

## Introduction

Our nation's Founding Fathers supposedly included Washington, Franklin, Jefferson, Hamilton, Madison and Adams, not to overlook the initial role of Paine in helping to encourage the American Revolution. A second tier of leaders included such eminent figures as George Mason, Richard Henry Lee, Edmund Randolph, and Patrick Henry of Virginia; James Wilson, Robert Morris, and Gouverneur Morris of Pennsylvania; John Jay of New York; John Dickinson of Delaware; William Paterson of New Jersey; John Rutledge of South Carolina; Samuel Adams of Massachusetts; and Roger Sherman of Connecticut.

Also from Connecticut but too often ignored was Oliver Ellsworth, whose depiction as an austere figure addicted to snuff gave him a comic aspect occasionally featured by historic accounts to offset the stern intentions of everybody else. Yet Ellsworth's role was at least as important, if not more so.

Today Ellsworth's official biography seems relatively devoid of interest in most of the appropriate encyclopedias. They list his having served in the Continental Congress, having been a judge both for the Continental Congress and on Connecticut's state superior court, having participated in the Constitutional Convention until his unexplained departure three weeks before it was signed, having served in the Senate during Washington's presidency, and having been the third chief justice of the Supreme Court without having provided any major decisions.

He is also now and again remembered for having authored the popular Letters to a Landholder supportive of the Constitution, for having dominated proceedings in Connecticut's ratifying convention, and for having led a failed diplomatic mission to France in order to avoid naval warfare against Napoleon. Unfortunately, it can be added that Ellsworth's journey to and from France was beset with heavy seas, and Ellsworth contracted an illness that obliged his withdrawal from public life. He died in 1806 at the age of sixty-two. This summary of his career is indeed accurate, but it falls short of telling the full story—a remarkable story that is almost entirely unknown today.

Listed here are nine reasons how and why Ellsworth played an essential role—

perhaps the most essential role of all—in the creation of the United States.

### **Naming the Nation To Be**

*First*, and probably least important, it was Ellsworth who gave our nation the name of The United States. Preceding the Constitutional Convention, Paine, Jefferson, and others all spoke of the united states in generic terms such as “the unified states” or “the group of states.” At the Convention, delegates from the large states kept talking of the “nation,” but as a small-state delegate Ellsworth preferred the earlier description as a unified group rather than a single unit necessarily dominated by the large states. So why not describe the group as before, Ellsworth seems to have suggested, but with the article *the* imbedded in the name and with use of capital letters—“the United States”? On June 20, 1787, Ellsworth proposed this change in his very first recorded contribution at the Convention beyond having seconded a couple of motions by Sherman, his fellow Connecticut delegate.

Support for this official name turned out to be unanimous among fellow delegates. Later, while authoring the final draft of the Constitution, Gouverneur Morris added the words, “of America,” to produce the full wording accepted today, The United States of America. What seems remarkable about

Ellsworth's contribution is that having provided the United States with its name he was as effective as anybody in having created a system of government suitable to its fullest implications.

### **The Connecticut Compromise**

*Second*, Sherman, Johnson, and Ellsworth successfully promoted the so-called Connecticut Compromise that broke the deadlock between the large and small states about representation in Congress. The large states wanted proportional representation that would guarantee them a majority of legislators as compared to the small states. On the other hand, the small states wanted equal representation that gave them just as many representatives—two apiece—as the large states. The trade-off they finally made was a bicameral arrangement whereby the House of Representatives exercised proportional representation while the Senate exercised equal representation.

Ellsworth himself proposed the plan finally accepted whereby members of the House of Representatives would be elected by popular vote and members of the Senate would be elected by state legislatures. The interests of a state's populace would presumably be emphasized in the House of Representatives, while the interests of its political leadership would be emphasized

in the Senate. Much later the Seventeenth Amendment rejected this arrangement in favor of using the popular vote for both the Senate and House of Representatives. Far more important, however, was the fact that the Constitutional Convention was on the brink of dissolving, and the Connecticut Compromise based on Ellsworth's proposal was acceptable to a majority of delegates and thus kept the Convention alive. Without this compromise the Convention would have failed.

### **Slavery in the Beginning**

*Third*, crucial to the success of the Connecticut Compromise was a less publicized compromise between the small northern states and the three states from the deep south—Georgia and the two Carolinas—which were prepared to abandon the Convention if slavery was not written into the Constitution. As a result, a trade-off was essential between the small northern states' toleration of slavery in the Constitution and, more specifically, their support of a three-fifths-population count for slaves in southern states in exchange for the southern states' support of the Connecticut Compromise. Without this secondary trade-off, the Connecticut Compromise was not possible and the Convention was effectively doomed.

It turned out that Georgia's delegates voted against the Connecticut Compromise anyway, but this did not matter, since the two Carolinas provided just enough votes for the needed majority. All delegates from the small northern states cooperated with this tacit arrangement, but it was Ellsworth alone who actually accepted the distasteful obligation to stand before the Convention on August 17 and 22, the latter on his final day at the Convention, to remind fellow delegates of the need to write slavery into the Constitution. His words featured the importance of states rights, as explained by Madison: "Let every state import as it pleases. The morality or wisdom of slavery are considerations belonging to the states themselves."

Ellsworth had no slaves of his own, but he actively promoted the compromise because it was crucial in the creation of the United States.

### **Committee of Detail**

*Fourth*, because of his active role at the Convention, Ellsworth was elected to the Committee of Detail (described by Madison as the Committee of Five) with four other Convention delegates: John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, and Nathaniel Gorham of Massachusetts. Their

task on this Committee was to combine in a single preliminary draft of the Constitution the twenty-two resolutions that had been gathered from the Virginia Plan, the New Jersey Plan, the Pinckney Plan, and various other proposals along with amendments passed on the convention floor.

The rest of the Convention took a vacation from July 26 to August 6 while these five delegates spent ten days in confronting this solemn task. Later during the Convention they kept meeting with each other to incorporate new amendments into their basic draft of the Constitution. The only record of proceedings by the Committee of Detail during the initial ten-day period additional to the Constitution itself were the written rough drafts by Rutledge, Randolph and Wilson. However, it is important to note that these drafts alone are not a particularly useful indication of what individuals dominated proceedings, since the three identified as their authors might have done little more than serve as amanuenses for the others as they argued the words and ideas under consideration.

More indicative of the level of input by participants during the Committee of Detail's sessions would have been their contributions to debate during the Convention afterwards to clarify their intentions while compiling the document. Ellsworth turns out to

have been the most outspoken during his seventeen days of attendance preceding his sudden departure from the Convention after August 24.

Having been silent for as many as three weeks after his arrival at the Convention, Ellsworth was reported by Madison to have made 53 contributions during his attendance after the Convention reconvened as compared to 49 contributions by Wilson, 30 by Randolph, 25 by Rutledge, and 20 by Gorham during the same period of days. In fact, Ellsworth spoke up more than anybody else on the floor except for Madison (55) and Gouverneur Morris (59). It is to be conceded that Ellsworth's contributions were usually brief as recorded by Madison, but he was obviously trying to clarify the Committee of Detail's intentions rather than proposing anything new that required greater elaboration.

In effect the brevity of Ellsworth's remarks very likely suggests he had assumed the role on the floor of the Convention in explaining the implications of the choices made by the Committee of Detail, further suggesting that he himself played a major role in obtaining these results. Gorham's contribution would seem to have been relatively modest, and Randolph's later refusal to sign the Constitution because he suspected skullduggery was involved

would suggest his alienation from others on the committee—as might well have been justified in light of Wilson, Rutledge, and Ellsworth’s later contributions to debate. What can be seen in retrospect as having been a coordinated effort among these three delegates both during the Committee of Detail and during Convention afterwards would therefore be suggested, if not totally confirmed, by Madison’s *Notes* published in 1840, four years after his death.

### **Federal Sovereignty Postponed**

*Fifth*, and perhaps most important, Ellsworth along with Rutledge and Wilson effectively postponed giving the federal government its sovereign authority over the rights of all the state governments. If they had written this authority into the Constitution, it would have been rejected at the Convention, to say nothing of the state ratifying conventions. Under the Articles of Confederation, our nation’s central government had lacked this authority, and during the Convention most of the delegates made it plain they were still unwilling to concede it. Ellsworth himself was actually quoted by Madison as having declared as late as August 20, “The U.S. are sovereign on one side of the line dividing the jurisdictions—the States on the other—each ought to have power to defend their respective sovereignties.”

However, an enforceable priority favorable to federal authority was obviously needed between state and federal government, and the review of state laws by Congress was no longer possible. Four times Madison had submitted an amendment on the floor of the Convention giving the national legislature the right of congressional review in revoking state laws found to be unconstitutional. When Madison first proposed his amendment it was quickly accepted with a unanimous vote, but it was later reconsidered and defeated three times in a row, the last time—after intensive politicking on the floor—by a single vote that made it obvious that the sides were deadlocked and nothing better was obtainable.

The possibility of substituting judicial review for congressional review had been mentioned among a few of the delegates off the floor of the Convention, but this was a brand new concept relevant to the issue of national sovereignty, and Ellsworth and the rest on the Committee of Detail seems to have excluded it from consideration during their meetings. Their reasoning was justified by the fact that it had not been mentioned in any of the resolutions submitted for inclusion in the Constitution. The question remains whether this omission might also have been considered useful in helping to

postpone the implementation of judicial review until a later time.

The stance of Wilson, Rutledge, and Ellsworth relevant to the possibility of judicial review seems to have become much more supportive by August 23, toward the end of the Convention. When it was proposed that one further attempt be made to add the congressional review of state laws to the Constitution, Madison resisted the suggestion, saying, "He had been from the beginning a friend to the principle; but thought the modification might be made better."

In retrospect it seems more than likely that Madison used this particular word "modification" to refer to judicial review, since this was in fact the only feasible alternative to congressional review that was finally implemented. After two other delegates expressed their opposition to another vote upon congressional review, Wilson could not help himself and took the floor to insist on the need to impose federal authority in the judgment of state laws: "that the firmness of justices is not of itself sufficient. Something further is requisite." Obviously, in light of his later efforts, he was suggesting an arrangement whereby state judicial decisions, regardless of the "firmness" of state justices in their loyalty

to the Constitution, could be examined and reversed at a higher level.

Rutledge and Ellsworth immediately challenged Wilson's proposal, as they already had on August 15 regarding the judicial review of federal law passed by Congress. Here, it seems, they wanted every aspect of the issue to be kept out of deliberations in order to avoid the rejection of judicial review comparable to the rejection of congressional review. Rutledge's words were plain enough: "If nothing else, this alone would damn and ought to damn the Constitution. Will any state ever agree to be bound hand & foot in this manner?"

Ellsworth immediately followed with his next-to-last speech before his departure from the Convention, in which he limited his discussion to legislative and executive review with no suggestion of the possibility of judicial review. In retrospect, it seems more than likely that both Rutledge and Ellsworth fully agreed with Wilson's insistence on the need for federal review, if possible through the use of the judiciary, but that they were convinced the issue was best postponed until after the Constitution had been ratified. Rutledge was meanwhile doing everything needed to revise the Constitution for the later imposition of judicial review, and it was Ellsworth who finally authored the Judiciary Act to impose judicial review.

Among the several amendments that turned out to be useful toward the later implementation of judicial review, Rutledge's June 5 motion against permanent inferior federal courts necessitated giving federal status to state courts for this purpose, and his August 23 amendment requiring all state judges to declare their oath of allegiance to the Constitution made possible an appeals system whereby state laws could be reviewed by federal judges.

Also useful was the so-called "supremacy clause" suggested by the New Jersey Plan to establish the Constitution plus all treaties and federal laws as the supreme law of the land for all judges in every state. Luther Martin later promoted this clause in order to guarantee the independent sovereignty of state constitutions, and on August 23 Rutledge proposed it again with its full wording. As such the Committee of Detail later wrote it into Article VI of the Constitution. It clearly established the priority of the federal Constitution over all state constitutions and state laws, but without clarifying how this authority could be exercised.

The crucial expedient to make possible a postponement of the adoption of judicial review was provided by the "assignment clause" first mentioned in Article 9 of the Virginia Plan. The clause was later imbedded

in Article III, Section 2 of the Constitution: “with such Exceptions, and under such Regulations as the Congress shall make.” This gave Congress sufficient latitude at a later time both to grant state courts their authority subsidiary to the federal Supreme Court and finally, and just as important, to grant the federal Supreme Court its power of veto over state supreme court decisions. As Wilson, Rutledge, and Ellsworth must have realized from the beginning, any law to establish the appropriate hierarchy among these courts would necessarily include the procedures relevant to the operation of this hierarchy, and herein the principle of judicial review could be implemented if not exactly declared.

Interestingly, both Ellsworth and Wilson seemed sufficiently confident of support for the Constitution at their respective state ratifying conventions just a few months after the Convention to have taken the opportunity to speak favorably of the possibility of using judicial review in defense of federal sovereignty.

Here, then, was palpable evidence of exactly the “takeover” conspiracy that Randolph, Martin, and others sought to prevent. Wilson declared, “If a law should be made inconsistent with those powers bestowed by this instrument [the Constitution] in Congress, the judges,

as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates.” Similarly, Ellsworth declared, “If the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so.” It was as simple as that—but something that could not have been mentioned at the Constitutional Convention itself.

### **Senate Majority Leader**

*Sixth*, having been elected to the very first session of the U.S. Senate, Ellsworth quickly assumed the role of its de facto Senate Majority leader, and indignant reports of fellow senators such as Maclay and Burr made it plain that Ellsworth’s leadership verged on legislative tyranny. Not surprisingly, his first and most important task (“Senate Bill Number 1” of the first session of the U.S. Senate) was to write the Judiciary Act and obtain its passage as mandated by the Constitution’s assignment clause.

Some senators vigorously opposed the bill, Maclay, for example, having described as “a vile law system, calculated for expense and with a design to draw by degree all

law business into the Federal courts.” Other senators were more cooperative with Ellsworth, most notably Paterson, his college friend and fellow delegate at the Convention, but the overwhelming consensus among everybody involved, including Madison, who was serving in the House of Representatives, was that Ellsworth was the single dominant author of the Act.

What Ellsworth achieved almost entirely on his own was of crucial importance to the functional success of our nation:

- He established a functional vertical hierarchy of federal and state courts,
- He confirmed the authority of the Supreme Court at the very top, and
- He installed all state courts, no matter how small, within the system below. Without exception these courts retained their status and authority at their respective levels, and their decisions relevant to the Constitution were subject to appeal to the state supreme courts, and then, if challenged, to the nation’s Supreme Court itself.

The most important component of the Act was Section 25, which included exactly two sentences—a short one introduced by

somebody else that had little impact followed by a gargantuan 307-word sentence that could only have been composed by Ellsworth himself to obscure the law in the very act of putting it into effect:

[Be it enacted,] That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be reexamined, and reversed or affirmed by the Supreme Court of the United

States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

Truly, the sentence speaks for itself. Its original draft seems to have been in the handwriting of a clerk, but its principal author—very likely its only author—was undoubtedly Ellsworth, as confirmed by its intentional complexity. Section 25 established the unique principle that any state law decided by a state supreme court could then be appealed to the federal Supreme Court if and only if the state supreme court has rendered a positive judgment.

Significantly, if a state supreme court rejected a law or lower court decision, its judgment could not be appealed to the federal Supreme Court. Only when a state supreme court arrived at a favorable decision that was appealed to the Supreme Court could the latter reverse this decision. This seemingly limited use of judicial review entailed what might have seemed a major compromise at the time. It imposed federal sovereignty, and at the same time it conceded states' rights on a limited basis. It assigns to state courts alone the power to originate legal action ultimately decided by the federal Supreme Court, and it gives state supreme courts first opportunity to negate a law that might otherwise be appealed for adjudication at a higher level.

In other words all of the state courts' negative decisions stand as decided without any opportunity for higher appeal. Only positive decisions can be negated. The arrangement seemed to enlarge the authority of state courts as compared to federal courts, though the federal advantage later became plain as legal precedents accumulated over future years.

More inclusively, Section 25 provided exactly the enabling feature for federal sovereignty that had been missing from both the Articles of Confederation and the Constitution itself. As was the case with

judicial review, federal authority as a whole was accordingly limited in the beginning, but it has steadily mounted from the cumulative impact of its multitude of interactive decisions over the twenty-two decades that have followed. Exactly who conceived of this arrangement? With no other candidates to be suggested, one must assume Ellsworth played a singular role in imposing this compromise, and probably without any clear idea how it would advance upon itself.

It is also important to recognize that Ellsworth's sentence afforded the federal government its sovereignty over state governments in all matters of law relevant to the Constitution. As such it is arguably the single most important feature of the Constitution—except of course that it is paradoxically nowhere to be found in this document. Instead, its guarantee of federal sovereignty was relegated to a barely decipherable segment of verbiage that was hardly mentioned in debate upon the passage of the Judiciary Act in either the Senate or House of Representatives. It was almost as if its neglect was the product of avoidance as a shared goal among everybody involved. Nobody seemed to mind that Section 25 entailed obvious tautology, since it secured the final authority of the Constitution, while the Constitution guaranteed the rule of federal law as spelled out by Section 25.

Niggling issues such as this could be ignored once the task had been completed—a constitution defended by a mere federal law that everybody depended on but nobody quite understood.

It accordingly seems probable that Section 25 was written to be overlooked, and, if and when it was specifically examined, it was sufficiently confusing to be ignored. It was buried in the text, positioned twenty-fifth in sequence among the sections, and its most cursory inspection discloses almost breathtaking stylistic demands compared to the Constitution's lucid prose style in its final draft by Gouverneur Morris.

Ellsworth himself was able to write with clarity as exemplified in his Landholder series, and it cannot be ignored that he had participated in the early authorship of the Constitution. Even the rest of the Judiciary Act is relatively lucid. However, in having authored the second sentence of Section 25 in its entirety, Ellsworth obtained exactly the needed results, as seems to have been his intention. For in fact the Judiciary Act involved controversial issues that were still potentially disastrous to the establishment of the federal government two years after the Constitutional Convention. Not only did it impose a vertical hierarchy giving a crucial role to state courts, but it also went one step further in Section

25 by using this hierarchy to impose a compromise that guaranteed effective federal sovereignty despite the concerns of a formidable minority of anti-nationalist Americans. What might be described as judicious obscurity was therefore in order, and with such effectiveness that even today there are scholars who mistakenly ascribe the achievement of judicial review to Chief Justice Marshall's 1803 *Marbury v. Madison* decision rather than the Judiciary Act.

### **Simultaneous Successes**

*Seventh*, Madison obtained passage of the Bill of Rights in the House of Representatives at about the same time as Ellsworth obtained passage of the Judiciary Act in the Senate. Then the two of them switched roles. Ellsworth sponsored Madison's Bill of Rights in the Senate at the same time as Madison sponsored Ellsworth's Judiciary Act in the House of Representatives. It seems more than likely that this presumably coincidental occurrence was coordinated, for in fact the two acts complemented each other. The Judiciary Act established federal authority to reject state laws at odds with federal laws, and the Bill of Rights specified individual freedoms as well as state and local decisions that could not be infringed on by federal authority vested in the Supreme Court. Each of these Acts both limited and helped to define the other.

## Senate Leadership

*Eighth*, Ellsworth's dominant role in the Senate was essential to the success of Washington's two terms in office. As the nation's vice president for eight years, John Adams was the presiding officer of the Senate, and in his opinion based on having observed Ellsworth's performance in the Senate, he was "the firmest pillar of Washington's administration."

Among Ellsworth's accomplishments, he obtained the passage of Hamilton's complete economic program for funding the national debt, assuming state debts, and establishing a United States bank. The only modifications were limited to the minor suggestions by Ellsworth himself. He also initiated the strategy of sending the Jay mission to England in order to avert war. It was a novel idea that had not occurred to Washington.

All in all, Ellsworth's dominance in the Senate guaranteed its full support of Washington's policies despite increasing factionalism elsewhere in the government. So it was probably the biggest mistake in Ellsworth's career to become Chief Justice of the Supreme Court. Without his presence, the Senate could no longer anchor Federalist policy, and as much as anything this weakness may be recognized as having

contributed to the limited success of the Adams presidency. In the words of Adams to his wife Abigail on March 5, 1796, “Yesterday Mr. Ellsworth’s Nomination was consented to as Chief Justice, by which we loose [sic] the clearest head and most diligent hand we had.”

### **Napoleon’s Gift**

*And ninth*, Ellsworth’s contribution as the third Chief Justice of the Supreme Court turned out to be relatively inconsequential, overshadowed by that of his successor, John Marshall. It might accordingly seem to have been a blessing that Ellsworth was chosen to lead a delegation to France in 1800 in order to negotiate a treaty (or “convention”) with Napoleon, thereby ending undeclared naval hostilities between France and the United States. Just as the Jay mission had patched up relations with England, Ellsworth’s mission was intended to obtain similar results with France.

Ellsworth and Napoleon seem to have been impressed with each other, Napoleon having said when he first saw Ellsworth, “We must make a treaty with this man.” Napoleon was reported to have become even more impressed with Ellsworth’s fellow envoy, William Davie, but whatever the relationship, the final treaty seemed to give Napoleon everything he wanted with

few concessions to American interests. American public response was furious, compounding its anger about Adams' use of the Alien and Sedition Act. As a result the Federalists were readily defeated in the 1800 election. In bad health because of his voyage to France, Ellsworth retired from national politics at the same time as the Federalist Party was driven from politics, and he ceased to play a major role in our nation's history.

Why, then, can this particular episode with Napoleon be included among Ellsworth's major contributions to the creation of our nation? Just three years later, Napoleon was confronted with a variety of major decisions, and despite mounting antagonism with Jefferson's administration, he all of a sudden made a spontaneous gift of the Louisiana Purchase to the United States. The cost of \$15 million he charged was very little compared to the value of the territory even at that time. The United States actually doubled in size, and the total expenditure amounted to approximately four cents per acre.

Of course there is no way of proving this, but the possibility seems more than likely that Napoleon had in mind Ellsworth, Davie, and the rest of the U.S. mission when he made this gift. They had bestowed on him a generous treaty, and he in turn just might have reciprocated with an enormous transfer

of land to the United States. Napoleon's personal gifts to Ellsworth at the Ellsworth Homestead in Windsor, Connecticut, are modest but tasteful, suggesting at least the possibility of mutual respect that just might have doubled our nation's total size at the time.

Having provided the United States with its name, Ellsworth was as successful as anybody in having unified the nation's system of government suitable to its name.

### **Why Has Ellsworth's Role Been Forgotten?**

First and foremost, Ellsworth tended to be aloof in his relations with others. His hostile fellow Senator McClain described him as being obstinate, conceited, and, worst of all, uncandid—in fact just about the most dishonest man he had ever met. He was constantly parlaying in back halls additional to his speeches before the Senate. Ellsworth also seemed almost a caricature of himself much of the time—tall, stiff, arrogant, and addicted to snuff, traces of which could usually be seen on his clothing.

As Adams explained with a backhanded compliment in the letter to his wife already quoted,

Though Ellsworth has the Stiffness of Connecticut: though His Air and Gilt are not elegant: though he cannot

enter a Room nor retire from it with the Ease and Grace of a Courtier: Yet his Understanding is as sound, his Information as good and his heart as steady as any Man can boast.

Ellsworth's problem was that many of his contemporaries had comparable understanding without a similar deficiency in the graces. Ellsworth could effectively carry a debate, sometimes with extraordinary aggressiveness, and he could just as effectively collaborate with fellow delegates at the Convention and with fellow Senators in Congress. However, his personal relations with others seem to have been standoffish unless he was negotiating political choices at the time.

There is little evidence of Ellsworth having had close friendships with fellow public servants beyond his college companion Paterson and his mentor Sherman. At times he worked closely with such figures as Wilson, Rutledge, and Madison, yet Madison was quoted as having said toward the end of his life that despite his high respect for Ellsworth there had never been any exchange of letters.

In 1789 Washington traveled into New England and actually visited Ellsworth's home in Windsor, Connecticut, but he only spent "near an hour" with him and

his family and then traveled on to spend the night elsewhere. The most memorable aspect of Washington's visit was his having supposedly dandled Ellsworth's twin sons Billy and Harry on his knees while singing the "Ballad of Derby Ram." In retrospect, this short a visit was both an honor and insult after the cooperative relationship between the two both during and after the Constitutional Convention.

Secondly, there is little record of Ellsworth's speeches and publications except for the Landholder series. Madison made an effort to summarize his remarks on the floor of the Convention preceding the Committee of Detail, but he increasingly tallied Ellsworth's contributions rather than spelling them out. Likewise, there was no record whatsoever for the crucial ten days Ellsworth spent with the Committee of Detail, nor was there adequate record of Ellsworth's speeches and motions during the eight years he spent in the Senate.

Moreover, because the Senate provided Washington with automatic support, modern historians focus on the story of his two terms in office relevant to what was happening elsewhere in his administration, most notably the House of Representatives. Nor does there seem to have been any record of Ellsworth's negotiations with the French in 1800. He seems to have thrived during

private consultation free of public scrutiny, but as a result his historic contribution is more difficult to ascertain in retrospect. We are left with little more than a sampling of his prose except for the transcript of his defense of the Constitution at the Connecticut Ratifying Convention, his energetic 1787 Letters to a Landholder, written in defense of the Constitution, and his tortuous exercise in obscurity in Section 25 of the Judiciary Act. In sum, Ellsworth's contribution was insufficiently documented compared to that of his more prominent contemporaries.

As a third explanation, neither the American public nor its historians enjoy the thought that conspiracy and opportunistic trade-offs might have played a major role at the very inception of our nation. Ellsworth's historic contribution unfortunately featured more than one such transgressions, most obviously in promoting slavery in order to implement the Connecticut Compromise and then in excluding judicial review from the Constitution so it might be added once the Constitution was fully ratified. Nor is it comfortable for orthodox American historians to recognize that the enabling act that secured federal sovereignty was nothing more than a law slipped into passage with almost no debate whatsoever.

What later generations wanted to emphasize about the origins of our nation

were the clean and principled achievements of such figures as Washington, Franklin, and Jefferson, not the often disingenuous interplay among Ellsworth, Wilson, Rutledge, and even Madison, all of whom were more directly involved in the formation of our nation's constitutional government.

The fourth and perhaps most important explanation is that Ellsworth became a favorite of antebellum Southern statesmen such as Clay and Calhoun because of his defense of slavery at the Constitutional Convention as well as his restricted application of judicial review that limited the origin of constitutional issues to state courts and with only the positive rulings of state supreme courts subject to repeal by the Supreme Court. At first this might have seemed a minor concession to the small states, but it was later considered essential among states rights proponents.

Before the twenty-ninth Congress, Calhoun actually praised Ellsworth along with Sherman and Paterson for having created the United States as a federal instead of a national government: "But to the coolness and sagacity of these three men, aided by others not so prominent, do we owe our present constitution" (Brown, 165). Unfortunately, Calhoun spoke as a southern leader, and among the slave states Ellsworth's judicial compromise

was considered useful to the extent that it encouraged the toleration of slavery without federal intervention. If, for example, state supreme courts avoided making positive decisions relevant to slavery, nothing could be appealed to the Supreme Court. Significantly, the Constitution drafted by the southern states during the Civil War duplicated the original Constitution except in having increased both its defense of states rights and the legalization of slavery, two of the issues that could be rightly or wrongly identified with Ellsworth's intentions.

And fifth, Ellsworth's judicial priorities ceased to be considered important after the Civil War. With the victory of the union armies, the North imposed the Fourteenth Amendment, requiring all state and local laws to abide by the Bill of Rights as finally interpreted by the Supreme Court. As a result, the initial effort of Ellsworth, Madison, and others to secure a viable balance between states' rights and federal authority ceased to have much relevance to our nation's future. Initially, the Bill of Rights (Madison's contribution) had been intended to protect state and local authority as well as individual rights against federal intrusion such as might have occurred through the Supreme Court's application of judicial review (Ellsworth's contribution).

However, the Fourteenth Amendment inverted this arrangement supportive of state and local independence by permitting the Supreme Court's use of judicial review to enforce the Bill of Rights at every level of government. At first interactive on a complementary basis, judicial review and the Bill of Rights were accordingly integrated on an entirely new basis once judicial review could be used to guarantee the Bill of Rights against state and local government as well as the federal government.

Of course vestigial traces of federalism are everywhere to be observed even today, but with the passage of the Fourteenth Amendment the primary concern shifted from interstate relations to an emphasis on individual and corporate rights as protected by the authority of the Supreme Court. This expanded defense of individual freedom brought to the fore such issues as the pursuit of civil rights, but it also enlarged the possibilities for corporations on presumably the same basis because of their supposed "personhood." The expansion of their operations on a national scale as interpreted by the Supreme Court permitted heavy industrialization and a centralization of banking to an extent not even Hamilton might have anticipated. Railroads, factories, and Wall Street speculation became important to our nation's destiny, as did enlarged immigration, rapid urbanization, labor unions, the later export of factories

abroad, and inevitably the relentless growth of the federal government to deal with all the problems both directly and indirectly involved—wars, depressions, and the like. Needless to say, none of this had been fully anticipated at the time of the Constitutional Convention.

It might be said in retrospect that Ellsworth performed a kind of jujitsu in having exerted the right pressure exactly when and where needed to keep the Constitutional Convention alive, then in having drafted an effective Constitution, that could later be given its teeth, and finally in having probably doubled the size of our nation, not that this was his intention at the time. Then again Ellsworth might be said to have served our nation in the capacity of a midwife whose delivery skills could later be ignored by future mainstream historians insistent on an uplifting narrative of national achievement. Infant America was what primarily mattered, not the intricate procedures brought into play by those who delivered it. As a result, Ellsworth's pivotal contribution turned out to be what might be described as a useful embarrassment best overlooked in favor of the visible and more inspiring contribution of his illustrious contemporaries.

Nevertheless, Ellsworth's ingenuity was essential to the cause. When the Constitutional Convention took place, our

forefathers were entangled in a seemingly inextricable conflict of interests among quarrelsome ex-colonies. However, their efforts led to a single powerful state—the most powerful in the world by the mid-twentieth century. Whatever his intentions, and to whatever extent he was able to fulfill them, Ellsworth played a central role in having made this happen. His success was in having established a functional unity among these states preceding their full unification obtained by the Civil War. To the extent that this political achievement depended on effective manipulation, it was Ellsworth as much as anybody who performed this necessary task.