

# Original Unintentions: The Franchise and the Constitution.

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THE CONTROVERSY OVER originalism—the question whether judges, in interpreting the Constitution, should be guided by the original intentions of the Framers or by some other standard—has generated a large body of literature. The quality of the work has varied from lucid to muddled, from calm and reasoned to nearly hysterical. Most writers have been influenced by how they want the courts to rule on particular subjects, though few have been as candid as the historian Jack Rakove, who confessed that “I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor.”<sup>1</sup>

Despite the range of these studies and polemics, however, two important considerations have been left out of account. One is that lawmakers, constitutional or legislative, do not always accomplish what they intend to accomplish. As Alexander Hamilton observed, “Nothing is more common than for laws to *express* and *effect*, more or less than was intended.”<sup>2</sup> The other is that certain features of the Constitution are almost invisible because they refer to previously existing institutions, constitutions, laws,

and customs that are nowhere defined in the Constitution itself. An example that springs to mind is the clause in Article I, Section 8, empowering Congress to “define and punish.... Offences against the Law of Nations.” At the time of the ratification, the law of nations consisted partly of positive law in the form of multinational treaties but mainly of natural law, particularly as embodied in Emmerich de Vattel’s classic *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). The content of the law of nations would change substantially during the impending wars of the French Revolutionary and Napoleonic eras, but the mandate remains that, in accordance with the original understanding, Congress is vested with power to define and punish offenses against natural law.

In domestic affairs, existing arrangements were perpetuated both implicitly and explicitly. Slavery is an obvious example: it existed by virtue of state constitutions and laws, and by not mentioning it directly and by not giving Congress power over it—save for the deferred power to prohibit “the Migration or Importation of such Persons as any of the States now existing shall think proper to admit”—the Constitution implicitly accepted it.

The focus of the present essay is a pair

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of implicit recognitions of existing arrangements contained in Article I, Section 2: the electors for members of the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature,” and in Article I, Section 3, stipulating that Senators shall be “chosen by the Legislature” in each state. Those provisions are fraught with implications, subtle and profound.

## II

Article I, Section 2, like much else in the Constitution, was the result of compromise in the Philadelphia Convention. The subject first arose, tangentially, on July 26, when George Mason of Virginia proposed that landed property qualifications be required for members of Congress and that persons having “unsettled accounts” with the United States should be excluded. The second part of the motion clouded the issue, but during the debates two points emerged. A vague consensus was expressed that some sort of property qualification, though not necessarily landed, ought to be required for any participation in the proposed new government. And, Gouverneur Morris of Pennsylvania observed that if qualifications were proper, he would prefer them to apply to “the electors rather than the elected.” James Madison shared that sentiment but commented that it would be difficult to form any “uniform standard that would suit the different circumstances & opinions prevailing in the different States.”<sup>3</sup> Underlying Madison’s statement was the fact that a property qualification which wealthy planters in, say, South Carolina would regard as adequate to keep riff-raff from the polls would disfranchise almost everyone in a poor state such as New Hampshire.<sup>4</sup>

After that day’s debate, the Convention adjourned until August 6, turning over the work in the interim to a five-man Committee of Detail: Nathaniel Gorham

of Massachusetts, Oliver Ellsworth of Connecticut, James Wilson of Pennsylvania, Edmund Randolph of Virginia, and John Rutledge of South Carolina. From the fragmentary records left by the committee, it appears that the members contemplated a requirement of a fifty-acre freehold for voters, but that was abandoned in favor of a provision that voter qualifications be set by the several state legislatures, with the exception that such specifications “*may at any Time be altered and superseded*” by Congress. Then the committee hit upon what was essentially the formula that ultimately made its way into the Constitution. The power of Congress to change the qualifications was dropped, though a related power was added: the state legislatures were to set the “Times and Places and the Manner of holding the Elections of the Members of each House” subject to being altered or superseded by Congress. The reason for empowering Congress to alter the regulations was concern lest some states attempt to thwart Congress by electing no members and thereby preventing a quorum, as Rhode Island had tried to do and as New York would almost do in 1789. (As an aside, it is to be observed that the clause would have permitted Congress to provide for direct election of senators rather than election by the state legislatures; this feature was abandoned in the finished Constitution, and thus senators would be elected by the legislatures until the adoption of the Seventeenth Amendment in 1913.)<sup>5</sup>

These proposals of the Committee of Detail were debated immediately upon the reassembly of the full convention. Because of the importance of the subject, no fewer than thirteen delegates—considerably more than normal—spoke. Three delegates insisted upon a freehold qualification for voters, but after Ellsworth and others explained the impracticality of setting a uniform qualification, the provisions were passed unani-

mously. The matter was not seriously raised again.

Another proposal, however, seemingly unrelated but actually quite so, came up two weeks later. On August 20, Charles Pinckney of South Carolina offered thirteen propositions to be considered by the Committee of Detail; one of these was that "No religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S." The proposals, together with several more submitted by Gouverneur Morris, were committed without debate or consideration. Nothing emerged from the committee, and on August 30 Pinckney tried again, moving that "no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States"—almost exactly the language of Article VI of the Constitution.<sup>6</sup>

The motion was passed by a unanimous vote of the state delegations, but it was not entirely uncontested. Roger Sherman of Connecticut thought the provision "unnecessary, the prevailing liberality being a sufficient security agst. such tests." And Luther Martin of Maryland, in a long address delivered to his state's legislature two and a half months after the Convention adjourned, somewhat querulously observed that "there were some members *so unfashionable* as to think, that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers." Moreover, he added, "in a Christian country, it would be *at least decent*" to distinguish between "the professors of Christianity and downright infidelity or paganism."<sup>7</sup>

Edmund Randolph, explaining the religious test clause in the Virginia ratifying convention in 1788, made it clear that the general understanding was that Martin's distinction was implicit in the clause itself. Its meaning was merely that officers "are not bound to support one

mode of worship, or to adhere to one particular sect. It puts all sects on the same footing." Men of ability and character "of any sect whatever"—but not of no sect whatever—were, in Randolph's reading, able to hold public office in the federal government. The plurality of local ways, which had been a barrier to uniform property qualifications for voters and officeholders, was in the matter of religion a positive benefit, for the existence of many sects "will prevent the establishment of any one sect in prejudice to the rest."<sup>8</sup>

One thing Martin and Randolph neglected to mention, or perhaps were unaware of, is that the Framers not only did not prevent religious tests for voters for members of both houses of Congress, but even in some instances actually incorporated such tests. Unintentionally.

### III

Before taking up the matter of the unintentional religious qualifications for voting, it will be well to survey briefly the intentional qualifications the Framers had in mind, namely property holding. Eleven states adopted constitutions during or immediately after the Revolutionary War; the exceptions were Rhode Island and Connecticut, which continued to be governed under their royal charters into the nineteenth century. Of the eleven, nine specified the qualifications for voters in their constitutions. Two of these, North Carolina (1776) and New Hampshire (1784), required only that voters be taxpayers, though neither state levied much in the way of taxes except direct taxes on land, so that the qualification virtually amounted to requiring a freehold. Pennsylvania was unique: to vote for members of its unicameral Assembly, one had to be either a freeholder or a taxpayer. Because Pennsylvania levied and collected a wide variety of taxes, the artisans and mechanics of Philadelphia were normally qualified to vote; but in 1786

the Radical party, then in control of the Assembly, exempted them from taxes and thus disfranchised them. The taxes and voting rights were restored during the Assembly's next session.<sup>9</sup>

Of the other six states that set voter qualifications in their constitutions, most essentially required freehold estates. Massachusetts (1780) required landholdings yielding £3 per year, or any estate of £60. New York (1777), where tenantry was common, required a freehold of £20 or a tenement of 40s. per year; special qualifications were provided for citizens of Albany and New York City. (Voting was *viva voce*, which allowed great landowners to intimidate their tenants, so the effect of the provision was to give the patroons many votes.) Maryland (1776) required 50 acres in the county of one's residence or £30 in the state as a whole. New Jersey (1776) required £50 of any kind of property. Georgia (1777) required a £10 estate or the practice of a mechanic's trade. South Carolina (1778) required a 50-acre freehold or a town lot, or the payment of taxes equivalent to the tax on 50 acres.<sup>10</sup>

The constitutions of Virginia (1776) and Delaware (1776) provided that the right of suffrage should remain as it was established by law "at present." In Virginia that meant a freehold of 100 unsettled acres or 25 acres of improved land. In Delaware it meant 50 acres of land, of which twelve must be cleared and improved, or £40 worth of other property. Delaware, like New York, had *viva voce* voting, and voting was mandatory for the eligible electorate, on penalty of a 40s. fine.<sup>11</sup>

In Connecticut and Rhode Island, property qualifications were established by law and varied considerably from time to time.

As for religious requirements, that contained in the South Carolina constitution of 1778 was the most straightforward. Article XIII of that instrument speci-

fied that a man could vote only if he "acknowledges the being of a God, and believes in a future state of rewards and punishments." That provision was more liberal than the religious qualification for the governor, lieutenant governor, and privy council, who were required to be "of the Protestant religion."<sup>12</sup>

The religious requirements in Rhode Island and Connecticut were more subtle. Rhode Island's 1663 charter declared that the colony was founded to "preserve unto them that libertye, in the true Christian ffaith and worshipping of God, which they have sought with soe much travaill." Electors in the colony were to be "ffreemen." In 1663 the Assembly, acting in accordance with the purpose of the colony's establishment, enacted a statute "refusing admission as freemen to any inhabitants not professing the Christian religion." Nor was the provision softened during the more relaxed religious atmosphere that prevailed in the eighteenth century. In 1761 two Jewish merchants in Newport applied for citizenship—freeman's status—under an act of Parliament, but the Superior Court, after trying in vain to avoid the issue by referring it to the Assembly, rejected the application in 1762.<sup>13</sup>

The situation in Connecticut was similar, though Jews would probably not have been tolerated there at all, as Roman Catholics were not. Connecticut had three tiers of inhabitants. The first was people who were simply living within the borders without legal status. The second was "admitted inhabitants," about whom it has been written that "Strictly speaking, the law did not require admitted inhabitants to be members of a congregation, but practically speaking all who were admitted probably were." But "admitted inhabitants" ranked below freemen, the only people who could vote, who were to be "the trusted pillars of the commonwealth." Inasmuch as attendance in church was mandatory, the ef-

fect of the charter and legislative enactments was to limit the suffrage to Protestant Christians.<sup>14</sup>

Three other states had constitutional provisions which may have amounted to religious qualifications for voting in much the way the Rhode Island and Connecticut charters and laws did, but one cannot be certain. New Hampshire's constitution promised equal "protection of the law" to every denomination of "Christians demeaning themselves quietly." New Jersey's provided that "no Protestant inhabitant of the Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles." Pennsylvania's said almost the same thing: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship." In all three constitutions qualifications for voting were set out separately, but whether those qualifications were in addition to those that provided equal protection in New Hampshire and civil rights in New Jersey and Pennsylvania is uncertain. Clearly, all three protect the rights of worshippers but not of non-worshippers; and all required officeholders to be Christians.<sup>15</sup>

Several other states implicitly required religiosity<sup>9</sup> not as a qualification for voting but as a precondition of any rights of citizenship including the suffrage franchise. Most states, to protect themselves from Tories in their midst, required loyalty oaths of their inhabitants. Some, such as New York, made such an oath a part of the constitution; some, Pennsylvania for instance, required oaths by legislative enactment. The penalties for refusing to take the oaths included banishment and confiscation of one's estate—a fate that befell many thousands, who fled to Nova Scotia or England. One could scarcely vote for representatives in New York or Pennsylvania if one were

residing in exile in Nova Scotia or England.

What this had to do with religion was that oath-taking was and had been for centuries among Anglo-Saxon peoples a fundamentally religious institution. Its premise was that the surest guarantee that people would testify truthfully and perform their duties faithfully was the fear of divine retribution in the hereafter. To readers in a secular age that might seem no guarantee at all. But among eighteenth-century Americans belief in a future state of rewards and punishments was well-nigh universal, reminders of mortality were ubiquitous, and thus oaths were potent instruments, indeed.

In sum, the effect of Article I, Section 2, was in some states to require religious tests as a qualification for voting for members of the House of Representatives. Moreover, the states were at liberty to impose additional and more stringent religious tests. The whole subject was outside the purview of the federal government.

#### IV

The question of the qualifications for electors of United States senators, namely the members of the several state legislatures, is clearer. Property qualifications varied greatly, from none at all in Pennsylvania to merely a freehold in Delaware and Virginia, to £100 estate for the lower house and £200 freehold for the senate in New Hampshire, to £500 for the lower chamber and £1000 for the upper in New Jersey and Maryland, to £2000 for resident senators in South Carolina and £7000 for senators who did not reside in the county from which they were elected.<sup>16</sup>

Religious qualifications were the rule, not the exception. Sometimes these were elaborate and specific. Delaware, for instance, required members of both houses of its legislature to make the following statement: "I, A B, do profess faith in God the Father, and in Jesus Christ His only

Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration." Pennsylvania required members of its unicameral legislature to declare, "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." Sometimes the qualification was phrased negatively, as in North Carolina's provision that "no person who shall deny the being of God, or the truth of the Christian religion, or the divine authority of the Old or New Testament" could be eligible to hold a seat in the legislature. Maryland and Massachusetts required their legislators to be of "the Christian religion"; Georgia, New Hampshire, New Jersey, and South Carolina required that they be of "the Protestant religion." Of the thirteen states, only New York and Virginia imposed no religious qualification whatever for their legislators.<sup>17</sup>

Thus the electors of the members of the United States Senate were white adult males, usually of above average wealth, and with the exceptions of New York and Virginia, self-professed Christians, normally Protestants.

## V

Several sets of constitutional inferences are to be drawn from these observations. The first concerns the related concepts of democracy, representative government, and popular sovereignty. The American Revolution released these as engines of awesome potential for destructive as well as constructive purposes. Some Americans were alarmed at the prospects, particularly after Shays' Rebellion in 1786-1787, and longed to turn back the clock. The Framers of the Constitution, however, sought instead to devise institutional controls for the forces

the Revolution had unleashed, to channel them in ways that would leave them dynamic and yet preserve a stable, free socio-political order. In Madison's famous phrase in *Federalist* 10, they searched for and found "a republican remedy for the diseases most incident to republican government." The remedy was a mixed government: not mixed in the traditional sense of the one, the few, and the many—the crown, the lords, and the commons—for those were not among the institutional materials with which the Founders worked, but in the sense of branches and levels of government, each having an interest in checking and balancing the others.

This perception of what the Founders wrought is not novel; it was spelled out in *The Federalist* and has been commented on by scholars ever since. But a modification is suggested by the data on qualifications for the electorate cited above. Absolutely central to the Founders' system of mixed government was the principle of representation. But whom or what did people in government represent? The conventional answer is that the House represented the people, impersonally, and the Senate represented the states, impersonally. But in light of the qualifications for electors of the two branches and particularly the religious qualifications, a more personal answer seems in order. Some modern scholars have maintained that eighteenth-century Americans were committed neither to a classical-*cum*-Machiavellian republicanism, as the ideological school of interpretation would have it, nor to a Lockean possessive individualism as an older school maintained, but to a deeper form of communitarian Christianity.<sup>18</sup> The hidden religious qualifications for electors of members of Congress lend credence to that deeper commitment.

In any event, it is clear the Founding Fathers did not regard voting as an inherent, natural, and inalienable right.

Another implication has to do with federalism. In *Federalist* 39, answering critics who charged that the Constitution established a consolidated national government instead of a federal government, Madison ingeniously rang the changes on his proposition that the new government was partly national and partly federal. The House, as Madison saw it, was national, the Senate federal; in regard to the operation of its powers, the new government was national because it extended to all persons in the Union, but in regard to the distribution of powers it was partly national and partly federal. Most importantly, the very act of reconstituting the Union was federal, for "assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." In passing it should be observed that Madison abandoned this nuanced position in 1798, arguing in the Virginia Resolutions that the Union was one of sovereign states as such, not of sovereign peoples of states; and in 1819 John Marshall argued that ratification and therefore the creation of the Union was an act of the whole people. Thus the two Virginians set up a false dichotomy which, unlike the original understanding, could lead to nullification, secession, and civil war.

But closer to the point is that, in light of the preexisting institutions that it incorporated, the Constitution was even more a federal arrangement than Madison in *Federalist* 39 read it as being. Inasmuch as the state legislators had the power to define the electorate for House members and directly elected members of the Senate, in an ultimate sense they had Congress almost as much at their mercy as they had had under the Articles of Confederation. There was one crucial difference. Before, it took a huge majority of the states to get anything done, and such near-unanimity was not forthcom-

ing. Now it took a similarly overwhelming agreement among the states to prevent or undo the work of Congress, and such near-unanimity was again not forthcoming.

Yet another implication of the incorporation of existing arrangements into the Constitution was religious. Thomas Jefferson has been widely quoted to the effect that the Constitution contemplates an absolute wall of separation between church and state. Despite his lack of credentials to pronounce judgment in the matter, having had nothing whatever to do with drafting either the Constitution or the First Amendment, his view has come to prevail in Supreme Court decisions. Most conservatives decry that turn of events, but Jefferson's statement must be read in light of an important distinction. Several state constitutions, even when imposing religious qualifications for voting and officeholding, expressly forbade active ministers of the Gospel from holding public office—an apparent paradox. The paradox, however, is only apparent, not real. For the Founders, to mix *church* and state was to invite dissension and disorder; to separate *religion* and state was to invite mortal peril. The difference is useful to bear in mind.

Finally there are the implications pertaining to originalism in interpreting the Constitution. No reasonable argument can be made from the history of the drafting, ratification, and implementation of the Constitution that will justify the claim by jurists that the Constitution is what the judges say it is, or the assertion that the judges are bound only by some mystical aura or spirit that pervades the document. Being guided by the clear intentions of the Framers remains the nearest security for recovering a regime of liberty under law. But in following that polestar, one must not forget that the Constitution contains both more and less than is visible to the naked eye.

1. *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996), xv (note). 2. Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, vol. 8 (New York, 1965), 111. 3. Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, 1937), vol. 2, 121-125. 4. See *ibid.*, vol. 2, 248-249, where Charles Pinckney and John Rutledge of South Carolina sought high property qualifications for all federal officials. 5. *Ibid.*, vol. 2, 151, 153, 164, 165, 240-241. 6. *Ibid.*, vol. 2, 341-342, 468. 7. *Ibid.*, vol. 2, 468, vol. 3, 227. 8. *Ibid.*, vol. 3, 310. 9. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws...*, 7 vols. (Washington, 1909), vol. 4, 2459, 2461, vol. 5, 2790. The episode in Pennsylvania is reported and documented in Forrest McDonald, *We The People: The Economic Origins of the Constitution* (Chicago, 1958), 170. 10. Thorpe, vol. 3, 1898, vol. 5, 2630, vol. 3, 1691, vol. 5, 2595, vol. 2, 779, vol. 6, 3252. 11. *Ibid.*, vol. 7, 3816, vol. 1, 563; Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (Princeton, 1960), 13; Robert E. and B. Katherine Brown, *Virginia, 1705-1786: Democracy or Aristocracy?* (East Lansing, 1964), 132-133. 12. Thorpe, vol. 6, 3251, 3249. The constitution's Article XXXVIII provided toleration

for all who believed in God and a future state of rewards and punishments and declared that God is to be worshipped publicly. It also indicated that the Christian Protestant religion was the established religion of the state. 13. Thorpe, vol. 6, 3212, 3214; David S. Lovejoy, *Rhode Island Politics and the American Revolution, 1760-1776* (Providence, 1958), 76. 14. Oscar Zeichner, *Connecticut's Years of Controversy, 1750-1776* (Chapel Hill, 1949), 241, n. 20; Richard L. Bushman, *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765* (New York, 1967), 166, 221-232. 15. Thorpe, vol. 4, 2454, vol. 5, 2597, vol. 5, 3082. 16. *Ibid.*, vol. 5, 3084-3085, vol. 1, 562, vol. 7, 3816, vol. 4, 2460-2461, vol. 5, 2595, vol. 3, 1691, 1694, vol. 6, 3251. 17. *Ibid.*, vol. 1, 566, vol. 5, 3085, 2799, vol. 3, 1690, 1908, vol. 2, 779, vol. 4, 2460, 2461-2462, vol. 5, 2797-2798, vol. 6, 3250. 18. On communitarian Christianity, see Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton, 1994). On the broader subject of the religious roots of American political institutions, see M. Stanton Evans, *The Theme is Freedom: Religion, Politics, and the American Tradition* (Washington, 1994).

## Candle's Light

*The sun-god, Helios, weeps in the sky  
As sad September ends the golden days  
Of summer. Gleaners gather. Reapers scythe.  
Birds flock as sheep on tawny hillsides graze.  
The amber leaves glow like a candle's light  
That blushes rose before the evening yields  
To darkness and the deepening of night.  
As glistening pumpkins flicker in the fields,  
A twilight gleams. The embers of the year,  
Raked by Hephaestus, God of Fire, flame.  
Red orchards blaze like torches. Harvest sears.  
The vine's god, Dionysus, flushes, games  
Til frosts fall like white mists upon the leaves,  
Extinguishing their glory, and the sheaves.*

Mary E. Slayton