the fear that, if they did not reconcile their differences, "some foreign sword will probably do the work for us." The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise, based on a proposal which had been repeatedly advanced by Roger Sherman and other delegates from Connecticut.[265]

Justice Black thus concluded, "It would defeat the principle solemnly embodied in the Great Compromise . . . for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."[266] His argument thus hails the Great Compromise as a foundational agreement that suggests not a close vote, but a consensus, and his acceptance of this account of consensus encourages him to find that the principle of proportional representation must prevail.

B. *Reynolds v. Sims*

In *Reynolds v. Sims*, the Supreme Court saw the Great Compromise as a decision based on pragmatism.[267] Despite demographic changes in Alabama, the state drew voting districts based on population numbers in the 1900 census.[268] Because the state districts for both Alabama's house and senate were not based on the "one-person-one-vote" principle, the Court found a violation of the Fourteenth Amendment's Equal Protection Clause.[269] In its analysis,

263. *Id.* at 12.
264. *See supra* notes 130–40 and accompanying text (suggesting that the causal connection between Franklin's plea and the Great Compromise is attenuated).
265. *Wesberry*, 376 U.S. at 12–13.
266. *Id.* at 14.
267. 377 U.S. 533, 574 (1964).
268. *See id.* at 540–41.
269. *See id.* at 575–76.

the Court rejected an argument based on the "federal analogy."[270] According to that analogy, the federal constitution required each state to have two United States senators; a state's senate need not be based on population.[271] The Court found the argument unpersuasive.[272]

Writing for the majority, Chief Justice Earl Warren observed that the federal arrangement grew out of a unique set of circumstances.[273] He noted that the federal system was "conceived out of compromise and concession indispensable to the establishment of our federal republic."[274] The Great Compromise, he argued, "averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation."[275] Thus, the Court interpreted the Great Compromise as a pragmatic solution to a specific problem, and not a political science principle that would extend to other settings.[276]

C. Evenwel v. Abbott

In *Evenwel v. Abbott*, the plaintiffs argued that Texas violated the Equal Protection Clause by requiring jurisdictions to draw state and local legislative districts based on population.[277] They contended that the state should have drawn the districts based on the population of eligible voters.[278] The lawsuit was a politically conservative effort to reduce the power of nonvoting traditionally liberal citizens—for example, Latinos and immigrants—and their representatives.[279]

270. *See id.* at 571–76.
271. *See id.* at 571–72.
272. *See id.* at 573–76.
273. *Reynolds*, 377 U.S. at 574.
274. *Id.*
275. *Id.*
276. *See id.*
277. 136 S. Ct. 1120, 1123 (2016).
278. *See id.*
279. *See, e.g.*, Brief of NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Appellees at 22, Evenwel v. Abbott, 136 S. Ct. 1120 (2016).

> Such burdens, too, disproportionately affect racial minorities, low-income residents, and other communities that often lack the opportunity or resources to easily comply with heightened registration and voting requirements. *Cf. Veasey v. Abbott*, 796 F.3d 487, 505–07 (5th Cir. 2015) (affirming finding that documentary voting requirements disproportionately affect low-income voters and racial minorities, including more than 600,000 registered voters and one million eligible voters, overwhelmingly Black and Hispanic in Texas). Apportionment schemes based on voter registration, therefore, constitute yet another mechanism by which legislators could reduce the representative access of poor communities and

Justice Ruth Bader Ginsburg, writing for the majority, looked to history, precedent, and practice to hold that the Equal Protection Clause did not mandate voting districts with equal numbers of voters.[280] A contrary holding, she argued, would have overturned a fundamental understanding of the Constitution.[281] Emphasizing political theory, she found that the Great Compromise was indeed a compromise between endorsing majoritarianism and protecting non-majoritarian interests.[282] After referring to the Great Compromise, however, Justice Ginsburg discussed *The Federalist No. 54*, which defends how the Constitution allocates seats in the House of Representatives among the states.[283] It is a fair reading that she assumed *The Federalist* fully reflects a consensus at the Convention.

Justice Ginsburg's historical analysis suggests that the Convention deputies thought out the system of representation in considerable detail as part of reaching "difficult compromises."[284] At the same time, that detailed understanding included a balancing of equitable considerations and checking majority power, which did not permit a single comprehensive theory of representation. A finding for the plaintiffs would upset that balance.[285]

D. The Role of History in Judicial Analysis

In *Wesberry*, then, the majority relies on a highly consensus-oriented understanding of the Great Compromise.[286] Franklin brought the deputies together with a plea for prayer.[287] In *Reynolds*, the Court viewed the

people of color under Appellants' proposal.

Id.

280. *Evenwel*, 136 S. Ct. at 1132–33.

281. *See id.* at 1132.

282. *See id.* at 1128–30. Justice Thomas, in his concurring opinion, noted that "[t]he Constitution lack[ed] a single, comprehensive theory of representation," but that the Framers devised "a 'mixed' constitutional structure." *Id.* at 1136–37 (Thomas, J., concurring). That structure achieved a compromise between an equitable system of representation and a system that would prevent the majority from abusing control over public policy. *Id.* According to Justice Thomas, that result required "difficult compromises." *Id.* at 1137.

283. *See id.* at 1127 (discussing THE FEDERALIST NO. 54 (James Madison)). An argument exists that Alexander Hamilton authored the essay. *See* THE FEDERALIST NO. 54, at 366 (Jacob E. Cooke ed., 1961).

284. *Id.*

285. *.See id.* at 1132.

286. Wesberry v. Sanders, 376 U.S. 1, 10–17 (1964).

287. *See supra* notes 80–82 and accompanying text.

Compromise as a pragmatic agreement.[288] Chief Justice Warren limited the principle of the Great Compromise to the circumstances that brought about the compromise.[289] In *Evenwel*, the Court seemed to find that the Compromise stemmed from a sophisticated analysis of political theory.[290] The theory included a balancing of equitable considerations and a check on majority power.[291] Each case, then, drew on a different historical interpretation of the events of 1787 to support a holding that today most authorities would hail as desirably democratic.

Text, case precedent, current policy considerations, and history work together to constrain contemporary decision-making, yet none of these constraints is completely restricting. The words of a text are open to various constructions. Policy considerations provide a framework for viewing a controversy and may compete with differing policy considerations. Case precedents invite narrow and broad constructions and may even be deemed irrelevant to resolving a new case.

Here, however, we focus on the role of history. To some degree, the factual history, the narrative of a law, including the narrative of a constitutional provision's development, constrains the meaning of the text. Although false histories may gain prominence—as in the case of Franklin's success in bringing about conciliation of sparring deputies—they eventually lose force, and true facts win out. As courts look to history, their applications of history are limited by the facts. In this way, history constrains decision-making.

The historical narrative, however, is open to various interpretations, and these interpretations free the legal decision maker to interpret the law in a limited variety of directions. As we have seen, historians find at least four ways to read the story of the Great Compromise.[292] The historical record limits them to these and perhaps other stories.

In each case, the historian can write a story that is acceptable as a truthful story. Each story has the attributes of a successful story that can support an argument; that is, the story must be faithful to the facts, must be persuasive by corresponding to the audience's background, social knowledge, and cultural presuppositions, and also must join together the narrative, the characters, and

288. Reynolds v. Sims, 377 U.S. 533, 574 (1964).
289. *See id.*
290. *Evenwel*, 136 S. Ct. at 1126.
291. *See id.*
292. *See supra* Part III.

the setting without contradictions.[293] These requirements constrain both historical and legal imagination.

With the exception of the expanded Franklin narrative, which lacks fidelity to the facts, the stories of the Great Compromise conform to these requirements.[294] The question, then, is in a given case, which story most appeals to the Court? For the true legal realist, the question may be, in a given case, which story most supports the Court's decision?

This question points to its own answer. At least when it comes to fundamental constitutional questions, it would be jarring for a court to depict a doctrine as resulting from an ugly deal or from a conspiracy, even if the true history is less than complimentary to the Constitution and its narrative. An essential element of the American narrative is a governmental structure founded on reason or at least intelligent compromise (for the issue of slavery, I acknowledge an exception to my argument).

Consequently, the frequent narrative relates a story of conflicting positions eventually resulting in compromise consistent with American political theory. This reality limits the contribution of the historian to judicial analysis. Critical historical narratives may disrupt the conventional narrative and contribute to how society understands and acts in the societal and political sphere. However, the influence of disruptive narratives ends at the courthouse steps.

V. CONCLUSION

At the close of the Convention, Benjamin Franklin encouraged all the deputies to endorse the proposed Constitution.[295] He noted the inevitable disagreements in which the deputies engaged: "For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views."[296] However, he also noted that the result of the deliberations was necessarily imperfect: "From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir,

293. *See* J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling,* 10 LEGAL COMM. & RHETORIC: JAWLD 67, 71 (2013); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion,* 14 J. LEGAL WRITING INST. 53, 64–66. (2008) (identifying these characteristics of a persuasive story).

294. *See supra* Parts III and IV.

295. *See* 2 FARRAND, *supra* note 3, at 641–42.

296. *Id.* at 642.

to find this system approaching so near to perfection as it does . . . ."[297]

Further, Franklin identified the key to a successful government: "Much of the strength [and] efficiency of any Government in procuring and securing happiness to the people, depends, on opinion, on the general opinion of the goodness of the Government, as well as . . . of the wisdom and integrity of its Governors."[298]

The Court's adherence to a positive history of fundamental Constitutional provisions accords with Franklin's insight into the importance of a popular perception of the "goodness of the Government."[299] Thus, for the Court, at least, positive historical analyses of compromise and conciliation prevail.

297. *Id.*
298. *Id.*
299. *Id.* at 643.