

# **Parallel Accords: The American Precedent**

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## PREFACE

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This study was inspired by the presentation at the annual conference of the International Association of Centres for Federal Studies at Bruges, Belgium in October 1989 of a paper by Stephen Schechter entitled "‘Well Begun is Half Done’: The Politics of Founding". Listening to his analysis of the processes involved in the founding of the United States Constitution 1787-90, exactly two centuries ago, I could not help but be struck by some remarkable resemblances to the debates and processes occurring in contemporary Canada in relation to the Meech Lake Accord. Consequently, upon return from that conference we undertook a study, at the Institute of Intergovernmental Relations, of the American precedent to analyse how the strategy of a "parallel accord" or of "companion resolutions" had been employed in that situation.

Two other staff members of the Institute, Darrel R. Reid and Dwight Herperger, worked with me as joint authors and they made a very major contribution to this work. We would like to express our appreciation to all the Institute staff who helped us with this project, particularly to Patti Candido who made endless modifications on the word processor to the text as it developed, to Valerie Jarus for superb preparation of the text in camera-ready form, to Anne Poels for assembling research material, and to Doug Brown, Associate Director, for reading over and advising on the typescript. I would also like to thank Phil Wood, John Meisel and Peter Leslie who reviewed the text and gave us useful comments and advice.

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Ronald L. Watts  
30 April 1990

## SOMMAIRE

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Lorsqu'on examine le processus en vertu duquel les treize Etats originels des Etats-Unis d'Amérique ratifièrent la nouvelle Constitution du pays entre 1787 et 1790, on est aussitôt frappé d'y trouver des similitudes marquantes — mutatis mutandis — avec les stratégies et les luttes entourant l'actuel processus de ratification de l'Accord du lac Meech. Le projet d'une nouvelle constitution pour les Etats-Unis, élaboré à l'occasion de la Convention de Philadelphie en 1787, s'avéra un ardu compromis salué à l'origine ni plus ni moins comme un "miracle". Au cours de la campagne de ratification subséquente, six Etats votèrent rapidement et de façon successive en faveur du projet de constitution. Par après, on assista toutefois à un net ralentissement du processus de ratification, du fait principalement de la résistance acharnée manifestée par les Antifédéralistes dans chacun des Etats n'ayant pas encore ratifié le projet de constitution fédérale. Les Antifédéralistes insistèrent pour que l'entérinement soit assujéti aux révisions à apporter au projet de constitution. La stratégie des Fédéralistes (partisans de la Constitution) consista d'abord à plaider en faveur d'une approbation sans réserves de la Constitution fédérale. Mais, confrontés dans un certain nombre d'Etats à une opposition au moins aussi vive que celle émanant des provinces canadiennes récalcitrantes contre l'Accord du lac Meech, les Fédéralistes américains réalisèrent qu'il était vain de jouer la carte de l'intransigeance; de fait, enjoindre la ratification de la Constitution sans autre porte de sortie pour ses adversaires eut conduit ceux-ci à désavouer purement et simplement l'initiative des Fédéralistes. Ces derniers se rendirent compte alors que la seule manière de conserver intacte la Constitution exigeait de gagner à leur cause les Antifédéralistes en leur proposant, dans le cadre des conventions d'Etats, que la ratification de la Constitution comporte également le dépôt de "résolutions d'accompagnement". Mais, pour ce faire, il importait que la Constitution soit d'abord ratifiée dans sa forme originale. En contrepartie, les Fédéralistes s'engagèrent à endosser toute recommandation qui prônerait des modifications constitutionnelles complémentaires, notamment un "Bill of Rights"; celui-ci constituerait une défense du droit des Etats aussi bien que des droits individuels et serait incorporé dans la nouvelle Constitution aussitôt après son entrée en vigueur. Cette stratégie, utilisée en premier lieu au Massachusetts puis au cours des campagnes de ratification menées dans quatre autres Etats clés, contribua à sauvegarder la nouvelle Constitution. Ce cas donnera peut-être matière à réflexion en ce qui concerne le présent contexte constitutionnel canadien.

## SUMMARY

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The process followed in the original thirteen states when ratifying the new American Constitution during the period 1787-90 indicates some remarkable similarities to the strategies and actions employed in the current Meech Lake Accord ratification process, although some differences in context must be borne in mind. The proposed new United States Constitution, produced behind closed doors at the Philadelphia Convention in 1787, was a difficult compromise hailed initially as a "miracle". During the subsequent ratification campaign, six states in rapid succession produced affirmative votes for the proposed Constitution. Thereafter, the ratification process slowed significantly as fierce Antifederalist opposition mounted in each of the states yet to ratify the Constitution. The Antifederalists insisted that ratification should be conditional upon revisions to the proposed Constitution. At first the strategy of the Federalists (supporters of the new Constitution) was to insist upon approval of the new Constitution with no changes. But faced in a number of states with opposition at least as strong as that which has arisen in the Canadian provinces which have yet to endorse the Meech Lake Accord, the American Federalists came to realize that there was no point in insisting that it was the new Constitution or nothing: the answer to that proposition would be nothing. They realized that the key to saving the Constitution intact was to win over the Antifederalists by offering in the state conventions what were in effect "companion resolutions" to accompany ratification. They insisted upon ratification of the new Constitution unchanged, but coupled with this a commitment to support recommendations for further constitutional amendments, particularly a bill of individual and states' rights to be added to the new Constitution soon after its implementation. This strategy, first employed in Massachusetts, then in four other key state ratification campaigns, succeeded in saving the new Constitution. This example provides some lessons which are significant in the current Canadian context where the possibilities of a "parallel accord" or the adoption of a "companion resolution" have been under consideration.

## PARALLEL ACCORDS: THE AMERICAN PRECEDENT

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### 1. INTRODUCTION

The debate over the Meech Lake Accord has become increasingly polarized between those arguing for its ratification unchanged and those pressing for revisions and additions to it. In this situation some suggestions have been made that agreement upon a "parallel accord" or a "companion resolution", accommodating some of the concerns that have been raised, might help to resolve the apparent impasse. The purpose of this study is to draw attention to the way in which agreement for the ratification of the United States Constitution 200 years ago was obtained, in the face of considerable opposition, through a procedure of agreeing during the ratification process to accompanying resolutions containing recommendations for further constitutional amendments to follow. In the current Canadian predicament there is value in examining this American precedent for its relevance to the current Canadian situation.

The Meech Lake Accord, outlining the principles that would enable Quebec to endorse the 1982 amendments to the Constitution, was the product of unanimous agreement among the First Ministers at Meech Lake on 30 April 1987. Just over a month later on 3 June 1987 at the Langevin Block in Ottawa the legal formulation of these principles, including some minor modifications in response to public comment, was approved by the First Ministers as the *Constitution Amendment, 1987*. Under the procedures for constitutional amendment set out earlier in the *Constitution Act, 1982*, ratification of this constitutional amendment requires endorsement by Parliament and all ten of the provincial legislatures within a period of three years from its first passage in Parliament or a legislature.<sup>1</sup> At first the prospects for approval of the "miracle"

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1 While questions have been raised about whether the time limit set out in s.39(2) of the *Constitution Act, 1982* applies to amendments requiring unanimous provincial endorsement under s.41, the view generally accepted by the participating governments is that the time limit of 23 June 1990 for ratification does apply, since the Accord constitutes a total package in which some elements come under s.38 to which the time limit set forth in s.39(2) clearly does apply. The contrary view espoused by some authors is that since the *Constitution Amendment, 1987* contains some elements that require unanimous endorsement, the requirement of unanimous endorsement set out in s.41 applies to the whole package, and the time limit does not relate to amendments requiring unanimous agreement under s.41. See for example, Gordon Robertson, *A House Divided: Meech Lake, Senate Reform and Canadian Union* (Halifax: Institute for Research on Public Policy, 1989), pp. 5-20. See section 5, p. 52, below for further discussion of this issue.

of unanimous agreement at Meech Lake seemed highly favourable both because of the unanimity of the First Ministers and because of the support given to it publicly by the three major party leaders in Parliament. In just over a year, by early July 1988, the House of Commons and eight of the provinces and legislatures had formally adopted the proposed amendment. As time has elapsed, however, the concerns of certain groups within the public about the Accord, and the election in three provinces — New Brunswick, Manitoba, and Newfoundland — of new premiers and governments who had not participated in the original agreement and who wished to see changes made to the Accord, have brought into question whether the unanimous endorsement of the Accord will be achieved by 23 June 1990. With only two months to go, the legislatures of New Brunswick and Manitoba, whose premiers are insisting upon changes, had yet to endorse it, and in Newfoundland the legislature has rescinded the previous approval of that province. On the other hand the Quebec government insists that the Accord must remain intact if it is to assent willingly to the earlier 1982 constitutional revisions. There appears to be a political impasse. It is in this context that there have been increasingly frequent suggestions that a “parallel accord” or a “companion resolution” embodying additional provisions desired by the premiers and legislatures who are critical of the Accord in its present form, might obtain their support for the proposed *Constitution Amendment, 1987*, before the time limit expires.

In considering the issues facing Canada at the present time it may be helpful to examine precedents elsewhere. A particularly noteworthy precedent can be found in the process that occurred in the ratification of the new Constitution of the United States exactly 200 years ago in the period between 1787 to 1790.<sup>2</sup> Because of the serious problems arising with the previous Articles of Confederation as viewed in certain quarters, a constitutional convention met in Philadelphia in 1787, and its proposals for a new constitution were ratified in a campaign which subsequently involved debate in each of the 13 states. In some states there were quick ratifications. In others there were fierce debates between the Federalists supporting the new Constitution and the Antifederalists opposed to it, and in some states the latter were in a majority. At first the Federalists opposed any consideration of amendments, since they feared this might open a Pandora’s box and unravel the delicately balanced compromises which had been reached. But subsequently, in at least five states, the Federalists initiated

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2 While ratification by the required 9 of the 13 states was achieved within less than a year, by June 1788, enabling the new Constitution to come into effect in 1789, it was not until May 1790 that all of the original 13 states had ratified it. The first ten amendments to the new Constitution (the Bill of Rights), embodying recommendations made during the consideration of the new Constitution by the states, were passed by the new Congress in September 1789, and their ratification by the required number of states was completed in December 1791.



a compromise in which ratification would be accompanied by a resolution listing recommended amendments to the new Constitution to be acted upon as soon as the Constitution went into effect, and this promise of action on the concerns of the Antifederalists gained the support required for ratification. After ratification of the Constitution, the new Congress during its first year in office in 1789 quickly turned to enacting a set of amendments which were then transmitted to the states for ratification. This second ratification process, completed in 1791, consequently resulted in the first ten amendments embodying the Bill of Rights which were added to the new Constitution. The American precedent, therefore, is relevant both because many of the arguments and strategies proposed by the Federalists and Antifederalists were remarkably similar to those heard in the debate over the Meech Lake Accord, and because proposals for a parallel set of constitutional amendments played a key role in gaining support for the new Constitution.

The similarities between the American example and the current Canadian situation are striking. In both cases, whether at the Philadelphia Convention or the Canadian First Ministers' meeting at Meech Lake, the design of the constitutional proposals was carried out behind closed doors to enable effective negotiation and compromises. In both cases the results of these negotiations went further than the public expected, taking the citizenry somewhat by surprise. In both cases, during the ratification process the proposals were endorsed quickly in some states or provinces, there were lengthy and difficult debates in others, and there were some states or provinces which were clearly reluctant to ratify and where revisions to the proposals were strongly advocated. In both cases, there were concerns expressed by opponents regarding the relation of the constitutional proposals to the status of a bill of rights. In both there were similarities in the strategies adopted by the supporters and the opponents of the constitutional proposals. In both, the future of the nation hung on the ratification of the proposals.

At the same time, any such examination of the American example must also take clear account of significant differences between the two situations. These relate both to the processes involved and to the wider political context. To begin with, there were important differences in the processes involved in ratification. The ratification process in the United States in 1787-90 was related to a proposal for a totally new constitution, whereas the Meech Lake process relates to the amendment of parts of an already existing constitution. The bodies ratifying on behalf of the states or provinces also differed. The Philadelphia Convention removed the responsibility for ratification from the state legislatures, which had a vested interest in the status quo and could be expected to resist change, to special state ratification conventions, thereby providing a full opportunity for free and public debate. In Canada, under the constitutional amendment process adopted in 1982, the provincial ratification process rests

with provincial legislatures where issues of governmental self-interest, party rivalry and party discipline have had a strong impact on the character of the debate. The Philadelphia Convention further structured the ratification process in favour of its proposals by replacing the existing unanimity rule under the Articles of Confederation with the easier target of approval by nine of the thirteen states. In Canada, while a number of provisions of the Meech Lake Accord would, under s. 38 of the *Constitution Act, 1982*, require approval by only seven provinces representing 50 percent of the population, the total package of the Accord includes some elements which require unanimous provincial endorsement under s. 41. Therefore, it has been generally assumed that the whole package requires unanimous consent. The implications for those states or provinces refusing to ratify were also different in the two cases. In the American example, since a totally new constitution was being brought into effect, states refusing to ratify after the required minimum approval of nine states had been obtained ran the risk of excluding themselves from the new federation. In the Canadian case, provinces can refuse to ratify without any risk of immediate penalty. There is no consequent price of immediate exclusion from further participation in the federation. They do, however, have to consider some risks. In the shorter-term there is the concern that failure of the Accord may block progress for some considerable time to come on other constitutional revisions, such as Senate reform, which they have been pressing for. In the longer-run there is the risk that failure of ratification could lead possibly to Quebec's eventual secession and perhaps even the subsequent disintegration of the federation.

There is also a contrast in the thrust of the opposition to ratification in the two ratification campaigns. In the American example the Antifederalists were decentralist in their focus, critical of the powers being given to the new central government and insistent upon the inclusion of a bill of rights whose primary purpose would be to limit the ability of the new national government to intrude upon individual and states' rights. By contrast, in Canada the critics of the Meech Lake Accord are concerned about the apparent reduction of the powers of the national Government and of the ability of the Charter of Rights and Freedoms to constrain provincial governments.

There are also clear differences between the eighteenth century and twentieth century contexts of the American and Canadian cases, not the least being the impact of communications technology upon the character of public and private deliberations and upon reporting in the media. The character of sustained intellectual debate by legislators and the public found in the discussion of the proposed U.S. Constitution two centuries ago has been hard to recreate in a climate dominated by the electronic media with its focus on highlights and simplistic contrasts. A further particularly important difference in the two situations is in their ethnic composition and particularly the bilingual character

of Canada compared to the more homogeneous character of the United States at the time of its federal origins. Also by no means insignificant, are the differences in political culture and forms of democratic expression in the two countries. Finally, in the American case, the situation in which the ratification occurred was the immediate aftermath of a revolutionary war. The debate between the Federalists and Antifederalists was therefore not just a battle over the degree of centralization of power, but a broader struggle over the political, economic and social forms to be taken by a new nation in a rapidly changing world. While some might argue that the situation in Canada is in some ways similar, most opponents of the Meech Lake Accord would appear to take the position that there is not much wrong with the status quo and that the proposed adjustments would do more harm than good. There seems to be a general belief that even the most extreme outcome of failure to ratify the Accord, the separation of Quebec, would not have a serious impact on the economic stability of Canada or of the country's fundamental ideological or political underpinnings. The American Federalists argued, and acted, as if failure would lead to a disaster for their newly independent country. The character of the debate was affected, therefore, by a sense of real urgency. In contemporary Canada, on the other hand, those who have expressed concern about the impact of the failure to ratify the Meech Lake Accord upon the future of the federation, have usually been dismissed as fear-mongers. This difference between the two cases in the seriousness with which the issue has been treated may turn out to have been a crucial determinant of the outcome.

While these major differences must be kept clearly in mind, there are enough striking similarities at least in the two processes of constitutional ratification to make an examination of the American precedent worthwhile for Canadians considering a resolution to the impasse over Meech Lake through resort to a parallel accord or companion resolutions. Moreover, the ratification process in the United States, which until recently received far less attention from political observers and scholars than the deliberations of the Philadelphia Convention itself, has in recent years been the subject of a considerable body of new literature occasioned by the American Bicentennial celebrations.<sup>3</sup> It is the purpose of this study, therefore, to draw on that literature in an effort to examine the ratification process which followed the Philadelphia Convention.

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3 See section 2.2 for a review of this literature.

## 2. AN OUTLINE OF THE U.S. PROCESS OF CONSTITUTIONAL ADOPTION

### *2.1. Design of the Constitution, 1787*

The first constitution of the United States, the Articles of Confederation (written in 1777 and fully ratified in 1781) granted the central government very limited powers. Its ineffectiveness, which rapidly reached crisis proportions, soon led to agitation for constitutional reform. The result of this concern was the meeting of the inconclusive Annapolis Convention of 1786. This was followed by the Philadelphia Convention which was called by the Confederation Congress for the specific purpose of proposing amendments to the Articles of Confederation. The 55 delegates to the Convention from the 12 states (Rhode Island sent no delegates) were drawn by and large from among the most eminent men in the United States. To facilitate negotiation and compromise, sessions were held in secret behind closed doors. Votes were by state and each state received one vote.<sup>4</sup>

The Convention first met on 25 May 1787. For over three months the delegates wrestled with the two major proposals put before them. One was the Randolph (Virginia) Plan submitted on behalf of the larger states. This embodied a modified version of Madison's proposal for a Congress based on representation by population and a national government that would define both its own and state authority. In its centralist thrust it was not unlike the position that John A. Macdonald took during the Canadian Confederation negotiations some 80 years later. A reaction to it was the Paterson (New Jersey) Plan offered in rebuttal on behalf of the smaller states. It advocated equal representation of the states in Congress and a national executive subject to the control of the states. The Paterson Plan represented little more than a strengthened version of the

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4 For accounts of the Philadelphia Convention see: Max Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1964), 4 volumes; Lance Banning, "The Constitutional Convention", in Leonard W. Levy and Dennis J. Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan Publishing Company, 1987), pp. 112-31; Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little Brown and Company, 1966); Clinton Rossiter, *1787 The Grand Convention* (New York: The Macmillan Company, 1968).

existing Articles of Confederation, which it was argued was more consistent with the mandate that Congress had given when calling the Convention. The apparent deadlock between the two proposals stretched from 30 May to 16 July. The debate between these two proposals became so bitter that the Convention almost broke up.<sup>5</sup> The impasse was finally resolved by the Connecticut Compromise. This proposal led the delegates to agree upon a two-chamber Congress in which representatives in one house would be chosen on the basis of population (as advocated by the Randolph Plan) and in the other house on the basis of state equality (as advocated by the Paterson Plan). In the succeeding days following the Connecticut Compromise, the resulting spirit of compromise also led to a resolution on the issue of whether the national government should have a veto over state laws or vice versa. This was resolved by giving neither level of government a veto over the other. Thus was established the coordinate status of the two levels of government under the new Constitution, the innovative feature which scholars were subsequently to identify as the essential characteristic distinguishing modern federal systems from other forms of government. Agreement by compromise was also reached on a number of other issues including the election of the executive and the residence of legislators. In the end, on 17 September 1787, 39 delegates representing 12 states signed the agreement. Three who were present did not sign, and 13 were absent of whom 4 were known to be critical.<sup>6</sup> Thus, out of apparent deadlock was achieved the pragmatic compromise which Washington and Madison described as "the Miracle at Philadelphia".<sup>7</sup> It was that agreement upon the design of a new Constitution which was transmitted to the Congress then existing under the Articles of Confederation and which was in turn transmitted by the Congress to the states for approval by ratifying conventions.

Two points are worth special note here. First, the new Constitution drafted at Philadelphia was the product of pragmatic compromise. While later documents, not the least Hamilton, Madison and Jay's *Federalist Papers* written in support of the proposals during the ratification debate, have often attempted to

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5 See, for instance, Bowen, *Miracle at Philadelphia*, p.140. In the debate over whether members of the upper house should be elected by the state legislatures, it is interesting for Canadians to note that among the alternative proposals advanced by the nationalists was one similar to the interim arrangements proposed for the Senate in the Meech Lake Accord: Read (Delaware) proposed "that the Senate should be appointed by the Executive Magistrate out of a proper number of persons to be nominated by the individual legislature" (Farrand, *The Records of the Federal Convention*, 1964, vol. 1, p. 151, 7 June 1787).

6 Bowen, *Miracle at Philadelphia*, pp. 262-3.

7 *Ibid.*, p. ix.

identify the basic principles underlying the new Constitution, commentators upon the actual negotiations at Philadelphia have emphasized the pragmatic character of the resolutions that were reached.<sup>8</sup> The description of the resulting compromise as a "miracle" was to be echoed 200 years later in Canada in the early days following the unanimous agreement by the First Ministers on the Meech Lake Accord. This, too, was seen as a compromise which represented a major national achievement. In both cases, however, these constitutional proposals were, nevertheless, to face fierce opposition during the subsequent ratification process.

A second point to note is that the proposals of both the Philadelphia Convention and the First Ministers' meeting at Meech Lake contained significant elements of creative ambiguity. As a number of commentators have pointed out, precisely what "federalism", as embodied in the Philadelphia proposals, meant was never clear, nor did the *Federalist Papers* clear up that ambiguity. Thus, Richard Leach points out, "any attempt to argue for a particular relation between national government and the states — in particular for a precise division of powers between them — must fall flat for lack of constitutional corroboration .... Instead of a rigid set of principles, what the framers gave us was a flexible instrument ... which is able to respond to changing needs and circumstances and is not bound by the tenets of a particular theory".<sup>9</sup> Not surprisingly, this ambiguity led to concerns during the subsequent ratification debates. Once adopted, however, the generality of terminology contributed to the adaptability of American federalism over two centuries. There may be lessons here for Canadians wishing to insist upon greater legal precision in the terms of the Meech Lake Accord.

It is not the purpose of this study to analyse the substance of the new Constitution designed at Philadelphia in 1787 and under which the United States has operated for two centuries. The focus of this study is rather on the process of constitutional ratification. It is worth noting, however, that two features of the new Constitution were to provide the basis for fierce opposition during the ratification debate. The first of these was the omission of a bill of rights. The issue was considered at the Philadelphia Convention, but the delegates, believing that their prime purpose was to strengthen the national government — not to restrict it — defeated the motion for a committee to draft a bill of rights by a vote of ten states to none. As John Kaminski has noted:

The decision to omit a federal bill of rights almost proved fatal to the new Constitution. Opponents of the Constitution, called Antifederalists, used the

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8 See for instance, W.H. Riker, *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987), pp. 17-41, and Richard H. Leach, *American Federalism* (New York: Norton and Company, Inc., 1970), pp. 1-10.

9 Leach, *American Federalism*, pp. 9-10.

omission of a bill of rights incessantly as proof that a conspiracy was afoot to subvert the principles of the Revolution and deprive Americans of their dear-bought rights. Backed into a corner, supporters of the Constitution, called Federalists, were forced to devise arguments to explain the omission arguments that convinced few Antifederalists that the Constitution did not need a bill of rights. Thus, throughout the year-long debate over the ratification of the Constitution, the lack of a federal bill of rights remained the single most important issue.<sup>10</sup>

A second feature of the constitutional proposals affecting the subsequent ratification debates was the fact that the new Constitution proposed by the Philadelphia Convention represented a radical departure from the Articles of Confederation. In producing such a proposal the Convention had exceeded its mandate from Congress. The Congress had called the Philadelphia Convention for the purpose of proposing amendments to the Articles, not to produce a totally new constitutional structure.

For these reasons, it was by no means clear that the proposals of the Philadelphia Convention would receive the required public support when sent to the states for consideration. Thus, the ratification campaign itself was critical to the adoption of the new U.S. Constitution.

## *2.2. The Process of Ratification Outlined*

The Constitutional document that was forwarded from Philadelphia to the Confederation Congress on 17 September 1787 contained two significant provisions its framers hoped would ease its passage by the various state legislatures. First, the unanimity rule, which in the Articles of Confederation had in effect given each state veto power over legislative change, was replaced by a provision requiring ratification by 9 of the 13 states to bring it into force. Second, the Constitution's framers provided that the document was to be ratified not in the state legislatures, but by special conventions convened after state-wide elections. This provision, the framers hoped, would circumvent, or at least attenuate, the power of state legislators who had an interest in retaining the status quo and were in the best position to block the new Constitution. As has been noted by Stephen Schechter, these two creative provisions probably saved the Constitution from going down to defeat. The circumvention of the state legislatures allowed the Constitution to pass in states like Virginia and New York where there was strong and entrenched legislative resistance to the new Constitution, while elimination of the unanimity rule ensured that recalci-

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10 John P. Kaminski, "The Bill of Rights: A Necessary Bottom to the New System" (paper presented at the annual conference of the American Political Science Association, Atlanta, 1989), p. 3.

trant North Carolina and Rhode Island did not stand in the way of the Constitution's eventual ratification.<sup>11</sup>

Following the Philadelphia Convention, the Constitution was considered by the Confederation Congress. The new Constitution was not without friends at the Congress. Fully one-third of its delegates had been framers of the Constitution. The Federalists, who constituted a strong majority in Congress, hoped to see the Constitution transmitted to the states with the strongest possible endorsement: a recommendation from that body to the states to ratify the document. This, however, was not to be. Debate in the Congress was dominated by a small but energetic Antifederalist minority which, among other things, objected to the Philadelphia Convention's failure to include a bill of rights in the Constitution.<sup>12</sup> As it was important to the Federalists that the Constitution receive the strongest possible support from the Congress, they settled for a unanimous vote that the document "be transmitted to a convention of delegates chosen in each state by the people thereof" without any recommendation.<sup>13</sup> This represented a compromise acceptable to both Federalists and Antifederalists: on the one hand, Federalists had managed to get the document through Congress with a unanimous vote; on the other hand, the Antifederalist minority had ensured that the Constitution would have to live or die on its own merits through a series of 13 ratification conventions.

Even while the friends of the Constitution celebrated its passage through the Confederation Congress, they fretted about its future prospects. Despite this first important step in the ratification process, the continued survival of the Constitution was by no means assured. Across the country there were deep

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11 Stephen L. Schechter, "Well Begun is Half Done': The Politics of Founding" (a paper presented to the annual conference of the Association of Centers for Federal Studies, Bruges, Belgium, October 1989), pp. 6,7.

12 These objections had been voiced by the same spokesmen in the Philadelphia Convention itself. Although various individual rights had been included in the new draft Constitution, it was not until late in the Convention that the issue of a bill of rights was broached. Stating his concern that a bill of rights had not been included in the document, Virginian George Mason noted that "Such a bill would give great quiet to the people". Elbridge Gerry of Massachusetts proposed the establishment of a committee to draft one. Still preoccupied with the task of strengthening the central government, however, the Federalist majority at the Convention rejected this proposition. Many delegates believed such a bill to be unnecessary in that state bills of rights remained in effect and were, they believed, sufficient for the protection of individual rights. It remains an interesting, albeit entirely speculative, question whether the struggle to ratify the Constitution would have been either as bitter or as long had the concerns of Mason and Gerry — two framers at Philadelphia who did not sign the Constitution and later led Antifederalist opposition to it — been met at this early stage.

13 *Ibid.*, p. 275.



divisions over the merits of the document. In an unprecedented outburst of literary and philosophical ardour, polemicists debated the relative merits of all possible aspects of the document from every possible point of view. Subjects such as the nature of republican government, the proposed House of Representatives, the Senate, the President, the Judiciary, and especially the lack of a bill of rights became the subject of a debate which ranged from lengthy philosophical disquisitions to what James Madison characterized as "vehement and virulent calumniations".<sup>14</sup> While Federalist observers agreed that New Jersey, Delaware and Georgia would likely ratify quickly, they were far less certain about Massachusetts, Virginia and New York where, if anything, there appeared to exist a significant body of Antifederalist opinion. For states like North Carolina and New Hampshire, they were unwilling even to venture a guess as to support for the Constitution.

There was a further complication: although on paper the Constitution could be brought into force with the ratification of nine of the thirteen states, such was the fragility of the constitutional plan that it was widely assumed that any one of the four most populous and powerful states — Massachusetts, New York, Pennsylvania and Virginia — was in a "physical and political position to wreck the whole scheme by holding out".<sup>15</sup> It was understood by both Federalists and Antifederalists, therefore, that the endorsement of each of these states was necessary to ensure the survival of the new Constitution. The element of uncertainty this cast over the entire process both heightened the importance of the ratification battles in each state and brought the premier spokesmen for both sides to the fore.

After the transmission of the document by Congress, the states began considering the document. In rapid succession conventions in Delaware (7 December 1787), Pennsylvania (12 December 1787), New Jersey (18 December 1787), Georgia (2 January 1788) and Connecticut (9 January 1788) produced affirmative votes for the Constitution. These early successes were due largely to two factors: first, in most of these states there was support for a stronger union than the Articles of Confederation had been able to provide; and second the ratifying conventions were carried out before Antifederalists could mount an organized opposition to the Constitution.

Subsequently, the ratification process slowed significantly as Antifederalist opposition mounted and as the process moved to states with a sharper division of opinion on the merits of the new Constitution. This uncertainty was reflected, among other things, in the votes by which the Constitution was endorsed in the state conventions. In the first five states it passed either unanimously or by sizeable majorities. Thereafter, the Constitution was ratified by significantly

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14 Schechter, p. 15.

15 Rossiter, p. 279.

narrower margins. Over the next five months Massachusetts (6 February 1788), Maryland (28 April 1788), South Carolina (23 May 1788) and New Hampshire (21 June 1788) produced ratifications, thereby reaching the essential nine ratifications necessary to bring the Constitution into force.

The process had been neither easy nor swift, however. In Pennsylvania, Massachusetts and New Hampshire, the conventions had been characterized by passionate debate, rising animosity and, occasionally, legislative skulduggery. Both Federalists and Antifederalists alike watched these campaigns closely. In the case of the Federalists, the campaigns in two of these states prompted them to make crucial adjustments to their strategy which, it may be argued, ultimately ensured the success of their efforts. After a bitter and fractious ratifying convention in Pennsylvania, Federalists in other states sought to avoid leaving embittered opponents, often making concessions to them which were not strictly necessary to ensure ratification of the Constitution. It was the Massachusetts Convention, however, that brought about the most important innovation in Federalist strategy. Here, in order to win over their opponents, the Federalists introduced the concept not simply of ratifying the Constitution unconditionally but of accompanying this ratification with a conciliatory companion resolution including recommendatory amendments. This, as shall be seen below, would become the turning point in the successful campaign to ratify the Constitution.

Although the required nine states had now produced ratifying votes, all those who had an interest in the matter had their eyes fixed upon the two critical states of Virginia and New York. Both contained sizeable, articulate and relatively well-organized opposition to the Constitution, and both, because they were populous states, were seen as being crucial to the success of the new Constitution. The process ended in close affirmative votes by the conventions in both states: Virginia on 25 June 1788, and New York on 26 July 1788. As to brilliance of debate, depth of analysis, eminence of participants and closeness of result, these two conventions have been seen, and were seen at the time to be, microcosms of the entire campaign for the ratification of the Constitution.

With the ratification vote of these two states the survival of the Constitution was assured. When the Constitution came into force and the new government convened in April 1789, however, the new federation was comprised of only eleven states. In two states — North Carolina and Rhode Island — the Constitution had either failed to pass its ratifying convention (North Carolina) or had been ignored (Rhode Island). With the installation of the new government these two states became, in effect, separate sovereign states. In North Carolina, a convention in July 1788 had produced a resolution that neither ratified nor rejected the new Constitution. Hoping to force the Union to deal with what were seen as serious deficiencies in the document, the North Carolina Convention proposed a wide variety of amendments as preconditions to their ratification.

It was not until 21 November 1789 that delegates to a second state convention, their anxieties over the new federal power eased somewhat by the orderly administration of George Washington and by Congress's enactment of the new Bill of Rights, produced North Carolina's ratifying vote. Rhode Island, which had long been noted for its individualist and separatist tendencies, showed little interest in ratifying the Constitution until almost a year after the establishment of the new federal government. Even then, it took two sessions and two very close votes before Rhode Island became the last of the thirteen original states to ratify the Constitution.

Although the ratification process differed from state to state and debate turned often upon regional and state concerns, several themes emerged that were common to Federalist and Antifederalist strategies throughout the thirteen colonies. The Articles of Confederation, which came into effect on 1 March 1781, had been long attacked by nationalists like Alexander Hamilton, who argued that the Articles gave too much power to the states; under the Articles, he argued, "an uncontrolled sovereignty in each state will make our nation feeble and precarious".<sup>16</sup> The principal concerns of Hamilton and his colleagues were that the Confederation Congress lacked the power to regulate commerce, to enforce the collection of taxes and to oversee the raising of troops. Although several attempts had been made to strengthen the Union and its economic powers by amending the Articles, these efforts were consistently undermined by the Articles' unanimity provision, which required the consent of every state to new legislation. In practice, this provision hamstrung the Confederation Congress. Yet, as the Federalists well knew, the Articles were not without supporters; there existed within the Union a strong fear of centralized government removed from local control and a corresponding concern for states' rights. To Federalists, however, the constitutional proposal produced at Philadelphia was both an essential step away from constitutional chaos and a step towards true nationhood. Given the likelihood of strong regional opposition to the new Constitution, they were determined to see the document succeed. Understood in these terms, the initial ratification strategy of Federalists throughout the Union can be phrased as "No Compromise, No Amendments and Quick Ratification". The Constitution was to be pushed through the state legislatures with the greatest possible speed.

Among Antifederalists, the single most widely-held objection to the Constitution was the perceived lack of protection it afforded for individual and states' rights. Although Antifederalist forces were not able to coordinate their strategies as carefully or as successfully as their Federalist opponents, some general

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16 As reported in Patrick T. Conley and John P. Kaminski, *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Madison: Madison House Publishers, 1988), p. 5.

strategic concerns appeared. The Antifederalist strategy was to call for a second constitutional convention to correct the perceived deficiencies of the Philadelphia Convention. Failing that, they pushed for "conditional ratification": that is, that state ratification of the Constitution would be conditional upon the future action of Congress to amend the Constitution.

Early on in the process it became disconcertingly apparent to the Federalists that their own strategy, if pursued blindly, would result in the death of the Constitution. As a result, the Federalists in the Massachusetts Convention initiated a compromise whereby a list of recommendatory amendments was attached in a companion resolution to the ratification of the Constitution. While this list had no legal impact upon the Constitution, in that the state Convention unconditionally ratified the Constitution, the list was intended to generate a significant amount of "moral weight" for further constitutional amendment to be undertaken after the Constitution went into effect. When this strategy was first proposed, it was resisted by the Federalists. They feared that any discussion of the Constitution's shortcomings could open a Pandora's box. Later, however, as it became apparent that this strategy was an effective way of accommodating Antifederalist concerns, it came to be recognized by the Federalists as a valuable tool in obtaining the consent of otherwise hostile state conventions. Consequently, the Massachusetts approach was repeated in four of the five state ratifying conventions to follow.<sup>17</sup>

### *2.3. Implementation of Recommendations*

Once the Constitution had been successfully adopted, attention turned to the fall campaign for the first federal elections and the subsequent installation of the new Government. The conventional wisdom, it seemed, was to leave action on recommendations for further constitutional amendments identified during the ratification campaign "until the ship of state was under sail again".<sup>18</sup>

The first Congress under the new Constitution assembled a quorum on 6 April 1789. President George Washington was installed on 30 April. In his inaugural address he included a recommendation that Congress consider possible amendments to the Constitution. The procedure for such constitutional amendment was laid out in Article V of the new Constitution:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legisla-

17 Those states which adopted this approach were Massachusetts, South Carolina, New Hampshire, Virginia and New York. North Carolina and Rhode Island ratified the Constitution after it had come into operation and Congress had passed its proposed Bill of Rights on to the states for their approval.

18 Robert A. Rutland, "Framing and Ratifying the First Ten Amendments" in Levy and Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan Publishing Company, 1987), p.309.

tures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in the three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress, 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]<sup>19</sup> that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Notwithstanding the provisions for the establishment of conventions, Article V essentially allowed for Congress to initiate proposals for constitutional amendment, subject to ratification by the state legislatures.

Ironically enough, it was a Federalist representative, James Madison of Virginia, who took up the lead cause of introducing amendments in Congress to the new Constitution. In his efforts to secure a role in the first Congress, Madison had to confront the opposition of Antifederalist Patrick Henry, who had arranged to keep Madison off Virginia's delegation to the U.S. Senate, thus leaving Madison to seek election to the House of Representatives. Facing an Antifederalist candidate in that campaign, Madison was forced to pledge that he would work towards a bill of rights if elected, although he insisted that this should be accomplished through the existing provisions for constitutional amendment rather than through a second constitutional convention.

Once elected, Madison fulfilled his electoral promise and on 8 June 1789 requested that the House go into the Committee of the Whole to consider his list of proposed amendments which he had gleaned from over 200 separate proposals made in the various state ratifying conventions. Although nine in number, the proposed amendments comprised 26 separate paragraphs, beginning with a declaration affirming the people as the source of all power. In support of his proposals, Madison maintained that such a declaration of rights would serve to enhance the legitimacy of the new government "without weakening its frame or abridging its usefulness in the judgement of those who are attached to it".<sup>20</sup>

In providing a comprehensive, well-digested plan rather than simply introducing the concept of a bill of rights, Madison hoped to overcome the apparent apathy of many of his fellow legislators on this matter. Accordingly, he restricted the proposed amendments to, in his words, "points which are important in the eyes of many and which can be objectionable in those of none".<sup>21</sup> Moreover, he had structured his proposals in such a way that they could be

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19 These provisions, relating to the prohibition of the importation of slaves and the power of Congress to tax incomes, were later rendered obsolete.

20 Rossiter, p.302.

21 Rutland, p.311.

easily incorporated into the text of the original document. Clearly, Madison was conscious of the unpredictable nature of his enterprise and sought to minimize any potential effect that might derail the amendment initiative.

Debate among Madison's colleagues in the House was less than enthusiastic. Many Federalists believed the amendments to be unnecessary while Anti-federalists claimed it was not enough. An example of the latter group was George Mason, who characterized Madison's proposals as "Milk and Water Propositions" which served as "a Tub to the Whale" in that they did not deal with more substantive concerns such as limiting the powers of the national government.<sup>22</sup> The irony, of course, was that Madison was now called upon to defend the inclusion of a bill of rights, something which Federalists had adamantly opposed earlier in the debate over ratification of the Constitution.

On 21 July 1789, less than four months after the first Congress had convened, a select committee composed of one member from each state was struck to further consider the amendments. Reporting a week later, the committee had slightly modified Madison's original package — more in terms of form than substance — presenting a list of 17 amendments to the House for further debate. During the month of August, these amendments were debated periodically, both in the Committee of the Whole and in the House itself, and at no point was the outcome at all certain. For two days, representatives debated the form of the document, ultimately overturning Madison's original integrative approach and instead favouring the attachment of a list of amendments at the end of the existing Constitution. Throughout the debate, many attempts were made to broaden the discussion to include numerous other proposed rights. However, Madison insisted that "if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet but with little difficulty".<sup>23</sup> Indeed, Madison's persistence in maintaining this focused approach was a key factor in keeping the bill of rights proposal alive.

On 24 August 1789, the 17 proposed amendments were sent to the Senate for its consideration later the next week. Over the course of three weeks, the amendments were further consolidated, resulting in a list of 12 which was then sent back to the House of Representatives. Ultimately, the House accepted these amendments, with some minor modifications, in a vote of 37-14 on 24 September. The Senate concurred the following day and arrangements were made to have the approved version of the 12 amendments forwarded to the President for transmittal to the states. By this time, exactly four months had passed since Madison first introduced his proposals to the House.

As Robert Rutland points out, Congress proved to have been a "speed demon" by comparison with the lethargic state legislatures when it came to

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22 Kaminski, p.37.

23 Rutland, p.313.

ratification of the proposed amendments. While several states rejected the first two of the proposed 12 amendments (relating to salaries and representation in Congress), the remaining ten were ratified by the requisite three-fourths of the state legislatures over a period of more than two years.<sup>24</sup> Many politicians, it seemed, took for granted the ratification of the proposed amendments, and thus devoted little attention or energy to the matter. However, at no point during this time was the outcome in doubt.<sup>25</sup>

The first state to ratify the proposed Bill of Rights was New Jersey on 20 November 1789, followed in succession over the winter and early spring months by Maryland, North Carolina, South Carolina, New Hampshire, Delaware, New York and Pennsylvania. After ratification by Rhode Island on 11 June 1790 almost a full year would pass before the next state legislature, that of newly-admitted Vermont, assented to the proposed package of amendments. Finally, in a debate that spanned some 25 months or so, Virginia approved the entire package of proposed amendments on 15 December 1791, thus fulfilling the requisite three-fourths approval of state legislatures necessary to bring the Bill of Rights into effect. Three states — Georgia, Connecticut and Massachusetts — failed to ratify the amendments at all.<sup>26</sup>

Unfortunately, records of state legislative proceedings during this period were usually limited to a mere recording of the vote, and thus, little is known about the full nature of the debate in many of the state legislatures. However, it is evident that the most serious, acrimonious and certainly protracted debate over the proposed amendments occurred in the State of Virginia, whose representative James Madison had initiated the proposal. The somewhat fractious Antifederalist camp was intent on seeing that more of the numerous amendments proposed by Virginia's state Convention during the earlier constitutional ratification campaign would be acted upon. This group was unable to carry the day on the final vote, however. There was strong pressure on Virginia, as the final state required to give effect to the formal adoption of the Bill of Rights, to go along with what the rest of the country by this time now considered a *fait accompli*.

According to Rossiter, the redemption of the promises made in 1788 by Federalists to give priority to a list of recommended amendments was significant in three respects.<sup>27</sup> First, the Bill of Rights, as proposed by Congress, proved sufficient to entice the hold-out states, Rhode Island and North Carolina, into ratifying the Constitution as well as the accompanying amendments.

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24 The admission of Vermont as a state in March 1791 brought to 11 the total number of ratifications that would now be required to bring full effect to the Bill of Rights.

25 Rutland, p.315.

26 As part of their sesquicentennial celebrations, these three states formally adopted the Bill of Rights in 1939.

27 Rossiter, pp.303-4.

Second, immediate Congressional action on the amendments to the Constitution had the effect of minimizing Antifederalist discontent and, perhaps more importantly, of thwarting any attempt at calling a second constitutional convention. Finally, following through on the promises made during the ratification campaign of 1788 hastened the popular acceptance of the Constitution as fundamental law by all who had previously opposed it.

#### *2.4. Subsequent Constitutional Amendment under Article V*

One contrast between the American process in 1787-90 and the current Canadian context is that the proposed Meech Lake Constitutional Accord is not a proposal for a new constitution, but rather an amendment to an already existing one. For comparative purposes, therefore, there is some value in looking at the processes of constitutional amendment in the United States subsequent to the original adoption of the Constitution.

It is estimated that over the 200 years since the adoption of the United States Constitution, there have been over 9000 proposed resolutions to amend it introduced in Congress, with countless more having been introduced in state legislatures.<sup>28</sup> Of these, only 33 have received the requisite two-thirds support of both Houses of Congress in order to be transmitted to the states for ratification. And, of these 33 proposed amendments, 26 have been successfully ratified at the state level. The alternative procedures for constitutional amendment contained in Article V have been used only rarely. There has been only one case of the states successfully initiating an amendment through the convention method (the XVII Amendment, which sought popular election of Senators); and, only once has Congress prescribed the convention method of state ratification (the XXI Amendment, which was designed to repeal the earlier Prohibition Amendment).

The constitutional amendment process, described by one scholar as "the most purely legislative process in American politics", is unique in its requirement of extraordinary and concurrent majorities in both Congress and among the state legislatures, essentially forcing participants to garner support from the people as well as their elected representatives at two levels of government.<sup>29</sup> In this respect, the constitutional amendment procedure incorporated in the Canadian *Constitution Act, 1982* requiring ratification by provincial legislatures is more similar to that in the United States than to most other federations. In Switzerland and Australia, for example, ratification is by referendum requiring the support

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28 Stephen L. Schechter, "Amending the United States Constitution: A New Generation on Trial", in Keith Banting and Richard Simeon, eds., *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto Press, 1985), p.163.

29 *Ibid.*, p.168.



of a majority of voters in the federation as well as majorities in a majority of the cantons or states.

In procedural terms, the U.S. Supreme Court has demonstrated unusual self-restraint in interpreting Article V, maintaining, for example, that state rescission of a ratification vote or extension of ratification deadlines are matters more appropriately within the purview of Congressional legislation rather than judicial interpretation. Congress has been neither particularly thorough nor consistent in this respect, and thus, the simple language of Article V continues to provide the fundamental principles of interpretation for amendment of the United States Constitution. It is interesting to note the experience of the Equal Rights Amendment (ERA) regarding these issues. Proposed by Congress in March of 1972, the amendment had been ratified by 30 state legislatures within the first year, just eight shy of the requirement for formal adoption of the amendment. However, intervening political developments significantly affected this early momentum such that by 1978, Congress deemed it necessary to extend the deadline for ratification to 1982. During this time, debate raged over not only the substance of the amendment itself, but also over procedural issues. The Congressional decision to extend the deadline and rescission votes in states which previously ratified the amendment were issues of controversy. Ultimately, the amendment still failed to achieve the required support by three quarters of the state legislatures.<sup>30</sup> The American experience might be instructive for those who argue that the Meech Lake Accord might be saved by an extension of the three year deadline.

Under the procedure of Article V, constitutional amendments are "proposed" by Congress and "ratified" by state legislatures or conventions. Consequently, there is no provision for revision of the amendments by the states; rather, there is only the opportunity to accept or reject. This is typical of the constitutional amendment process in most federations, it being generally recognized that if in the ratification process there were an opportunity for a state to revise the proposals, the result could be an endless round of revisions of revisions. The existence of the option to reject thus provides the opportunity for democratic debate.

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30 *Ibid.*, pp.160-1.

### 3. RATIFICATION BY THE STATES, 1787-90

#### *3.1. The Issues*

The Confederation Congress did not spell out in precise detail how the Constitutional document should be ratified by the various states, specifying only that it be submitted "to a convention of delegates chosen in each state by the people thereof".<sup>31</sup> Beyond this rather vague condition, the exact manner by which the states chose to ratify the Constitution was left in the hands of their legislatures. With the sole exception of independent-minded Rhode Island, the general procedure adopted was the same in each state. Each legislature proclaimed an election to select delegates for a ratification congress. Elections were then held along the same electoral divisions as those for the state legislatures. In this process the timing of the election call, of the election itself and of the ratification convention varied from state to state, and came to be one of the most important instruments in the hands of state legislators to influence the outcome of state conventions.

In several cases, the timing of these various events was exploited by Federalist or Antifederalist majorities in the state legislatures who felt an advantage could be gained for their views either by expedition or delay. The Delaware legislature, for example, determined to be first to ratify the Constitution, produced a ratification within ten weeks of the transmission of the Constitution to the states by the Confederation Congress. Allowed such a short time frame, Antifederalist forces in that state had little time to organize and even less time to encourage opposition to the new Constitution. The effect of this fast pace was to ensure a unanimous pro-Federalist vote at the state ratifying convention. In New York, where the legislature was controlled by Antifederalists, the process was entirely different. Here the process took almost nine months from transmission to ratification with nearly five months from election call to ratification. Antifederalist legislators, determined to stretch out proceedings as long as possible to encourage the growth of Antifederalist sentiment, sought to slow the process as much as possible. By means of timing, therefore, state legislatures sought to influence proceedings as best they could, given that the actual proceedings were out of their hands. As shall be pointed out later, however, such manipulation of timing did not always produce the intended result.

From the time the delegates gathered in Philadelphia in 1787 until the Constitution was ratified by all 13 of the original states in 1790, Americans underwent a public debate which, for depth of analysis, breadth of scope and sheer output, has not been rivalled before or since. This debate was carried on at every level of society and through many different channels. The framers'

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<sup>31</sup> Rossiter, p. 275.

handiwork quickly became a popular subject of discourse in educated circles and was discussed at length in private correspondences and through the many private "networks" and informal committees of the time. The participants in these informal associations corresponded across state boundaries and saw their role as keeping one another abreast of events, new ideas and the latest arguments for and against the new Constitution. George Mason, for example, one of the leading Antifederalist thinkers, distributed a list of his objections to the Constitution to Antifederalist correspondents in New York and Pennsylvania. The Federalists, many of whom had participated in the Philadelphia Convention and "were beginning to feel quite paternal about their little bundle of compromises",<sup>32</sup> however, proved the most adept at this manner of communication and "consciousness-raising".

These networks found their literary expression in an explosion of newspaper articles and pamphlets that appeared during the period. These documents were distributed widely; they were either sold at cost, distributed free of charge to those who could read, or affixed to the walls of taverns to be read to those who could not read. Many were eager to leap into the fray on all levels. Debate on the Constitution during this period ranged from tightly-reasoned constitutional arguments such as those written by the Federalist "Publius" and Antifederalist "Brutus" and "Federal Farmer" to those notable only for their mudslinging and bitter personal attacks. Newspaper essays were reprinted in other states and thus widely distributed. Essays by "Publius", for example, were reprinted in newspapers throughout the 13 states before being republished as a bound volume, entitled *The Federalist Papers*.

As evident in the newspapers of the time, the debate over the ratification of the Constitution was remarkably wide-ranging. Commentators eagerly expounded upon the strengths or weaknesses of the new document as they related to the nature of republican government; the composition of the House of Representatives and Senate; the office of the President; the Judiciary; and, most importantly, the exclusion of a bill of rights.

Although the ratification debate had attracted a certain amount of scholarly attention over the years, the bicentennial of the Constitution in 1987 has drawn new attention from scholars to the importance of the ratifying process and the role of Federalist and Antifederalist ideas in that process. As a result, research on this long-neglected aspect of American political life has become more complete, thorough and available than ever before. For the most part, the corpus of scholarly research can be grouped into four main categories: overviews of the process; treatments focusing on historical analysis; commentaries from the viewpoint of constitutional theory; and documentary collections. Each will be briefly assessed below.

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32 Rossiter, p. 275.

Among several overviews of the ratification process two important works stand out. Stephen L. Schechter's "'Well Begun is Half Done': The Politics of Founding"<sup>33</sup> provides a critical assessment of the ratification process, identifying important themes and their significance for constitutional change in federal countries. Because of its brief, conference-style format, it provides an excellent introduction to the subject. Schechter identifies two main factors as being critical to the ongoing success of the Constitution, namely: the opportunity for widespread public debate over the Constitution and the introduction of supplementary recommendatory amendments in the state conventions as a way of winning over support for ratification.

John P. Kaminski, in his paper "The Bill of Rights: A Necessary Bottom to the New System",<sup>34</sup> focuses upon the concern, evident from the beginning of the constitutional process, over the lack of protection for individual and states' rights in the new Constitution. Kaminski tracks the development of the debate through the ratification process as these concerns grew from being solely those of the Antifederalists to those of national importance in the post-ratification period. This paper, therefore, forms an important backdrop to the constitutional processes at work.

Among those works that can be described as historical analysis, three books are of particular note. Patrick T. Conley and John P. Kaminski, eds., *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Madison: Madison House, 1988) is an important collection of works from scholars on the ratification process in each of the states. Beginning with Delaware and following the process through to Rhode Island three years later, the authors explore the states' conflicting points of view and provide a fascinating picture of the political processes by which these competing interests and ideas formed the Constitution. The work is particularly useful in providing an historical background to the growth of Federalist and Antifederalist sentiment in the various states.

Clinton Rossiter's *1787: The Grand Convention* (New York: Macmillan, 1968) is an analytical work on the constitutional process and provides, in Part Four especially, an insightful general analysis of issues and outcomes during the ratification of the Constitution. The author is particularly effective at describing the political and constitutional climate at the time of ratification and drawing together the disparate threads of arguments for and against the Constitution that surfaced throughout the ratification process.

Of all the scholarship recently done on the ratification process in the states, Robert Allan Rutland's *The Ordeal of the Constitution: The Antifederalists and*

33 A paper presented at the annual conference of the International Association of Centers for Federal Studies, Bruges, Belgium, October 1988.

34 A paper presented at the annual conference of the American Political Science Association, Atlanta, Georgia, August 1989.

*the Ratification Struggle of 1787-1788* (Norman: U. of Oklahoma Press, 1965) is the only work to examine systematically the concerns of Antifederalists from their origins and follow them through the often bitter ratification battles fought state by state. Although Antifederalist resistance to the Constitution was often as much the result of regional as of constitutional concerns, Rutland succeeds in drawing together the different streams of Antifederalist thought into a coherent whole, and provides an important analysis of Antifederalist strategies aimed at blocking the ratification of the Constitution.

Among those works analysing the process from the standpoint of constitutional theory, Leonard Levy and Dennis J. Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan, 1987) and Arthur Taylor Prescott, *Drafting the Federal Constitution* (New York: Greenwood Press, 1968) are both valuable interpretive works. Levy and Mahoney provide an important collection of works by constitutional scholars on the historical, ideological and intellectual background of the Constitution. On the ratification process, the volume has good chapters on Federalist and Antifederalist constitutional thought and on the development of the first ten amendments to the Constitution, which arose out of Antifederalist criticisms of the Constitution during the ratification process. Arthur Prescott's book includes a detailed analysis of the ratification procedure in Massachusetts and Virginia, states he sees as being representative of the struggle as a whole. In chapter four, "Ratification of the Completed Constitution", Prescott provides representative samples of ratifying ordinances together with an assessment of important themes.

Without doubt, one of the most energetic projects to appear on the ratification of the Constitution is the *Documentary History of the Ratification of the Constitution*, a series of the State Historical Society of Wisconsin which is about halfway complete. The series is an invaluable documentary resource for students of the constitutional process. Beginning with a volume that gathers together printed sources on the Constitution between 1776 and 1787, and proceeding state by state through to Rhode Island, this 20-volume series, if the nine volumes to be published so far are any indication, will be an exhaustive chronicle of correspondence, newspaper articles, pamphlets, petitions, records of public meetings and legislative proceedings during the ratification process. This series promises to make primary research resources for the period widely available to scholars of the Constitution era.

### 3.2. The Ratification Debate State by State

#### DELAWARE

*Ratified 7 December 1787 (30-0)*

Even before the transmission of the Philadelphia Constitution to the states, Federalist commentators were confidently predicting that the State of Delaware would ratify the Constitution quickly and with virtually no dissent.<sup>35</sup> Indeed, Delaware legislators did little to prove them wrong, wasting no time in issuing an election call on 9-10 November for 26 November, with a convention to be held on 3 December. Four days later, on 7 December 1787 and after only several hours of debate, the State ratified the Constitution unconditionally. Delaware had produced a ratification within ten weeks of the transmission of the Constitution.

Almost nothing is known of what transpired at the ratifying convention, as records of the proceedings from that gathering have not survived. There is little doubt, however, that a strong consensus existed in favour of the new Constitution. Delawareans of all political stripes believed that only a stronger federal government could redress a number of vexing problems that had remained unsolved by the Confederation Congress. In the case of tiny Delaware, these related most particularly to matters of tariffs and trade. Thus, not surprisingly, support for the Constitution was particularly strong among the state's business community. Due both to the strong pro-Constitution consensus in the state and also, likely, to the rapidity with which the process was expedited by the state legislature, no Antifederalist party appeared during this period. Such a woeful prospect for success notwithstanding, Richard Henry Lee, a prominent Virginian Antifederalist, did attempt to encourage opposition to ratification within the state by speaking against the Constitution and handing out broadsides.<sup>36</sup> The results recorded by Delaware's ratifying convention do not offer any indications that he was successful.

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35 See, for example, the correspondence of James Madison to William Short, New York, 24 October 1787: Madison notes laconically that "Delaware will fall in of course". Merrill Jenson, ed., *The Documentary History of the Ratification of the Constitution*, Volume 1: *Constitutional Documents and Records, 1776-1787* (Madison: State Historical Society of Wisconsin, 1976), p.454. Hereafter cited as *Constitutional Documents and Records, 1776-1787*.

36 Conley, p.33.

## PENNSYLVANIA

*Ratified 12 December 1787 (46-23)*

Although they were not the first to ratify the Constitution, Pennsylvania legislators were the first to call and hold a ratifying convention.<sup>37</sup> On 29 September 1787 the Pennsylvania legislature called an election to be held on 6 November for delegates to a state ratifying convention that was to convene less than two weeks hence. Well before the convention assembled it was already apparent that two-thirds of the delegates supported the new Constitution. The result, accordingly, was never in doubt. At the convention, delegates debated the new Constitution clause-by-clause over three weeks before ratifying the Constitution on 12 December 1787.

Because it was known that an identifiable minority of citizens in the State were opposed to the Constitution, Pennsylvania became the first testing ground for the Federalists' ratification strategy. Like their counterparts in Delaware, Pennsylvania Federalists were eager to ratify the Constitution quickly. Because of the uncertainty of the issue in other states, they wished to gain an early momentum in the ratification process which would create an irresistible tide of pro-Constitution sentiment. By pressing for an early state convention and an early ratification vote, they intended to give Antifederalist forces little time to organize an effective resistance. Their eagerness, however, came to be the source of much disagreement and, as a consequence, would bring modifications to Federalist strategy in subsequent states. Within the State Assembly those opposed to the Constitution stubbornly fought a motion to call a quick election and eventually boycotted the proceedings, leaving the Assembly short of a quorum. At this stage a pro-Federalist mob sought out two Antifederalist delegates — the number needed for a quorum — and brought them forcibly to the Assembly for the vote, which was carried out in due course. In the short-term, such strong-arm tactics appeared to be successful. The short lead-up to the election ensured that urban areas — those most favourably disposed towards the Constitution — were well-canvassed, but not rural ones thought to be less than enthusiastic in their response. The result was that, when the Convention opened, the Federalists held a two-to-one advantage in delegates.

Pennsylvania Federalists adopted a number of strategies that they hoped would result in an impressive victory for the Constitution. First, they enlisted for their side a number of high-profile candidates, including Chief Justice Thomas McKean and the highly-respected Benjamin Franklin, to represent their case at the ratifying convention. During this period Pennsylvania Federalists also launched what today would be known as a media blitz. Pennsylvania newspapers were known to be supportive of the Constitution, and they eagerly

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37 John P. Kaminski, "The Bill of Rights: A Necessary Bottom to the New System", p.10.

printed pro-Federalist articles, pamphlets and rebuttals of those Antifederalist works that managed to find their way into print.

In the Convention itself, Pennsylvania Federalists pressed for unconditional ratification of the Constitution. Because of their numerical advantage, they moved for simple adoption of the Constitution. Their one concession to their Antifederalist opponents was to consent to a clause-by-clause debate of the new Constitution.

From the beginning of the campaign Pennsylvania Antifederalists had been on the defensive. Although their access to the press was somewhat limited, Antifederalist pamphleteers emerged to do battle with their Federalist opponents, and writers attacked the Constitution in those papers that would print their criticisms. Seeking to inflame old political rivalries in the state, they portrayed popular Federalist supporters such as Benjamin Franklin and James Madison as tools in the hands of clever manipulators.

Within the Convention, Antifederalists made the most of the examination of the Constitution, using the clause-by-clause debate to slow down proceedings. During the three weeks of this examination they attacked the Constitution as the result of "closed-door" negotiations, and argued that the framers had exceeded the mandate given them by the Confederation Congress. A principal part of Antifederalist strategy was to attack the Constitution for its lack of a bill of rights. They submitted petitions from 750 inhabitants of Cumberland County urging the Convention not to ratify the Constitution without a bill of rights. Finally, Antifederalists attempted to introduce a list of amendments that, in their view, would redress this shortcoming. When the Federalist majority beat back each of these attempts, the Antifederalists attempted a filibuster, hoping to give state opposition time to gather.

Ultimately, none of these tactics was successful. After three weeks of debate and Antifederalist attempts at delay, the Federalist majority closed debate and rammed through a motion for ratification in the face of bitter Antifederalist objections, refusing even to allow those amendments suggested by Antifederalists into the Convention's official journals.

The ratification process in Pennsylvania, even though it proved to be an "easy" victory for Federalist forces, also came to be known as one of the dirtiest campaigns in the ratification process. Although it had accomplished the result desired by Pennsylvania Federalists, victory had been achieved at the cost of leaving an embittered and humiliated Antifederalist minority. The bitter feelings left behind did not bode well for the future of the ratification process. Thereafter, Federalist leaders in subsequent states sought to avoid any such unseemly breaches of decorum. This change in strategy played a major part in bringing about the ratification of the Constitution and helped generate a climate of reasonably good will within which further compromises between Federalists and Antifederalists became thinkable.



## NEW JERSEY

*Ratified 18 December 1787 (38-0)*

Subsequent to the transmission of the Constitution to the states in September, it was apparent to observers that New Jersey would be among the first states to ratify the Constitution.<sup>38</sup> Indeed, there was widespread public support for the Constitution. In the first three weeks of October, for example, the New Jersey legislature received petitions from the citizens of Salem, Burlington, Middlesex and Gloucester counties calling for a ratifying convention to be held.<sup>39</sup> On 29 October the legislature called for a ratifying convention. Elections were conducted without complication, and convention delegates convened on 11 December to consider the Constitution. Between 14-16 December delegates conducted a section-by-section examination of the Constitution. On 18 December the Constitution was read once more and passed unanimously by convention delegates.

As with the State of Delaware, because of the scanty records that were kept, almost nothing is known of strategies employed within the Convention, or indeed, if any opposition to the Constitution was voiced. New Jersey's principal concern about any changes to the Articles of Confederation was that their small state might lose representation in any revision. This concern was met, however, by the two house representational system devised by the Philadelphia Convention.<sup>40</sup>

## GEORGIA

*Ratified 2 January 1788 (26-0)*

Georgia was the first southern state to ratify the Constitution. Unlike other southern states, it had a peculiar set of problems that made its incorporation into a strengthened federal structure attractive to state residents. To the south in Florida were the Spaniards, who had never been averse to stirring up trouble for the new state with the strong Creek and Cherokee Indian nations. So preoccupied with Georgia's security concerns was the legislature, which had been called to consider the threat of an Indian war, that it turned its attention to the proposed Constitution almost as an afterthought, setting the election for 4 December 1787. Georgia's delegate selection resulted in a strong majority for the Federalists, which ultimately produced a unanimous result in favour of the Constitution on 2 January 1788.

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38 William S. Johnson, in a 25 September 1787 correspondence, assesses New Jersey's response to the new Constitution as being "extremely favorable". *Constitutional Documents and Records, 1776-1787*, p. 227.

39 Mary R. Murrin, "New Jersey and the Two Constitutions", in Conley and Kaminski, eds., p. 71.

40 *Ibid.*, p. 70.

In calling its delegates together to consider the proposed Constitution, the state Assembly empowered convention delegates to adopt or reject any part of the whole, a provision that opened the door to a partial ratification. This provision produced a response of astonishment from George Washington who was monitoring the proceedings from Virginia:

Georgia has accompanied her act of appointment, with powers to alter, amend, & what not;—But if a weak State, with powerful tribes of Indians in its rear, & the Spaniards on its flank, do not incline to embrace a strong *general* Government there must, I should think, be either wickedness, or insanity in their conduct.<sup>41</sup>

Washington need not have worried, for there was widespread support for the Constitution throughout the state. In the period leading up to the Georgia ratifying convention there was a lively debate in the press featuring articles by both Federalist and Antifederalist commentators in the other states, including Antifederalists Elbridge Gerry of Massachusetts and “Centinel” of Pennsylvania. Of those criticisms raised against the Constitution, the chief one was that little time was being allowed to discuss its merits or lack thereof. One of these critics of the Constitution complained:

the popularity of the Framers is so great, that the public view seems to be for adopting the Constitution in the Lump on its appearance as a perfect system without enquiry or Limitation of time or Matter. Such hasty Resolutions have Occasioned all the Misfortunes that ever happened in governments.<sup>42</sup>

In the main, however, Georgians felt themselves in no position to be choosy. Although they might have had concerns about the Constitution, these were viewed as unaffordable luxuries given the pressing security matters facing their state. The attitude of Savannah merchant Joseph Clay seems to have been representative of most when he predicted that the new Constitution “would be adopted with us readily; the Powers are great, but of two evils we must choose the least”.<sup>43</sup> It is a reasonable indication of the importance attached by Georgia to the signing of the Constitution that the list of delegates included Governor George Mathews; past governors John Whereat, Edward Telfair, Nathan Brownson; and future governors George Handley and Jared Irwin. Although the minutes of the Convention do not reveal any division of opinion, one delegate noted that the Convention’s paragraph-by-paragraph examination of the Constitution was carried out “with a great deal of temper”.<sup>44</sup> Such feelings,

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41 As recorded in Albert B. Saye, “Georgia: Security through Union”, in Conley and Kaminski, eds., pp. 86-7.

42 General Lachlan McIntosh, as recorded in *ibid.*, p. 87.

43 *Ibid.*

44 *Ibid.*, p.88.

however, did not affect the final result. On 31 December it was "resolved, Unanimously, that the proposed Federal Constitution be now adopted".<sup>45</sup>

#### CONNECTICUT

*Ratified 9 January 1788 (128-40)*

From the beginning of the ratification process in Connecticut it was evident that there was within the state a sharp division of opinion over the new Constitution. When, on 17 October 1787, the Connecticut General Assembly called for town meetings one month hence to elect delegates to a January ratification convention, Antifederalist Assemblyman Benjamin Gale, who had labelled the Constitution a "dark, intricate, artful, crafty and unintelligible composition", warned his fellow voters that the Assembly had "managed the matter [such] that they have not left ... a fortnight to weigh and consider the most important affair that ever came before you".<sup>46</sup> Although it is not certain that a majority of Connecticut voters opposed the Constitution, there is a good possibility that this was the case.<sup>47</sup> There was a geographical split in sentiment between the delegates with those from the hinterland opposed to the Constitution and those from more settled areas in favour.<sup>48</sup> The Connecticut Convention met on 3 January 1787 and, after protracted debate, ratified the Constitution six days later by a vote of 128-40.

Connecticut Federalists, who at the time held a majority in the state's General Assembly, put forth a list of distinguished delegates to the Convention. In addition to the state's three delegates to the Philadelphia Convention — all of whom had supported the Constitution — the Federalists were able to count among their number "two governors, one lieutenant governor, six members of the upper house, a judge of the Superior Court, two ministers, eight generals, eighteen colonels, seven majors, thirteen captains, and sixty-seven others, including many county judges and justices of the peace".<sup>49</sup> Here, then, was the cream of Connecticut society. Their collective influence was augmented by that of the local newspapers, most of which were owned by Federalist sympathizers.

During the Convention the Federalists dominated both the debate on the floor and, apparently, elsewhere. Indignant Antifederalists charged their opponents with packing the gallery of the Convention house with Federalist supporters who interrupted Antifederalist speakers by "shuffling and stamping [their] feet,

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45 *Ibid.*

46 As reported in Christopher Collier, "Sovereignty Finessed: Roger Sherman, Oliver Ellsworth, and the Ratification of the Constitution in Connecticut", in Conley and Kaminski, eds., p. 108.

47 *Ibid.*, p.109.

48 Rutland, p. 82.

49 *Ibid.*, p.109.

coughing, talking, spitting and whispering".<sup>50</sup> The most important tactic in the Federalist repertoire, however, was their portrayal of the Constitution as a means of defending Connecticut against a greedy, avaricious New York which had long sought to dominate its smaller neighbour through its collection of exorbitant customs duties on goods bound for their state. A vote for ratification, so their argument ran, was a vote against New York.

In a state with a proud tradition of defending its liberty against "Parliament, Crown and Empire", the main concern of those who opposed the Constitution was that it gave too much power to the central government. A corresponding theme of concern was the failure of the Constitution to include guarantees for personal liberty. Unfortunately for Connecticut Antifederalists, however, these concerns were never translated into an effective opposition to the Constitution. Although New York Antifederalists attempted to bolster their colleagues by shipping anti-Constitution pamphlets into the state, the response of Connecticut Antifederalists to the Federalist campaign was little more than reactive. Shut out from the popular press, they attempted to voice their concerns in debate. Here too, however, they were outclassed by their Federalist opponents. According to the lone reporter that covered the Convention — himself an ardent Federalist — the Constitution

was canvassed critically and fully. Every objection was raised against it which the ingenuity and invention of its opposers could devise ... Suffice it to say that all the objections to the Constitution vanished before the learning and eloquence of a [William Samuel] Johnson, the genuine good sense and discernment of a [Roger] Sherman, and the Demosthenian energy of an [Oliver] Ellsworth.<sup>51</sup>

The final blow to Antifederalist fortunes came on 2 January when news came via ship from Georgia that that state had unanimously ratified the new Constitution. All that remained for the dispirited Antifederalist minority was to assure their allies in New York that the hopes of Antifederalists now lay "in the Virtue & wisdom of your State together with that of Virginia & Massachusetts [in] not adopting the Constitution".<sup>52</sup>

#### MASSACHUSETTS

*Ratified 6 February 1788 (187-168)*

While Federalists could take pride in the progress of the Constitution through the first five states, the State of Massachusetts was thought to harbour a large body of Antifederalist sentiment. Because of its status as the third most popu-

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50 Ibid.

51 As reported in *ibid.*, p.110.

52 Rutland, p.87.

lous state in the Union, it was widely assumed that a failure to ratify the Constitution in this state would cripple the ratification process. Writing to fellow Federalist George Washington, Henry Knox saw no reason to quibble with the conviction expressed by many in Massachusetts that "the decision of Massachusetts would most probably settle the fate of the proposition".<sup>53</sup> In accordance with the instructions of the Confederation Congress, the General Court of Massachusetts<sup>54</sup> issued a call for a ratification convention to be held beginning the second week in January 1788. Of the 401 communities in the commonwealth, 46 did not send representatives.<sup>55</sup> When the Convention gathered it was assumed by both sides that Antifederalist delegates were in the majority. Assessing the Constitution's chances of success, one Federalist wrote to James Madison that "Our prospects are gloomy, but hope is not entirely extinguished".<sup>56</sup>

Knowing that they faced an uphill battle, the Federalists, who perceived themselves to be in the minority, sought to delay the proceedings as much as possible, hoping that in the interim they could convince the majority of the rightness of their cause. Their initial bargaining position was one that allowed for no amendments to the Constitution and no second constitutional convention, which they saw as a thinly-disguised attempt to wreck the constitutional process. Their prospects, however, did not look good. A sober evaluation of their situation, according to one scholar, prompted them to "cast about for expedients by which their main end might be secured with as little sacrifice of their cause as possible".<sup>57</sup>

The plan they hit upon was to introduce into the Convention a series of amendments which, while not conditions for ratification of the Constitution, would accompany the ratified constitutional document as a companion resolution containing recommendations to the future Congress for additional constitutional amendments. Although it is not known where this scheme originated, the first known mention of it occurs in a letter written by "Republican Federalist" in the *Massachusetts Centinel* of 12 January 1788 which warned delegates to the Convention that they "will in all probability be warmly urged to accept the system [i.e. the Constitution], and at the same time to propose amendments".<sup>58</sup> Massachusetts Federalists were indeed taking this new strategy very

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53 As reported in Samuel B. Harding, *The Contest Over the Ratification of the Federal Constitution in the State of Massachusetts* (New York: Da Capo Press, 1970), p. 115.

54 The General Court was the name of the state's legislative body.

55 John J. Fox, "Massachusetts and the Creation of the Federal Union, 1775-1791", in Conley and Kaminski, eds., p.121.

56 Ibid.

57 Harding, p.83.

58 As reported in *ibid.*, p.84.

seriously. One week after the letter appeared in the press, John Avery, Secretary of the Commonwealth, was noting that:

I am seriously of [the] Opinion that if the most sanguine among them [sic] who are for adopting the proposed Constitution as it now stands would discover a conciliatory disposition and give way a little to those who are for Adopting it with Amendments I dare say they would be very united. ... my wishes are that they may adopt it and propose Amendments which when agreed upon, to transmit [sic] to the several States for their Concurrence.<sup>59</sup>

Within Avery's comments lay the key to the new strategy: the Federalists sought to convert those they described as "honest doubters" — delegates who had severe misgivings about elements of the Constitution, but could possibly be convinced that their concerns would be met after the Constitution had been ratified and the new Congress put in place.

Although they now had a plan, Massachusetts Federalists were missing one crucial element: they required someone to help them propose it in the Convention. This person would need impeccable credentials: he could not have openly supported the Constitution, and he had to be someone who stood high in popular esteem. They found the perfect candidate in Governor John Hancock, the titular president of the Massachusetts Convention. Until that point Hancock had not taken a clear stand on the Constitution; indeed, he had not even appeared in the Convention, afflicted, as he claimed, by a severe case of the gout.<sup>60</sup> Governor Hancock was approached by the Federalists with inducements to introduce the recommendatory amendments that they had agreed upon. In return for his cooperation they offered to support him in the next gubernatorial election. There is evidence as well that they dangled before him the prospect that they would support him in a bid for the Vice-Presidency of the new republic.<sup>61</sup>

On 31 January, Hancock rose in the Convention and read a statement prepared for him by Federalists Theophilus Parsons, Rufus King and Theodore Sedgewick. In it, he proposed that the Convention ratify the Constitution

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59 *Ibid.*

60 It has been noted by several commentators that Hancock seemed to develop gout attacks whenever particularly difficult political decisions were required. Ten days earlier one commentator had noted caustically that "Hancock is still confined, or rather he has not yet taken his Seat; as soon as the majority is exhibited on either Side I think his Health will suffice him to abroad." Harding, p.85.

61 Harding, p. 86.

unconditionally, but include a series of recommendatory amendments to be sent to Congress. He then produced a list of nine proposed amendments.<sup>62</sup>

The plan succeeded brilliantly. In short order, the Federalists' "conciliatory proposition" had attracted support both from those who had proclaimed themselves neutral and from many who had earlier opposed the Constitution. Delegates like Charles Turner, of Scituate, Plymouth Colony, rose in the convention to announce their change of heart:

The proposed amendments are of such a liberal, such a generous, such a catholic nature and complexion, they are so congenial to the soul of every man who is possessed of a patriotic regard to the preservation of the just rights and immunities of his country ... that I think they must, they will be universally accepted. ... I find myself constrained to say, before this Assembly, and before God, that I think it my duty to give my vote in favor of this Constitution, with the proposed amendments.<sup>63</sup>

Although leading Antifederalists fiercely condemned the plan as a dangerous delusion, the Hancock proposal had a significant impact upon rank and file Antifederalists.

The Federalists enhanced their chances of success in other ways as well. Within the Convention they won a number of procedural battles over such important items as agendas and the chairmanship of the Convention. At critical moments when their prospects looked dim, this clear-sighted attention to detail paid dividends. They were aided in their strategy-making, apparently, by information given to them by an informer privy to Antifederalist strategy sessions.<sup>64</sup> This combination of careful pre-planning and attention to detail was evidence of something more significant: the Federalists were an organized minority with a plan.

The main concern of the Massachusetts Antifederalists was that the Constitution lacked a bill of rights. In this view they had an important ally; from his post as American minister to the court of Louis XVI, Thomas Jefferson had published his views of the new Constitution, which were ambivalent at best. Although he had approved both the Constitution's principle of the separation of powers and the balancing of representation between large and small states in the House of Representatives and Senate, Jefferson had grave misgivings

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62 The proposed amendments contained clauses reserving residual powers to the states; fixing representation levels in the new Congress; establishing limits upon the power of Congress in the areas of direct taxation and the regulation of state elections; limiting the powers of Congress to establish companies with exclusive advantages of commerce; enhancing individual rights in the justice system; and prohibiting citizens from accepting titles and offices from foreign powers.

63 As reported in Harding, p.91.

64 Rutland, p.97.

about the omission of a bill of rights which free men needed to protect themselves from "every government on earth, general or particular, and [was] what no just government should refuse, or rest on inference".<sup>65</sup> Given this mixture of good and bad, Jefferson suggested that perhaps the best solution was a second constitutional convention to redress the seeming oversight of the first one in Philadelphia. Although Jefferson was to change his opinion subsequently, his views, strikingly similar as they were to the position of the Antifederalists, provided an important impetus to Antifederalist efforts to see the Constitution redrawn.

In the Convention, Antifederalists at first sought to rush debate over the Constitution to exploit their seeming numerical advantage before the Federalists could gain momentum. In this they were outmanoeuvred by the Federalists' mastery of procedural matters. In response to the Hancock proposal, Antifederalists proposed a series of options including the ratification of an amended version of the Constitution, a call for adjournment of the Convention to await a call for a second constitutional convention, and a motion to withhold ratification of the Constitution for several months to see what other states would do as a means of giving the state more influence in the establishment of the new Constitution.

It would be difficult to overestimate either the brilliant success of the "conciliatory proposition" in the Massachusetts Convention or its decisive impact upon Antifederalist groups in other states which were yet to hold ratifying conventions. Because the backbone of Antifederalist opposition to the Constitution was its lack of protection for rights, the Federalist proposal for coupling ratification with recommendations for subsequent amendments created enough of a split in Antifederalist ranks to ensure a narrow federalist victory. Massachusetts Federalists had introduced a concrete and positive proposal that held out the promise of further constitutional reform. To "honest doubters", it seemed, the proposition struck just the right mix of conciliation and good will for change in the future.

Throughout the Union both supporters and opponents of the Constitution took note of this new innovation. Among those Federalists fretting from afar about the process in Massachusetts, the reaction was one of relief. James Madison wrote to George Washington that "The amendments are a blemish, but are in the least Offensive form."<sup>66</sup> Even though Antifederalists such as Virginian Patrick Henry responded that Massachusetts had "put the cart before the horse", it was quickly recognized by observers that this resolution represented a crucial breakthrough. Even Thomas Jefferson, after having seen the Massachusetts resolution, wrote that

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65 *Ibid.*, p.90.

66 As reported in Kaminski, p. 14.



My first wish was that 9 states would adopt it in order to ensure what was good in it, & that the others might, by holding off, produce the necessary amendments. But the plan of Massachusetts is far preferable, and will I hope be followed by those who are yet to decide.<sup>67</sup>

After the Massachusetts Federalists squeezed out a narrow victory on 6 February, the Convention prepared and forwarded its ratifying document to Congress. This document, remarkable for its recognition of the concerns raised by Anti-federalists in the Convention, was to serve as model for state ratifying conventions still to come. Although the first paragraph of the ratifying ordinance states that the Convention delegates "Do in the name & in behalf of the People of the Commonwealth of Massachusetts assent to & ratify the said Constitution for the United States of America",<sup>68</sup> the remaining two-thirds of the document is devoted to the proposed recommendatory amendments. The ordinance continues:

And as it is the opinion of this Convention that certain amendments & alterations in the said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectively guard against an undue administration of the Federal Government, The Convention do therefore recommend that the following alterations & provisions be introduced into the said Constitution.

[Thereafter follow, in substantial form, the nine amendments introduced by Governor Hancock.]

The document continues by issuing instructions to future members of the new Congress from Massachusetts:

And the Convention do in the name & in behalf of the People of this Commonwealth enjoin it upon their Representatives in Congress at all times until the alterations & provisions aforesaid have been considered agreeably to the Fifth article of the said Constitution to exert all their influence & use all reasonable & legal methods to obtain a ratification of the said alterations & provisions in such manner as is provided in the said Article.<sup>69</sup>

The "conciliatory proposition" was to become the rule for future ratifying conventions. Indeed, Federalists in four of the next five states to call conventions would use the Massachusetts formula to win ratification of the Constitution. John Kaminski has rightly noted that without this critical initiative, the Constitution never would have been ratified and put into place.<sup>70</sup> While it seems obvious in retrospect that the Massachusetts proposition marked the turning

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67 Ibid.

68 Arthur Taylor Prescott, *Drafting the Federal Constitution* (New York: Greenwood Press, 1968), p.170.

69 Ibid., p.172.

70 Kaminski, p.14.

point of the campaign to ratify the Constitution, this was by no means yet clear, however, to those deeply involved in planning for the state ratification conventions still to come.

#### MARYLAND

*Ratified 28 April 1788 (63-11)*

When Maryland's ratifying convention convened on 21 April 1788, it did so at what appeared to be a critical juncture in the ratification process for the Constitution. Although six states had now produced ratifying votes in favour of the Constitution, there were a number of indicators to suggest that the momentum might be slowing down. Massachusetts had ratified the Constitution on 6 February, but it had done so by a narrow majority. Two weeks later the ratifying convention in New Hampshire had adjourned without voting on the Constitution. In early March, Rhode Islanders had overwhelmingly rejected the Constitution in a state plebiscite. Many Federalists, therefore, looked anxiously to Maryland to see whether the thrust of the important victory in Massachusetts would be maintained. Elections for delegates to the ratifying convention held in early April eased their concerns greatly by producing a 64-12 margin in favour of the Federalists.

Carrying such a strong majority into the Convention, Maryland Federalists were determined that there would be a quick ratification, that there would not be any amendments to it, and indeed that no amendments would be discussed on the floor of the Convention.

Their Antifederalist opponents, though numerically inferior, had a most able leader in William Paca, former governor of the State. His major concern was that the Constitution lacked a bill of rights. Realizing that the Federalist majority would not allow any discussion of amendments on the convention floor, Paca offered his opponents a deal: he would vote for an unconditionally ratified Constitution if allowed to present some suggested amendments after the vote was taken. The Federalists accepted. Immediately following the ratification vote, a committee was struck, before which Paca placed his list of suggested amendments. Although the committee consisted of nine Federalists and four Antifederalists, Paca managed, over the course of two days, to obtain committee approval for 13 of his suggested amendments.<sup>71</sup> While the Federalist

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71 These amendments, as one scholar has noted, have a startlingly modern ring: "They sought to guarantee the right to petition the legislature for redress of grievances; to ensure the right to trial by a jury; to limit the use of search warrants; to prohibit establishment of a national religion; to guarantee freedom of speech and the press; and to secure to the states all powers not expressly delegated to the federal government by the Constitution." (Gregory Stiverson, "Necessity, the Mother of Union: Maryland and the Constitution, 1785-1789", in Conley and Kaminski, eds., p.149.)

majority, fearing the disruptive effect the introduction of Paca's amendments might have upon the Convention, eventually withdrew its support, Paca had made his point. And although Maryland Antifederalists were ultimately unsuccessful, it was generally recognized that they had made an important contribution to keeping the drive for a bill of rights alive. One puzzling question remains: why would the Federalists, with their obvious numerical superiority at the Convention, agree to a deal such as Paca had suggested? Furthermore, how could Paca convince a Federalist-dominated committee of the need for amendments to the Constitution? While there are no firm answers, some possible ones may be suggested. First, there was a growing perception among the states yet to ratify that a bill of rights was a necessary addition to the Constitution or, at least, that it would not do any harm in its present form. Second, there was a concern within Federalists circles not to appear too inflexible about Antifederalist concerns which could be met without amending the Constitution itself prior to ratification. Whatever the reason, the enthusiastic ratification vote of Maryland gave a new momentum to the constitutional ratification process which would next be carried into the State of South Carolina.

#### SOUTH CAROLINA

*Ratified 23 May 1788 (149-73)*

Although the debates in the South Carolina legislature had been marked by bitter acrimony between Federalists and Antifederalists, on 19 January a vote was taken calling for a ratifying convention to be held in May. After the election results were counted, it became apparent that the Federalists held a two-to-one majority in delegates. Accordingly, when the Convention opened on 13 May 1788, ratification of the Constitution by South Carolina was seen as a foregone conclusion. After an extended debate the State Convention ratified the Constitution by a vote of 149-73 on 23 May 1788. The vote, while overwhelming, showed a significant geographical split: the low country areas, which were more populous and more developed, voted overwhelmingly in favour of the new Constitution (121-16); delegates from the back country, which was less populous and less well developed, voted 28-57 against the new Constitution.<sup>72</sup>

In addition to its overwhelming majority in delegates, South Carolina Federalists maintained control of the proceedings in the Convention. To ease the passage of the Constitution they offered their Antifederalist opponents a concession similar to those offered in Massachusetts earlier: they would allow a set of purely recommendatory amendments to be submitted in a companion

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<sup>72</sup> Jerome J. Nadelhaft, "South Carolina: A Conservative Revolution", in Conley and Kaminski, eds., p.175.

resolution along with the Constitution that would "carry forth the spirit of the Boston resolves without disturbing friends of the Constitution".<sup>73</sup>

South Carolina Antifederalists, while outnumbered, attempted to heighten regional concerns among the delegates by portraying the Constitution as an attack by northern anti-slave interests upon the south. In general, it was their view that the Articles of Confederation, while flawed, could be repaired. At first, they called for the convening of a second constitutional convention; when that initiative was rebuffed, they called for an adjournment of the state Convention. In each case they were overruled. Early in the Convention there had been an abortive attempt by New York Antifederalist General John Lamb to persuade South Carolinian Antifederalists to press for specific amendments to the Constitution prior to ratification, but this effort, in view of the great geographical distances between the Antifederalists groups was, as Rutland has pointed out, "too little, too late".<sup>74</sup>

In a response to Lamb that was to become true of the Antifederalist effort in general, Antifederalist leader Rawlin Loundes wrote:

Had your Plan been proposed in time I doubt not it might have produced a very good Effect in this Country. A Strong Systematic Opposition [which could be] directed to the same specific Objects, would have had a Weight, which the Advocates for the Constitution must have submitted to.<sup>75</sup>

Such was not the case, however, nor would it be for Antifederalist opposition efforts throughout the 13 states. From the beginning of the ratification process in South Carolina, it was evident to most that Antifederalists were united only by their opposition to the Constitution. Beyond that, they had "no program, no leadership, no success".<sup>76</sup>

#### NEW HAMPSHIRE

*Ratified 21 June 1788 (57-47)*

The ratification process in New Hampshire was a convoluted one which required two conventions before the Constitution was finally ratified on 21 June 1788. After statewide elections, the first Convention met at Exeter on 13 February with a nominal Antifederalist majority. After two weeks of debate and procedural wrangling the Convention adjourned without having taken a vote on the Constitution, in favour of a second ratifying convention to be held four months later at Concord. There on 21 June Federalists eked out a 57-47 vote in favour of the Constitution and New Hampshire became the ninth state of thirteen to ratify the document.

<sup>73</sup> Rutland, p.168.

<sup>74</sup> *Ibid.*

<sup>75</sup> As reported in Rutland, p.169.

<sup>76</sup> Rutland, p.168.

From the beginning of the process, New Hampshire Federalists demonstrated a concern for organization and the coordination of their activities that was not matched by their Antifederalist opponents. As they had been instructed, Federalist delegates arrived promptly at the beginning of the first Convention at Exeter (before many Antifederalist delegates arrived) and won a number of key procedural advantages, including the chairmanship of the Convention. Early at the first Convention, Federalist strategy was to delay, hoping to swing enough delegates through debate to earn them a majority. When it became apparent both that their strategy was not working and that the Antifederalists likely held a majority, Federalists offered their opponents a bargain: if they agreed to an adjournment, Federalists would agree to hold the next convention in June in the heart of Antifederalist country. The Antifederalists, themselves not too sure of their own support and confident that the delay and change of venue could only work in their favour, agreed.

During the four-month hiatus between conventions, New Hampshire Federalists launched a newspaper campaign that emphasized the virtues of the new Constitution and featured personal attacks against Antifederalist leaders. During this period, as well, the ratifying votes of Maryland, the seventh state to ratify, and South Carolina, the eighth, were widely reported in the State.

When the Convention reconvened at Concord, Federalists had prepared a different strategy. First, from the outset they let it be known that they would support a series of recommendatory amendments patterned upon those of the Massachusetts Convention. These would be framed by a joint committee of the Convention and forwarded to Congress along with New Hampshire's ratifying ordinance. Second, they emphasized New Hampshire's now-dominant position in the ratification of the Constitution. As number nine in the process, the state had the opportunity to become the "keystone of the federal arch", the final ratifying vote necessary to bring the Constitution into effect.

New Hampshire Antifederalists, who had watched a putative Antifederalist majority slip away in Massachusetts, adopted a tactic different from those of their Antifederalist colleagues elsewhere. In the statewide elections for delegates to the second ratifying Convention they instructed towns to bind delegates by written instruction so that they could not be talked out of voting against the Constitution. While it is not clear how many of the delegates to the New Hampshire Convention were bound in this way, there were probably at least 25 — a significant number in a convention of only 100 delegates. During both conventions, Antifederalists sought conditional ratification of the Constitution: the State would ratify the Constitution only upon condition that all the proposed amendments made by the Convention became part of the new Constitution. In preparing their list of amendments, they sought and received assistance from New York Antifederalists.

In the end, the New Hampshire Federalists were successful for several reasons. First, they had a program that included contingency plans in case their quest for ratification went wrong. At the Exeter Convention, they were able to stave off a negative vote and adjourn the Convention while giving them time to regroup and plan another strategy. Second, they demonstrated a flexibility in making strategy. Early in the Convention they abandoned cries of "this or nothing" in favour of a more pragmatic approach which would ultimately bring them success. Finally, and most important, the Federalist concession of the need for a bill of rights in the Constitution quickly undercut Antifederalist opposition to the Constitution.

As a result of their victory, New Hampshire became the ninth state to ratify the new Constitution. As nine of thirteen states were needed to ratify the Constitution, it could now, technically at least, be brought into force. Even so, whatever joy might have been felt by Federalists was held in check, as all looked to the critical states of Virginia and New York where, arguably, the real political fate of the Constitution was to be decided. Unless ratifying votes could be produced in these two key states, it seemed likely that their successful efforts in the nine previous states would effectively be for naught.

#### VIRGINIA

*Ratified 25 June 1788 (89-79)*

Among the 170 delegates that assembled at Richmond on 2 June 1788 were a veritable "Who's Who" of revolutionary heroes and constitutional thinkers. Leading the Antifederalists were Patrick Henry, George Mason and Richard Henry Lee, while prominent Federalists included James Madison and Governor Edmund Randolph. More important still, Virginian Federalists were backed by the tremendous personal popularity of fellow Virginian George Washington, who had presided at the Philadelphia Convention and, although not present at the state ratifying convention, was a fervent supporter of the new Constitution. At the outset of the Virginia Convention, it was not clear who held the advantage. Although few were willing to offer hard numbers, it seemed as though the Federalists perhaps held a slim six- or seven-vote advantage.

Virginia Antifederalists provided the stiffest resistance to the Federalist offensive of any opposition group in the Union. Their conviction was that the Constitution as it stood was unsatisfactory and must be changed. Their thinking had been bolstered by Thomas Jefferson's support for Virginia withholding its ratification vote until a bill of rights was enacted. Yet, despite the eminence of the Virginia Antifederalists, they were a divided camp. One group, headed by George Mason and Richard Henry Lee, believed that Virginians were facing a *fait accompli* since nine states had already ratified the Constitution. They considered that Virginia's primary role was to recognize this and to press for

the protection of individual rights along the lines suggested earlier by Jefferson. Lee put forward a plan modelled on one followed by the English Parliament exactly one hundred years previously: according to this plan, Virginia would ratify the Constitution, but with amendments inserted and a two year deadline for their passage. If the first Congress failed to act on the amendments in the specified time, Virginia would simply declare itself "disengaged from this ratification".<sup>77</sup> Lee's intent was that the amendments should provide protection for states' rights, particularly those of southern states, by tightly circumscribing the new Congress's powers to regulate commerce. By advancing such a strategy, Lee and Mason were in effect admitting that a new constitutional order had come into being, but they were determined to salvage from it all the protection for individual and states' rights that they could.

Other Antifederalists, led by Patrick Henry, would admit no such thing. Henry was resolutely set against the Constitution and was determined to gut the Constitution by introducing amendments which would fundamentally change the document before them. Henry, a gifted revolutionary orator, dominated in debate by an outright attack on the proposed Constitution, particularly its omission of a bill of rights:

Here is a revolution as radical as that which separated us from Great Britain. It is as radical, if in this transition, our rights and privileges are endangered, and the sovereignty of the State be relinquished: And cannot we plainly see, that this is actually the case? The rights of conscience, trial by jury, liberty of the press, all of your immunities and franchises, all pretensions of human rights and privileges, are rendered insecure, if not lost, by this change.<sup>78</sup>

The Antifederalists were at their most effective when expressing their concern about this lack of a federal bill of rights. Through the painstaking clause-by-clause examination of the Constitution they raised concerns about its "general welfare" clause, the "necessary and proper" clause and, especially, the "supremacy" clause of the Constitution. State bills of rights, they argued, would be a useless defence against infringements upon the rights of individuals and states by a powerful and hegemonic central government. During the course of the ratifying convention, they sought to join forces with New York Antifederalists in agreeing upon what amendments should be proposed to redress this state of affairs. While there was much interest among Antifederalists from both states in banding together, their efforts to do so were largely defeated by the distance and travel time between Poughkeepsie and Richmond.

Virginia Federalists began their convention strategy by seeking unconditional ratification of the Constitution. In response to heated Antifederalist attacks, they argued that amendments were unnecessary by expounding a theory

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<sup>77</sup> Rutland, p.219.

<sup>78</sup> Kaminski, p.16.

first proposed by Pennsylvanian James Wilson. He argued that the Constitution created a federal government of delegated powers in which Congress could legislate only when the Constitution had expressly authorized it. As for Antifederalist proposals for conditional amendments, they were, as Edmund Randolph argued, "but another name for rejection. They will throw Virginia out of the Union."<sup>79</sup>

After three weeks of debate, the Federalists finally introduced a motion to ratify the Constitution. Having anticipated such a move, the Antifederalists countered with a motion that a list of conditional amendments be included in the Constitution. Federalists then responded with an offer to introduce a "conciliatory declaration of certain principles in favour of liberty, in form not affecting the validity and plenitude of ratification".<sup>80</sup> Although this strategy had worked in Massachusetts, South Carolina and New Hampshire, Henry's Antifederalists wanted no part of such a deal. The proposition that a state should adopt an unsatisfactory Constitution in order to amend it, argued Henry, was the argument of a lunatic; he asked his Federalist opponents whether their

rage for novelty [was] so great, that you are first to sign and seal, and then to retract. Is it possible to conceive a greater solecism? ... You agree to bind yourselves hand and foot — For the sake of what? — Of being unbound. You go into a dungeon — For what? To get out. Is there no danger when you go in, that the bolts of federal authority shall shut you in?<sup>81</sup>

Henry's arguments were spurred by more than a tinge of desperation. As debate continued it was becoming apparent that the Antifederalists did not have enough votes to stop their opponents. After the Convention voted down the Antifederalist conditional amendments by a ten-vote margin, the final vote to ratify the Constitution became a formality. On 25 June a motion to ratify was carried 89-79, and Virginia became the tenth state to ratify the Constitution.

During the next two days a joint committee drafted a list of recommendatory amendments, finally adopting 20 recommendations for a bill of rights and 20 suggested improvements for the Constitution itself. These were adopted by the Convention and forwarded to Congress with the ratified Constitution. Virginia Federalists had won a close battle marked by adroit political manoeuvring, brilliant debate and the clash of high political and philosophical principles. Although Virginia Antifederalists put up the most determined opposition to the Constitution during the ratification campaign, their effort was undermined not only by the fact that the requisite nine states had already ratified the Constitution but, more importantly, by the growing popularity of the use of recommendatory amendments by the state conventions. Since Massachusetts Federalists

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79 *Ibid.*, p.21.

80 Rutland, p.219.

81 Kaminski, p.21.



had introduced their "conciliatory proposition", it had been successful in New Hampshire and South Carolina. The enthusiasm with which this strategem was adopted seemed to indicate a widespread concern about the need for future post-ratification amendments to the Constitution and augured well for their chance of success once the new Congress was in place. Alluding to the critical role played by Virginia's ratifying vote, one scholar has called it "the cement of the nation".<sup>82</sup>

## NEW YORK

*Ratified 26 July 1788 (30-27)*

By the time that the New York legislature got around to calling a ratifying convention, the debate had taken on a decidedly anticlimactic nature. While it was now recognized by most that the Union would now indeed go ahead, nevertheless a refusal to ratify by a state as significant as New York would have created considerable confusion. The two Houses of the New York legislature, after three days of jousting, called for the election of delegates to be held on 29 April 1788, with the ratifying convention to meet in mid-June. For the first time in the history of the state, all free, adult male citizens would be able to vote by secret ballot for delegates to the Convention. Both Federalists and Antifederalists saw a late ratifying convention as being in their interests. The Federalists, believing there to be an Antifederalist majority in the state, wanted more time to convince New York citizens of the rightness of their cause. As well, they hoped — rightly, as it turned out — that by then the minimum required nine states would have ratified. This would have the twin results of assuring that no other state would be adversely influenced by a New York rejection if that occurred, and with nine states already aboard, pressure would be placed upon New York to join the Union as well. For their part, Antifederalists wanted a late convention because they hoped that rejections in one or two other key states would slow the progress of the Constitution, thus taking from New York the heavy responsibility of being the major cause for the rejection of the proposed Constitution. This, unfortunately for them, was not to be the case. New York Antifederalists found themselves the last of the key states to consider the Constitution. Yet, although the momentum had turned strongly against them, they were determined not to be swayed by Federalist arguments. By the time the ballots were counted, it became apparent that most New Yorkers shared their sentiments. The Antifederalists had swept the election, winning nine of the state's thirteen counties. Accordingly, when the Convention opened on 17 June in Poughkeepsie, 9 Federalists faced 46 Antifederalists across the floor.

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82 V. Briceland, "Virginia: the Cement of the Union", in Conley and Kaminski, eds., p.201.

New York had the most vigorous and best-organized Antifederalist group in the Union. Throughout the ratification process, New York Governor George Clinton and General John Lamb had attempted to lend support and encouragement to Antifederalists in other states, but their efforts were routinely frustrated both by the unorganized nature of resistance in the other states and the slow pace of communications between states.

There was certainly no shortage of creative constitutional thought at the New York ratifying Convention. Governor Clinton sought a second constitutional convention to redress the lack of a bill of rights in the first one. Antifederalist John Lansing submitted a plan with a proposed bill of rights that was to be prefixed to the Constitution. The plan featured three kinds of amendments: explanatory, including a bill of rights and some explanation of unclear portions of the Constitution; conditional, which prohibited Congress from exercising certain military, fiscal and regulatory powers until a second convention had been called; and recommendatory, which contained "numerous and important" items to be considered by the first federal Congress. This motion was dismissed by the Federalists as a "gilded rejection".<sup>83</sup>

Yet, the Antifederalists did not function with one voice. As has been noted by John Kaminski, "From the very beginning only a few of them were willing to hazard such a drastic step as unqualified rejection",<sup>84</sup> especially this late in the ratification process. Signs of a schism in Antifederalist opinion were not long in coming. A motion was put forth by moderate Antifederalist Melancton Smith, which attracted some interest from the Federalists. He presented a motion declaring that the Constitution was defective, but that since ten states had already ratified it, New York would do so as well, while reserving the right to withdraw from the Union if Congress did not call a convention to consider amendments within four years. This proposal prompted Federalist leader Alexander Hamilton to write James Madison to ask whether Congress would accept a ratification with a reservation to secede. Before he received a reply in the negative, however, Smith's proposal had already been rejected by his own Antifederalist colleagues.

For the Federalists, faced with overcoming a large Antifederalist majority in the Convention, their initial strategy was to keep the process going long enough to win over the majority of the candidates. To do this, they fought off an Antifederalist proposal for immediate rejection of the Constitution, thereby gaining a three-week reprieve during which they hoped to hear that New Hampshire and Virginia had ratified the Constitution. Their hopes were not disappointed. The news of the two ratifications, especially that of Virginia,

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83 John P. Kaminski, "Adjusting to Circumstances: New York's Relationship with the Federal Government, 1776-1788", in Conley and Kaminski, eds., p.244.

84 *Ibid.*, p.246.

significantly undermined Antifederalist resistance to the Constitution in the New York Convention.

From this point, the Federalists went on the offensive. Seeing that ten states had already ratified the Constitution, the Federalists were able to gain much ground by playing upon the fear that if New York did not ratify the Constitution it would be left behind at great cost in prestige and influence in the new Union. To sway the votes of wavering Antifederalists, the Federalists proposed both that a list of non-binding amendments be forwarded to Congress with the ratified Constitution and that a circular letter be sent to the states "Pressing in the most earnest manner, the necessity of a general convention to take into their consideration the amendments to the Constitution, proposed by the several State Conventions".<sup>85</sup> On 26 July the Convention approved a motion to ratify the Constitution with recommendatory amendments by a vote of 30 to 27.

The Federalists had succeeded in winning an impressive victory in the New York Convention. Yet, much more than the strength of their arguments, it was the weight of circumstances that won over their reluctant opponents. "Our arguments confound, but do not convince," Alexander Hamilton noted. "Some of the leaders however appear to me to be convinced by circumstances."<sup>86</sup> Because all of the other middle states — New Jersey, Pennsylvania, Maryland and Delaware — had already ratified the Constitution, New York had no chance of establishing an alternative middle confederacy, and the prospect of carrying on alone was unthinkable. In the end, New York had no alternative but to ratify the Constitution.

#### NORTH CAROLINA

*Ratified 21 November 1789 (195-77)*

When delegates from North Carolina gathered for a ratifying Convention in Hillsborough on 21 July 1788, it became apparent that Antifederalists held a majority and that the Constitution would not pass the Convention. Antifederalists were greatly concerned about the increased power that the new Constitution would give to the federal government at the expense of states' rights. After a week of relatively one-sided debate the Antifederalists carried a motion that neither ratified nor rejected the new Constitution. With it, they produced a series of amendments designed to check federal power and enhance states' rights, and they also proposed a bill of rights. By so doing, the state hoped to exert pressure upon the new government to accept its demands for amendments to the Constitution. This remained the state of affairs until November 1789.

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85 *Ibid.*

86 *Ibid.*

With the establishment of the new Government of the United States in April 1789, North Carolina, which had not ratified the new Constitution became, in effect, a sovereign state. As North Carolinians observed the successful and relatively orderly administration of George Washington and followed the progress through the new Congress of the proposed bill of individual and states' rights to be added to the Constitution, many of the concerns of North Carolina's Antifederalists declined. As a result, when state delegates met for the second time at Fayetteville in November 1789, they were much more favourably inclined towards the new Constitution. After three days of unrecorded debate, delegates voted 195-77 to ratify the Constitution, and North Carolina became the twelfth state in the Union. One month later, the state Convention ratified the Bill of Rights, which by this time had been sent by the new Congress to the states for consideration, thus becoming the fourth state to assent to these guarantees of individual liberties.

#### RHODE ISLAND

*Ratified 29 May 1790 (34-32)*

In a state that had long been renowned for its prickly independence in matters of religious and civil liberty, Rhode Islanders seemed little disposed to ratify a Constitution that seemed to create an overly-powerful federal government at the expense of the states. Upon receiving transmission of the Constitution from the Confederation Congress, the Rhode Island legislature deferred consideration of the matter until February of the next year. In the February session the legislature rejected a motion to call a ratifying convention and instead authorized a popular vote on the Constitution in contravention of Congress's instructions. The referendum seemed to support the attitude of the legislature; when the votes were finally counted in late March, 2,711 citizens had voted against the Constitution, 243 in favour. Armed with such a strong popular mandate, the legislature continued to rebuff efforts to have a ratifying convention called. Between the February session and Rhode Island's eventual ratification in 1790, the General Assembly turned aside eleven such motions.

When North Carolina finally joined the Union on 21 November 1789, Rhode Island became the last holdout to the Constitution. The Federalist minority was further encouraged by the publication of the twelve amendments to the Constitution which had been proposed by the new Congress of the United States. Finally, as a result of several factors, including economic pressures applied by the new federal government, a ratifying convention was called. It took two sessions before a motion ratifying the Constitution of the United States was passed by the slender margin of 34-32 on 29 May 1790. In light of the fact that

three delegates were absent from the final vote, it is entirely possible that a full convention might have reversed that decision.<sup>87</sup> As it was, Rhode Island became the thirteenth and final member of the original colonies to ratify the Constitution.

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87 Patrick T. Conley, "Rhode Island: First in War, Last in Peace", in Conley and Kaminski, eds., p.278.

#### 4. ASSESSMENT OF STRATEGIES AND OUTCOMES

The 13 states can be divided into three groups within which a number of common experiences and results are apparent: those which produced strong ratifications relatively quickly; those for which the process was a hard-fought and not easily-predicted affair; and those which failed to ratify the first time around.

In the first group, comprised of Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Maryland and South Carolina, the Constitution passed by healthy margins and in relatively short time. With the possible exception of Pennsylvania — the third largest state in the Union — each of these states had compelling reasons for supporting the new Constitution. Some, like Delaware, New Jersey, Connecticut and Maryland, were small and unlikely to be viable on their own. For these states, concerned as they were with the economic and legislative defence of their statehood, the chief attraction of the new Constitution was the guaranteed representation they received in the new legislative order. For others, like Georgia and South Carolina, ratification of the Constitution meant enlisting the help of a strong federal government in their defence against hostile external forces.

For a second group of states the ratifying procedure was a hard-fought affair marked by a lively debate in the press, extensive political manoeuvring and cliff-hanger conventions. With the exception of tiny New Hampshire, these states — Massachusetts, Virginia and New York — were three of the four most populous in the Union, and their ratifying vote was considered crucial to the success of the new Constitution. In each case it was not immediately apparent that such a positive result would be forthcoming. Each state contained well-developed bodies of Antifederalist sentiment, and in each the division of opinion for and against the new Constitution was so close that few were willing to predict the outcome of these ratifying conventions. In the end the Federalists won these states through a combination of factors which will be discussed further below.

North Carolina and Rhode Island, the two states which failed to ratify the Constitution the first time around, constituted the third group.

Over the course of the first 11 ratification conventions, it was those in the second group of states which most clearly reflected both the philosophies and strategies of the Federalists and the Antifederalists. Although the path to ratification was somewhat different in each of these states, some common themes may be identified that help to explain the eventual ratification of the Constitution.

Within the second group of states, Antifederalists suffered from no lack of able or articulate leadership. Men like George Mason, Edmund Randolph and Elbridge Gerry had attended the Philadelphia Convention and were intimately familiar with arguments both for and against the Constitution. Confronted with

the creation of a strong central government and seeing no corresponding concern for safeguarding individual and states' rights, however, they refused to endorse the constitutional document and were determined to see it amended. From the outset, however, these men were unable to forge a strong alliance of interests with those of like mind across the 13 states. For, while Antifederalists were loosely united by their opposition to the Constitution, they failed to formulate a common plan on how the new proposal should be reformed or replaced. In reality the Antifederalists were never a cohesive group committed to a single strategy, but were rather a shifting alliance of people united by a single antipathy: their dislike of the new Constitution. Some insisted that the Articles of Confederation could be salvaged with the addition of a few prudent amendments. Others were skeptics who were ready to let the Union dissolve and then regroup into three or four viable confederacies. Finally, there were the moderates who, after much soul-searching, were prepared to accept the Constitution on condition that a second convention be called to add further protection to the rights of citizens and states.

Within this loose Antifederalist coalition the greatest source of opposition to the new Constitution was the fear that it would create a powerful central government every bit as unresponsive to individual and state concerns as the imperial one they had just recently overthrown. To them, such a government, if unchecked by careful restrictions upon its powers, was worse than no government at all. Such concerns formed the base of their strenuous opposition to the Constitution.

Within Antifederalist ranks some common strategies emerged from the ratification struggles. Because the Constitution had already been passed by the Philadelphia Convention and referred to the states by the Confederation Congress, the Antifederalists were forced into a reactive role. Their first strategy was to call for a second constitutional convention to correct the oversights of the first. Following this, Antifederalists called for ratification conditional upon Congress amending the Constitution to protect individual and states' rights. Neither of these approaches proved successful. In the end, the Antifederalists usually settled for the Federalist offer of a package of recommendatory amendments to be forwarded to the new Congress with a fully ratified Constitution. Antifederalists then joined in the formulation of these non-binding amendments through joint committees struck by the ratifying conventions after the ratification itself was complete. Following the transmission of the state ratifying documents and recommendations to Congress, they continued to lobby for a number of suggested amendments, many of which Congress later included in its proposed Bill of Rights.

An enumeration of Federalist supporters of the Constitution would read like a list of the continental elite. A large proportion of these people, who today might be called opinion leaders, were involved in influencing public opinion

and included preachers, teachers, pamphleteers, editors, lawyers, legislators and members of the judiciary. In addition, Federalists could count upon the support of the tremendously popular George Washington, who would later become the Republic's first President. In the public mind, therefore, although all the details of the constitutional debate may not have been clear at the beginning, opinion was gradually swayed by the enthusiastic support of this high-profile group.

At first, Federalist strategy was simple and straightforward: they took the position of "No Compromise, No Amendments, and Quick Ratification". After the unpleasantness in Pennsylvania, however, it became apparent that a more conciliatory approach was necessary. It was during the Massachusetts Convention that they embraced the strategy of offering companion resolutions containing recommendatory amendments. The Federalists' success derived from this flexible tactical approach. When their strategies looked like they might fail — as they did at one time or another in New Hampshire, Massachusetts, New York and, to a lesser degree, in Virginia — they were able to assess the situation and change their tactics as necessary. The most common manoeuvre was to change their stance from that of accepting no amendments to the Constitution to that of accepting recommendatory amendments in return for their pledge to lobby for these changes once the new Constitution was in place. More than any other factor, it was this critical strategic adjustment that made the difference between success and failure. The Antifederalists, who possessed no overarching strategic plan and had few practical alternatives to the Constitution, were generally unable to respond effectively.

Among both contemporary and modern commentators on the ratification procedure, it is generally agreed that the Federalists were successful because they were better organized and had a more carefully planned agenda. In some cases, this involved mastering the machinery of ratifying conventions; in others, it involved the development of proposals to counter anticipated Antifederalist motions. By contrast, Antifederalists were often disorganized and their role was largely a reactive one. In several cases, the success of the one and the failure of the other was dramatic. In Massachusetts and New York, for example, the Federalists were able to turn around ratifying conventions which initially looked hopeless at first glance.

Underlying all considerations of agenda and strategy, however, was the firm conviction among Federalists that the proposed Constitution represented the best hope for the continued existence of the United States as a united political entity. For Federalists like Alexander Hamilton, the crucial importance of public debate in the ratification process was beyond dispute. The Constitution, though conceived in closed sessions by the Framers in Philadelphia, could only become a living entity through the consent of the people. This consent, there-



fore, was of crucial importance. "It has been frequently remarked," wrote Hamilton in *The Federalist* No. 1,

that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions on accident and force.<sup>88</sup>

From the very beginning of their campaign for the Constitution, the Federalists recognized that "reflection and choice" would only produce support for the Constitution when the people were educated as to the benefits it could bestow upon the country. The Federalists, far from presuming that their viewpoint would find ready acceptance, recognized that a tremendous weight of inertia needed to be overcome. They set out to sell their vision of change to the people. Through what one scholar has termed "eleven games of propaganda and politics"<sup>89</sup> the Federalists pressed their vision for positive constitutional change. They were successful because their vision was a positive one, because they believed fervently that it was the only course for the survival of the Union, and because they overlooked no detail in selling their vision to the public.

Grandeur in scope and more coherent in conception than the plans proposed by its opponents, the Constitution succeeded because it was widely promoted to the public and vigorously defended against all opponents. Through eleven successful ratification campaigns the Federalists so dominated the debate that among the American public the Constitution came to be recognized as "a shrewd and honest projection of the fact of incipient nationhood, the sign of an economic, social, and emotional reality that more and more Americans were coming to cherish as a legacy of the Revolution, an open door to prosperity, and a shield to independence".<sup>90</sup> That the Constitution continues to be seen this way more than two centuries after its adoption testifies to the effectiveness and lasting impact of the Federalist ratification campaign of 1787-90.

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88 As reported in Schechter, p.15.

89 Rossiter, p. 296.

90 Ibid.

## 5. CANADIAN RELEVANCE OF THE AMERICAN PRECEDENT

From the review of the experience of the original 13 states in ratifying the American Constitution, it is evident that the strategies employed by the participants in the process and the circumstances encountered by the various states share enough similarities with the current Meech Lake process in Canada to justify further examination of these similarities, although important differences in context noted in the introductory section must be borne in mind.

### 5.1. *The Requirements for Ratification of the Meech Lake Accord*

The resolutions adopted by Parliament and the provincial legislative assemblies have assumed that approval of the *Constitution Amendment, 1987* requires unanimous consent as provided for under s.41 of the *Constitution Act, 1982*. Moreover, as noted in the introduction of this study, it has been assumed that under s.39(2) of that Act, a three year deadline for ratification became operative after the first legislature assented to the proposed amendment. There is some debate as to whether *all* the proposed amendments embodied in the Accord are subject to the same ratification provisions. Indeed, B.C. Premier Vander Zalm's proposal of 19 January 1990 suggests that the different parts of the Accord be brought into force separately according to whether s.38 together with s.39(2) or s.41 is the basis of their ratification. Gordon Robertson contends that the three year deadline for ratification does not apply to the Accord because as a package it requires unanimous provincial endorsement under s.41, and the authority for the deadline provision, s.39(2), specifically refers only to the general amending provision found under s.38.<sup>91</sup> Nevertheless, the generally accepted view of those governments participating in the process appears to have been that the conditions of unanimity and the stipulated deadline do apply to the whole Accord as a package.

Given these provisions for the formal constitutional amendment process, it follows that if any changes to the substance of the *Constitution Amendment, 1987* were to be agreed to by all First Ministers, then each legislature would have to pass new resolutions of support for the revised Accord, even if it had passed the earlier version. As well, if unanimous endorsement of the existing Accord is not achieved by the end of the three year deadline, a completely new round of constitutional negotiations would have to be undertaken and the process of ratification begun anew.

These provisions which apply to the adoption of the Meech Lake Accord impose requirements different from those which applied to the adoption of the

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91 Gordon Robertson, *A House Divided: Meech Lake, Senate Reform and the Canadian Union* (Halifax: Institute for Research on Public Policy, 1989), p.15-20. Robertson suggests that the matter should be referred to the Supreme Court for an authoritative interpretation.

new U.S. Constitution. In the original American process of constitutional adoption, only 9 of the 13 states was required for ratification of the document, and no time limit was established for this to be accomplished. Hence, the political dynamics of ratification were somewhat different. The lack of a deadline in the American case was not significant since all 13 states ratified the new U.S. Constitution within three years. But the requirement of ratification by 9 states rather than all 13 enabled the new Constitution to come into effect without waiting for the hold-out states of North Carolina and Rhode Island. A further difference between the American and Canadian procedures is that for the Meech Lake constitutional amendment to be successfully adopted, debate and approval by Parliament, in addition to the provincial legislatures, is required.<sup>92</sup> While the United States Congress did discuss the constitutional document that the Philadelphia Convention had forwarded to it, Congress agreed simply to submit it to the states for consideration without expressing its own approval or disapproval.<sup>93</sup> Given the "founding" nature of the 1787-90 campaign to ratify the United States Constitution, the focus of the debate was clearly on the states as they struggled to decide whether to endorse and become a participant in an as yet unproven new form of federal government.

### *5.2. Progress on Ratification of the Meech Lake Accord up to April 1990*

Shortly after the Meech Lake Accord was reached on 30 April 1987, the Prime Minister proposed to the House of Commons that its members fully endorse the agreement in principle. The two other national party leaders responded in kind, giving unanimous support to the resolution. After the legal text of the Accord was agreed to at the Langevin meeting on 3 June, a Special Joint Committee of the Senate and the House of Commons was established several weeks later with a mandate to conduct public hearings and report to their respective Chambers by September 1987. When the report was released, it recommended adoption of the Accord while at the same time drawing attention to four areas of concern to be addressed in future rounds of constitutional negotiations. On 26 October 1987, the House of Commons voted 242-16 to ratify the Accord with all three party leaders in the House again expressing their combined approval of the proposed constitutional amendments. The Accord was then forwarded to the

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92 The requirement for Senate approval, however, is qualified in this case. According to s.47 of the *Constitution Act, 1982*, an amendment to the Constitution under the procedures defined in ss.38, 41, 42 or 43 can be proclaimed without a supportive resolution from the Senate if the House of Commons votes again to support the original resolution within 180 days of having first done so. This is in fact what occurred with the Meech Lake resolution.

93 Nonetheless, subsequent amendments to the United States Constitution required Congressional approval as well as approval by three quarters of the states, as dictated by the provisions of Article V.

Senate for further consideration; however, the Senate action taken in April of the next year was to pass an amended version of Meech Lake, with Senators proposing nine changes to the resolution. For the original proposal to remain intact, another House of Commons endorsement of the Accord as first introduced was needed to override the Senate-approved amendments. On 22 June 1988, the Commons voted 200-7 in favour of the original resolution, thus giving the three federal parties and their leaders another opportunity to express their approval of the Meech Lake agreement one year after debate on the proposal had been initiated.

The ten provinces required to ratify the Accord can be classified into roughly three different groups. The first group, comprising by far the majority of the provinces, produced strong endorsements of the Accord within just over a year of the signing of the agreement. The second category includes two provinces which, two and a half years into the ratification process, have not yet given their approval to the package of proposed amendments, citing the need for improvements or amendments to the Accord as it now stands. Finally, one province which had previously given its support to the constitutional amendment has now, after a change of government, rescinded the legislature's approval.

The provinces of the first group, seven in number, all passed the resolution supporting the Accord with very healthy majorities in a relatively short period of time. On 23 June 1987, nearly three weeks after the Langevin text had been agreed to, the Quebec National Assembly voted 95-18 in favour of ratifying the Accord. Since this was the first approval by a legislature, the ratification deadline for the proposed amendments automatically became 23 June 1990. Several months later, on 23 September, the Saskatchewan legislature endorsed the Accord with only 3 of its 46 sitting members dissenting. This was followed by Alberta's unanimous approval of the constitutional resolution on 7 December.<sup>94</sup> Prince Edward Island became the fourth province to ratify the Accord on 13 May 1988 in a vote with only a single dissention. Less than two weeks later, Nova Scotia's motion in support of the agreement passed by an overwhelming majority. On 29 June 1988, Ontario and British Columbia became the sixth and seventh provinces to ratify the Accord in votes of 112-8 and 42-5, respectively. The ratifications of all these provinces, with the exception of Ontario, parallel to a remarkable degree the experience of the first five states — Delaware, Pennsylvania, New Jersey, Georgia, Connecticut — in their successful ratification campaigns for the new United States Constitution.

The case of Ontario, however, is unique in two respects. To begin with, it was the first province to hold public hearings on the Meech Lake Accord (up until this time, only the Special Joint Committee of Parliament had conducted

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94 It should be noted, however, that 43 of the Assembly's 83 members were absent at the time of the vote. When the snap vote was called, the Liberals were in caucus.

public hearings). As well, it adopted an approach to ratification somewhat akin to that employed by the State of Massachusetts during the American ratification campaign of 1787-88. Prior to the vote on the proposed constitutional amendment, an all-party committee had been struck to consider and report on the Accord. After conducting public hearings at which considerable opposition to the Accord was expressed, the Committee released its final report in early June 1988. The report was highly critical of the process by which the Meech Lake Accord had been negotiated. As well, Committee members cited evidence of a "considerable unmet demand for further constitutional reform" within the province.<sup>95</sup> Nevertheless, the Committee concluded that given the importance of accommodating Quebec within the Constitution, the concerns of those opposed to the Accord were "not so pressing that they cannot be dealt with adequately during upcoming rounds of constitutional discussions". They therefore recommended adoption, but they included in their report a list of recommendatory amendments for consideration in future constitutional rounds following the ratification of the *Constitution Amendment, 1987*. This represents a position remarkably similar to that adopted by Massachusetts and subsequently by other states when ratifying the new United States Constitution.

The second category of provinces includes New Brunswick and Manitoba, both of whom more than two and a half years after the process began have yet to ratify the proposed constitutional amendment. In these two provinces, provincial elections occurring after the Accord was struck resulted in changes of government and, subsequently, a change in support for the Meech Lake Accord from the stance of the previous governments. Committees were struck — a select committee of the legislature in New Brunswick and an all-party task force in Manitoba — and public hearings were held, resulting in reports from both provinces seeking changes to the Accord.

In New Brunswick, after his party captured all 58 seats in the provincial legislature in an election in the fall of 1987, Liberal leader Frank McKenna became the first premier to express serious reservations about the Meech Lake Accord. At the Annual Conference of First Ministers later in November, he voiced his concerns about the pact, seeking assurances on particular provisions from his fellow First Ministers. Then, at a meeting with Quebec Premier Robert Bourassa in March 1988, Premier McKenna outlined six major changes to the Accord that his province would seek before ratifying the agreement, some of which would require actual revision of the text while others were supplementary in nature. In many respects, this approach reflects the strategy employed by opponents of the proposed United States Constitution during the ratification campaign of 1787-88. Antifederalists in Virginia and New York, for example,

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95 Ontario, Select Committee on Constitutional Reform, *Report on the Constitution Amendment, 1987* (Toronto: Legislative Assembly of Ontario, 1988), p.5.

argued that the approval by their state conventions of the new Constitution should be conditional on changes being introduced — such as the strengthening of individual and states' rights — before agreeing to the Constitution.

In New Brunswick, public hearings were conducted by a select committee of the legislature in January and February of 1989. However, release of the report was withheld until later that year in October. In the report, considerable concern was expressed over both the substance of the proposed constitutional amendment and the process by which it was achieved. In particular, the Committee members were especially critical of the "side agreement" of First Ministers neither to propose nor to allow any changes to the Accord, viewing the tactic as "an extension of the application of executive federalism to constitutional development that is both unprecedented and unacceptable".<sup>96</sup> The general thrust of the Committee's recommendations was for supplementary additions to the Accord, although a few, such as the call for removal of the territorial restrictions inherent in the "fundamental characteristics of Canada" clause, would require actual revision of the text of the Accord. Ultimately, the Committee recommended that the provincial government use its recommendations as a basis of discussion for improving the 1987 Constitutional Accord without clearly stating whether ratification of the Accord should be strictly conditional on the incorporation of its recommendations or not.

Subsequently, on 21 March 1990, Premier McKenna introduced two resolutions in the Legislative Assembly of New Brunswick. The first was the *Constitution Amendment, 1987* (the Meech Lake Accord) itself and the second was a "companion resolution" proposing a number of additional constitutional amendments.<sup>97</sup> The latter were intended to reflect substantially the recommendations of the earlier Select Committee. These additions to the 1987 Accord would add: a reference in the statement on linguistic duality to the equality of the English and French communities in New Brunswick; the obligation of Parliament and the Government of Canada to "promote" as well as to "preserve" the fundamental duality of Canada; a provision to ensure that the interpretive provisions of the Accord do not erode the guarantees of gender equality in section 28 of the Charter; an extension of the procedures for Senate and Supreme Court nominations to the northern Territories; a procedure for Senate review of the operation of equalization and treatment of regional disparities; a reversion to the original procedure prior to 1982 for granting provincial status

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96 New Brunswick, Select Committee on the 1987 Constitutional Accord, *Final Report on the Constitution Amendment, 1987* (Fredericton: Legislative Assembly of New Brunswick, October 1989), p.27. While such a side agreement appeared "unprecedented" to the Committee, such practice is in fact typical of constitutional amendment procedures followed in most federations (see section 2.4 of this study).

97 New Brunswick, *A Guide to New Brunswick's Companion Resolution to the 1987 Constitutional Accord* (Fredericton: Queen's Printer, March 1990).

to Territories; a provision in future for public hearings by Parliament and legislatures prior to any amendment of the Constitution; the inclusion in the agenda of future annual constitutional conferences of matters relating to the aboriginal peoples; and a limitation on the inclusion of fisheries in the agenda of future annual constitutional conferences. In introducing the companion resolution Premier McKenna indicated that whether New Brunswick proceeded with ratification of the Meech Lake Accord and the companion amendments would depend upon the degree of support received from elsewhere regarding these proposals. At the same time he emphasized that he was open to suggestions for revisions to the companion resolution.

To assist the process, Prime Minister Mulroney immediately arranged for the appointment of a Special Committee of the House of Commons to Study the Proposed Companion Resolution to the Meech Lake Accord under the chairmanship of Jean Charest. This committee was to report by 18 May 1990, just a little more than a month before the deadline for the ratification of the Meech Lake Accord. Soon after its formation the Committee announced that it would hold hearings in Ottawa, Yellowknife, Whitehorse, Vancouver, Winnipeg and St. John's.

The New Brunswick "companion resolution" resembles in many respects the companion resolutions containing recommended amendments adopted in Massachusetts, South Carolina, New Hampshire, Virginia and New York during the campaign to ratify the new American Constitution. In ratifying the entire body of the Meech Lake Accord, but proposing supplementary constitutional amendments, the approach is similar. But where in the American examples the companion resolutions set out recommendations for future action to be considered by Congress, the New Brunswick companion resolution when adopted by that legislature would actually commence the process of further constitutional amendments. The companion resolution would stipulate the text of additional constitutional amendments which, following their adoption by resolutions in Parliament and the other provincial legislatures, would be proclaimed after the *Constitution Amendment, 1987* comes into force.

In Manitoba the New Democratic government fell in March 1988 after failing to survive a vote of non-confidence in the legislature. Following the election, Howard Pawley, whose government had supported the Meech Lake Accord although the legislature had not yet passed a resolution to that effect, was replaced as Premier by Progressive Conservative Gary Filmon, who managed to garner only enough support for a minority government. When Quebec Premier Bourassa announced in December 1988 his government's intention to invoke the "notwithstanding clause" of the *Constitution Act, 1982* in support of proposed legislation (Bill 178) responding to a Supreme Court decision on bilingual signs, Premier Filmon announced that his government would be withdrawing its Meech Lake Accord resolution from its legislative agenda.

Nearly four months later, the hearings of an all-party Task Force on Meech Lake commenced. As in the case of New Brunswick, the final report was not released until shortly after the Quebec provincial election on 25 September 1989. The members of the Task Force unanimously recommended *against* adoption of the Accord in its present form, proposing instead six specific amendments to the Meech Lake proposal itself along with three supplementary recommendations.<sup>98</sup> Even after the introduction of Premier McKenna's "companion resolution" the three party leaders in Manitoba continued to insist that for Manitoba's agreement, supplementary amendments would be insufficient and the Accord itself would have to be revised. This resembles the position of the American Antifederalists who were willing to support constitutional ratification only if it were conditional on the acceptance of their proposed revisions to the document. An example of this strategy was their success in the hold-out state of North Carolina where they succeeded in delaying ratification of the Constitution until after the new Constitution had come into force.<sup>99</sup> The difference in the Canadian situation is that one hold-out province can by itself legally prevent ratification of the entire agreement.

Finally, in a category unto itself, Newfoundland is the only province first to endorse the Accord and then, after a change of government, to rescind its approval. In a vote of 28-10 on 8 July 1988, the Newfoundland legislature endorsed the package of proposed amendments, becoming the eighth and most recent province to do so. A provincial election on 20 April 1989, however, saw the governing Conservatives replaced by a Liberal majority. Within hours of the electoral victory, Premier-elect Clyde Wells stated in an interview that he would not be able to support the Meech Lake Accord as it stood. In the Speech from the Throne one month later, the Newfoundland government pledged to push for changes to the proposed amendment package and, if such changes were not considered by the other First Ministers, to seek approval from its Legislative Assembly to rescind its prior approval of the Accord. Subsequently, on 6 April 1990, after a heated debate in the Newfoundland Legislative Assembly and the imposing of closure, a motion to rescind the approval of the Meech Lake Accord was passed. There was no instance of rescission, threatened or otherwise, in the ratification campaigns for the new United States Constitution. However, Pre-

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98 Manitoba, Task Force on Meech Lake, *Report on the 1987 Constitutional Accord* (Winnipeg: Legislature of Manitoba, 21 October 1989), pp.72-9. It is important to note that although a Task Force has been struck and public hearings have been held in Manitoba, a select committee of the legislature has yet to consider and report on the Accord. This will have implications for the time available for any possible resolution of the current impasse before the ratification deadline in June 1990.

99 The implications of not ratifying for North Carolina, however, were much different relative to Manitoba in the current context, as failure to ratify the Constitution effectively excluded North Carolina from the newly-established federation.



mier Wells' position of insisting upon changes to the original text as a condition of ratification in effect represents a similar position to that taken by the Antifederalists in the United States who sought to make ratification conditional on prior changes to the Philadelphia document. Although in most states the Antifederalists did not prevail, their position did lead in the case of North Carolina to its initial non-ratification of the new Constitution.

Thus, the situation by April 1990 was that Parliament and seven provinces had debated and passed resolutions in favour of adopting the *Constitution Amendment, 1987* which still stood. Three provincial legislatures had yet to ratify the Accord. In one of these, New Brunswick, the Premier had proposed a "companion resolution" by which ratification would be accompanied by additional constitutional amendments. In the other two provinces, Manitoba and Newfoundland, the premiers remained adamant that the *Constitution Amendment, 1987* itself must be revised before their legislatures would ratify it. Political leaders in these two provinces appeared reluctant to soften in any way their demands for changes to the Accord. Meanwhile, opinion surveys suggested that public resistance to the Accord in its original form had also been hardening.<sup>100</sup> The prospects for a resolution of the constitutional deadlock seemed daunting.

### 5.3. *The Strategies of Supporters and Opponents*

To understand the current constitutional impasse, it may be helpful to review the initial strategies that were employed in support of and in opposition to the Meech Lake Accord.

At a conference held at Mont Gabriel, Quebec in May of 1986, Quebec's Intergovernmental Affairs Minister Gil Rémillard set out five conditions for his province's participation in a new constitutional agreement which, it was emphasized, were the most modest demands for constitutional reconciliation that a Quebec government had proposed during the past two decades. The consensus among conference participants, drawn largely from government and academic circles, was that in order to achieve a constitutional settlement with Quebec, the agenda for reform would have to be limited to the short list enunciated by Mr. Rémillard. Moreover, it was believed that an attempt at accommodation should be pursued in the very near future "while the issue has a relatively low

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100A Gallup poll released shortly after the signing of the Langevin text (18 June 1987) found that 56 percent of those surveyed thought the proposed constitutional amendment was a "good thing for Canada". By early February 1990, however, a *Globe and Mail*-CBC News poll indicated that only 24 percent of respondents were "for the Meech Lake Accord".

profile, because agreement can be more easily reached when passions are not inflamed".<sup>101</sup>

At the Annual Premiers' Conference in August later that year, the issue of constitutional reform vis-à-vis Quebec's demands was discussed. In what has come to be known as the *Edmonton Declaration*, the Premiers agreed unanimously that their top constitutional priority would be to embark immediately upon a federal-provincial process to bring about Quebec's return to the constitutional fold, using the province's five conditions as a basis for discussion. Moreover, there was a consensus among the Premiers that other matters of concern relating to constitutional reform such as Senate reform, fisheries, and property rights would be left for future constitutional negotiations, subsequent to resolution of the current agenda.<sup>102</sup>

Once unanimous agreement had been achieved at Meech Lake, the political accord was hailed as a "miracle", just as the constitutional document produced at the Philadelphia convention some 200 years ago in the United States had been. The original signatories agreed neither to propose nor to allow any changes to the Accord until it was ratified, viewing the agreement as a "seamless web" which would easily unravel if tampered with unnecessarily. The language here was remarkably similar to that used by Federalists in the early rounds of the ratification debate after the Philadelphia Convention. The provincial Premiers later collectively reaffirmed their commitment to avoid changes to the Accord at the Annual Premiers' Conference in Saint John, New Brunswick at the end of August 1987.

Initially, the prospects for approval of the Accord seemed highly favourable: agreement upon the final text of the proposed amendment had been unanimous, all three federal party leaders strongly endorsed the spirit and substance of Meech Lake, the House of Commons quickly passed a resolution supporting the agreement, and a majority of provincial ratifications was achieved within the first year of the process with overwhelming majorities. Progress during the first year was similar to the early successes which occurred during the American ratification campaign.

As in the United States example, however, the initial success was followed by a slowing in the momentum for ratification. With a ratification deadline of

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101 Peter M. Leslie, *Rebuilding the Relationship: Quebec and its Confederation Partners*, Conference Report (Kingston: Institute of Intergovernmental Relations, 1987), pp.5-6.

102 *Press Release*, 27th Annual Premiers' Conference, Edmonton, Alberta, 10-12 August 1986. This position was later reaffirmed at the annual First Ministers' Conference held in Vancouver, British Columbia, on 20-21 November 1986, at which the First Ministers agreed to intensify and expand negotiations on the current limited agenda, leaving other matters of concern for another, later stage of constitutional reform.

three years for Meech Lake, there was considerable opportunity in the intervening period for changes in the political environment to affect the processes and momentum of the ratification campaign. As already noted, elections in three provinces subsequent to June 1987 brought new Premiers to the fore who were not signatories to the original Meech Lake Accord and who opposed the pact unless changes or improvements were introduced.

Even before the Langevin text had been agreed upon, some critics had been quick to attack the substance of the Accord. For example, Pierre Trudeau's attack on the designation of Quebec as a "distinct society" and on the proposal relating to the federal spending power helped to delineate quickly one anti-Meech position associated with the former Prime Minister's vision of federalism. As well, at the hearings of the Joint Parliamentary Committee on the Accord and of the Ontario Select Committee on the Accord, various advocacy groups expressed concerns about the effect that the Accord would have on the Charter of Rights, and in particular on the rights of women, aboriginals and multicultural groups. They lamented what they saw as the failure of the proposed constitutional amendment to address the concerns of their constituencies. Meanwhile, after the Canada-U.S. Free Trade Agreement was endorsed by the electorate in the federal election of November 1988, the resentment of some of those opposed to the FTA turned on Quebec whose overwhelming support for the trade agreement had proved decisive.

Particularly critical was the reaction to Quebec Premier Bourassa's response to the Supreme Court ruling on bilingual commercial signs in December 1988 — invoking the controversial "notwithstanding clause" of the Charter of Rights and Freedoms to enable his proposed Bill 178 to provide for "French only" external commercial signs. This provided yet another focus for the anti-Meech forces.

Thus, there were many developments during the earlier stages of the process of ratification which contributed to a loss of momentum for the pro-Meech forces. Earlier in the United States, the response of the American Federalists to the slowing momentum in the ratification campaign had been to change their strategy. We turn, therefore, to an examination of the current options relating to the adoption of the Meech Lake Accord viewed in the light of the earlier American experience.

#### *5.4. Current Options*

New Brunswick, Manitoba and Newfoundland are clearly the focus of the present debate. With only a few months remaining before the ratification deadline — and even less time for some kind of resolution to be reached and then legislatively effected in these three or all the provinces — what are the alternatives for resolving the apparent impasse and what light does the earlier American experience shed on them?

### Straightforward Ratification:

Straightforward ratification would involve the passage by the remaining provinces of the *Constitution Amendment, 1987* by the June 1990 deadline without consideration of any revisions to the existing text or agreement on a possible parallel accord or companion resolution. This was the process advocated by the federal government initially and maintained consistently by the Quebec government. In the campaign to ratify the United States Constitution some 200 years ago, the Federalists, too, were adamant at first that the document forwarded to the states for their approval should be ratified unconditionally and without changes or appendages.

There is widespread consensus now, however, that, unless the development of a sufficient sense of national crisis as the deadline approaches engenders acceptance of the Accord as a necessary alternative to federal disintegration, the strategy of insisting upon ratification without changes or supplementary amendments is likely to spell certain defeat for the Accord, given the objections that have been raised by the three dissenting provinces. Indeed, it was a similar perception on the part of the Federalists mid-way through the ratification campaign for the new United States Constitution that led them to change their approach and to agree to the compromise of allowing supplementary recommendatory amendments to be included in the resolutions of state ratifying conventions.

### Renegotiation of the Accord:

Renegotiation of the text of the Accord before the 23 June 1990 deadline is an approach that has been advocated by political leaders in the provinces of Manitoba and Newfoundland. In its final report, the Manitoba Task Force unanimously recommended against ratification of the Accord unless action was taken on six proposed amendments to the Langevin text as well as on three other recommendations not involving its amendment. Newfoundland Premier Clyde Wells has strong objections to the main provisions of the Accord. His proposed changes would drastically alter the substance, if not the spirit too, of the agreement.

During the campaign to ratify the United States Constitution following the Philadelphia Convention, Antifederalists in states such as Massachusetts, Virginia and New York proposed numerous amendments to the text of the proposed Constitution in their ratifying conventions, seeking increased protection for individual and states' rights in the new document. Such attempts at revision were considered by the Federalists to be "but another name for rejection". Supporters of the new Constitution were anxious to avoid renegotiation of the text at a second constitutional convention, knowing well enough that the

delicate compromises which resulted in agreement at Philadelphia would be almost impossible to replicate at a second convention.

In the Canadian context, such fears have not gone unexpressed. The implications of renegotiation were addressed by Dr. Peter Meekison, a longtime constitutional advisor to the Alberta government, in his testimony before the special Parliamentary Joint Committee:

... when an agreement is reached after long and sometimes difficult negotiations, it is usually based on a series of compromises and the recognition that perfection or absolutes may be impossible but acceptable solutions are obtainable. To pull on a particular thread could unravel the entire agreement, because the delicate design, so carefully woven, can easily be destroyed.<sup>103</sup>

Renegotiation of the Meech Lake Accord would in effect require that the process of ratification be reinitiated, spanning possibly another three years (and a minimum of one), with no assurance that all 11 legislatures would agree to the amended resolution any more than to the present text. Again, intervening provincial elections could result in changes in provincial governments, and these governments could also insist on changes to the amended Accord, thus extending the process indefinitely.

Throughout the ratification process, the Quebec government has clearly stated that revision of the Accord is not an option it is willing to consider. Premier Bourassa has continually reminded his fellow First Ministers and the public that the five points his province presented as a basis for constitutional negotiation were Quebec's absolute minimum. After having achieved unanimous agreement on these conditions among the First Ministers at Meech Lake and then later at the Langevin meeting, and having secured near-unanimous endorsement by the House of Commons and majority resolutions of support which still stand in seven of the ten provincial legislatures for the Accord, it seems unlikely that Quebec would be willing to concede any ground on the matter. Moreover, any process of renegotiation would have to take account not only of the views of the English Canadian critics of the Accord, but also of the hardening of Quebec public opinion in response which, as indicated by public opinion surveys between January and April 1990, has in that period shifted strongly towards support for an even looser confederal structure.

#### The "Parallel Accord" Options:

Intermediate between straightforward adoption on the one hand and renegotiation of the Meech Lake Accord itself on the other — neither of which looks promising at the current time as a path to consensus — is the alternative of a "parallel accord". This would involve obtaining support for ratification of the

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<sup>103</sup> Report of Special Joint Committee, p.131.

Meech Lake Accord from New Brunswick, Manitoba and Newfoundland prior to the 23 June 1990 deadline through agreement by the federal government and all the provinces on a second parallel constitutional accord. Such a "parallel accord" would be designed to accommodate the concerns of the provinces which to date have been reluctant to assent to the Meech Lake Accord for a variety of reasons. The concept of a "parallel accord" was first suggested by Premier McKenna of New Brunswick, and subsequently it was acknowledged as a possible resolution by Senator Lowell Murray, the Federal Minister for Federal-Provincial Relations.<sup>104</sup>

The Constitutional Accord of 1987 was an agreement among governments to proceed with the ratification of the *Constitution Amendment, 1987*. A "parallel accord" would, therefore, involve another intergovernmental agreement upon further constitutional revision to be undertaken. It is possible to envisage a number of possible variants, all of which might come under the general category of a "parallel accord". For instance, in terms of the character of the second accord, it might consist of an agreement of First Ministers to proceed with the introduction in their legislatures of a "companion resolution" either identifying recommendations for early further deliberation by the governments involved, or consisting of a specific legal text of agreed constitutional amendments which would simply require legislative ratification. In terms of the timing of the ratification of the two accords, ratification of the Meech Lake Accord might be completed immediately following agreement on the second accord, or it might occur only after full ratification of the second accord is completed. In terms of content, the second accord might consist of constitutional amendments supplementing but leaving the Meech Lake Accord intact, or it might include agreed revisions to the text of the Meech Lake Accord.

The term "parallel accord" was not used during the earlier American ratification process 1787-90. This is not surprising since the new Constitution under consideration in the state conventions was not itself the product of a prior intergovernmental agreement or accord but rather of a Constitutional Convention. But the agreements first arrived at within the Massachusetts state ratifying convention and subsequently in a number of other key states, represented the equivalent of "companion resolutions". The ratification of the new Constitution was obtained in these state conventions by accompanying that ratification with a parallel resolution containing recommendations for further constitutional amendments to follow. We have seen how such companion resolutions in a number of critical states were in the end the key to the successful adoption of the new American Constitution.

What were the characteristics of these American companion resolutions? First, in terms of their character, they consisted of recommendations to be

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104 "Parallel agreement called a possibility", *Globe and Mail*, 1 December 1989.

transmitted to the Congress for early deliberation after ratification of the Constitution. Second, in terms of timing, ratification of the Constitution was completed without waiting for full ratification of the further amendments. Third, in terms of content, the proposed Constitution was left intact. The subsequent constitutional amendments consisted of the addition of a list of individual and states' rights to the Constitution.

In the Canadian context the approach advocated by the Ontario Select Committee on Constitutional Reform comes closest to the American precedents. It rejected the argument that the concerns expressed by those opposed to the Accord were so serious as to justify reopening the original Accord. The Committee members suggested instead that immediately following ratification of the original package of amendments, First Ministers should initiate a second round of constitutional negotiations. These would be directed at a series of amendments dealing with: the opportunity for the Northern territories to participate in Senate and Supreme Court appointments; the recognition of aboriginal peoples, multiculturalism and the protection and guarantee of Charter rights as "fundamental characteristics" of Canada; and the establishment of regular constitutional conferences to deal with aboriginal issues. The recommended amendments themselves do not provide for revision of the Meech Lake Accord itself, but rather would supplement the existing document.

For New Brunswick, Manitoba and Newfoundland, the mere attachment by their legislatures of recommendations for further constitutional revision to their ratifications of the *Constitution Amendment, 1987*, without any accompanying commitment on the part of the supporters of the Meech Lake Accord to these proposed revisions, would undoubtedly be considered insufficient. Just as in Massachusetts and the other critical American states, it was the commitment of the Federalists to support and implement the recommendations for further constitutional amendments which won the support of the Antifederalists for ratification, so in the Canadian case it would almost certainly require a commitment on the part of the supporters of the Meech Lake Accord to immediate action on a set of specifically identified matters to win the support of the reluctant premiers. Based on the debate to this point it would no doubt require a commitment expressed in an intergovernmental "parallel accord" at a meeting of First Ministers to proceed with immediate legislative action in the form of "companion resolutions" in Parliament and the provincial legislatures. These companion resolutions might deal with such proposals as those suggested in the New Brunswick example but embody such further revisions, including Senate reform, as necessary to obtain the support of *all* the governments.

It is worth noting that the success of the parallel agreements in the form employed in the adoption of the American Constitution depended very much upon the ability of the Federalists to instil a sense of trust and confidence in their opponents. In the ratification campaigns in such key states as Massachu-

setts, Virginia and New York, Antifederalists became sufficiently convinced that the recommended amendments would be dealt with promptly after the Constitution was formally adopted. Consequently, they were willing to proceed with immediate ratification of the Constitution. The ensuing campaign for elections to the first Congress provided an opportunity for this commitment to be tested. Furthermore, when it became evident that a bill of rights really was a top priority in the first session of Congress, this proved to be a major factor in convincing North Carolina and Rhode Island to ratify the Constitution along with the Bill of Rights, and thus to become members of the new federation. In the Canadian context, the prospects for the success of this approach would be dependent upon establishing the same degree of political confidence and trust that a "parallel accord" containing agreed recommendations for further action would be acted upon promptly and in good faith. Given the present lack of trust between the political leaders supporting and opposing the Meech Lake Accord, overcoming this distrust will be a monumental yet essential task.



## 6. CONCLUSIONS

As noted in the introduction and at various points in this study, there were significant differences in the conditions and context of the ratification processes of the new Constitution in the United States 1787-90 and of the Meech Lake Accord in Canada 1987-90, exactly 200 years later. Perhaps the two most significant procedural differences were: first, the fact that the former related to the adoption of a new constitution and the latter to the amendment of an existing constitution; second, that the former required the assent of nine of the thirteen states whereas the latter requires the unanimous assent of all ten provinces. These differences clearly have affected the political dynamics of the two ratification processes, and particularly the leverage of the hold-out provinces.

Nevertheless, we have noted many similarities in the positions taken and the strategies employed by the proponents and opponents in the two ratification campaigns. From this review of the earlier American process two clear lessons of relevance to the current Canadian situation emerge. First, the American Federalists recognized early in the ratification process the need for a vigorous campaign to explain to the public in the various states the full content and implications of their proposals and to convince them that the Federalists' vision of the country's future was a positive one.<sup>105</sup> Second, faced in a number of states with opposition at least as strong as that which has arisen in the Canadian provinces that have yet to endorse the Accord, the Federalists recognized the need for flexibility in their strategy. They came to realize that there was no point in insisting that it was the new Constitution or nothing; the answer to that proposition would be nothing. They realized that the key to saving the Constitution intact was to win over the Antifederalists by supporting, and indeed advocating, companion resolutions consisting of recommendations for further additional constitutional changes, particularly a bill of individual and states' rights. As it turned out, this strategy succeeded in saving the new Constitution.

These two lessons are clearly relevant to the efforts to secure the adoption of the Meech Lake Accord. First, at a time when opinion surveys suggest that popular support for the Accord has declined over the past two years while over 70 percent of those surveyed still concede that they know little or nothing about the contents of the Accord, there is a need to explain in positive terms its significance for the future of the federation. Second, the key to saving the Accord, as the American Federalists in their campaign found, may lie in keeping the Accord intact while at the same time making in a parallel agreement a firm commitment to additional constitutional revisions that would accommodate the concerns of the reluctant provinces. Just as the American Federalists insisted on keeping the Philadelphia proposals unchanged, the original Accord would need to remain intact. Otherwise, there would be little chance of Quebec's

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<sup>105</sup> See especially section 4 above.

support. But just as the American Federalists came to support and advocate further constitutional changes to win over the Antifederalists, the First Ministers may need to commit themselves to a "parallel accord" to win the support of the reluctant provinces. In the United States such accommodations and compromises built up a momentum in support of a new imaginative and innovative political system which combined unity and diversity. To achieve similar momentum the political leaders and governments in Canada will need to rise above prosaic squabbling in defense of particular interests and agree upon an imaginative vision of the federation accommodating its diversity.

As to the character and timing of a "parallel accord", the American example points to the need to establish a trust and confidence in the political will to implement the proposals in the "parallel accord". In the American companion resolutions no timetable for implementation was stipulated, but a real sense of commitment to implementation was made clear to the Antifederalists. The resulting trust in the political will and commitment of the Federalists to proceed with the additional amendments was a crucial factor in the acceptance of the new Constitution by the Antifederalists. It might be that in the Canadian case the "parallel accord", if it is to win over the skeptics, might have to include a timetable for achieving the further constitutional changes. The experience in the negotiations for constitutional amendments relating to aboriginal self-government is not reassuring about the efficacy of such timetables, however. In any case, what *will* be required is a clear reassurance to skeptical Senate reformers, supporters of the Charter of Rights, residents of provinces suffering from regional disparities, native leaders and residents of the Northern Territories that the Meech Lake Accord will not make the realization of their goals less likely. With some such "parallel accord" upon the contents of a "companion resolution" the supporters of the Meech Lake Accord might, as the American Federalists did, save their proposals and the federation.

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