

Court, and someone who was successful in achieving it. What Schwartz ends up describing, however, is a weak, ineffectual Chief Justice, unable to give effect to his own ideological views and, for the most part, unable to ride herd on his Court. As a result, the sharp turn to the right from Warren Era liberalism, which both President Nixon and Burger himself envisioned, never materialized. In many areas the Burger Court kept Warren policies alive through sheer inertia, while in others the Court actually moved further to the left. The turns to the right were haphazard, unpredictable, and reflected no consistent ideology. This was not an ascent of pragmatism; it was a collapse of leadership. "I don't think that the Burger Court has as wide a sense of mission," Schwartz quotes then Associate Justice Rehnquist as saying, in comparing the Burger and Warren Courts. "Perhaps it doesn't have any sense of mission at all." Schwartz concludes that *Roe v. Wade* was the "paradigmatic" Burger Court decision—because it reveals a thrashing group, with even those in agreement as to outcome unable to form a consensus on the reasoning.

**CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787.** By Calvin C. Jillson.<sup>1</sup> New York: Agathon Press. 1988. Pp. xiv, 242. Hardcover, \$30.00; Paperback, \$15.00.

*Richard S. Kay*<sup>2</sup>

In this book Professor Calvin Jillson, a political scientist, has sought to cast new light on the much-studied process of decision-making at the Philadelphia Convention of 1787. It is an interesting attempt to apply modern techniques of quantitative social science research to the archival evidence of the Convention's proceedings. While this is an admirable and promising enterprise, in the end the illumination shed by the data examined proves disappointingly limited.

In one sense, Professor Jillson is attempting to complicate what he takes to be oversimplified explanations in the existing literature. He reads previous analysts as falling into two categories, each concentrating on a limited and partial approach to the Convention. One group (Charles Beard and Forrest McDonald are exemplary)

---

1. Associate Professor, Department of Political Science, University of Colorado, Boulder.

2. Professor of Law, University of Connecticut.

saw the differences in Philadelphia largely as a clash of material—social and economic—interests. Another, somewhat later, group (here Louis Hartz and Bernard Bailyn are typical) were more impressed with the convention's divisions on ideological and theoretical lines. Jillson, on the other hand, posits an understanding of the deliberations in which both interest- and principle-based differences were important.

In a second sense, however, Professor Jillson seeks to simplify and organize our views of the convention. “[T]he activities of the Convention,” he tells us, “were by no means as fluid and unstructured as past interpretations have indicated.” Conflicts based on principle and those based on interests more or less took turns in controlling the course of decision.

More specifically, Jillson divides the four and one-half months of the convention into five discrete periods. In two of these periods the issues were dominated by “higher level questions.” These questions were concerned in a general way with “the scope, scale and form appropriate to government.” In deciding such issues, Jillson claims, the state delegations divided into two coalitions reflecting the political subcultures of different regions of the country. There was first what he calls a “peripheral coalition” of the states of New England and the South. In each of these regions either “moralistic” or “libertarian” republican attitudes resulted in a preference for limited and localized governmental power. Against this alliance, he finds, ranged a second coalition of Middle Atlantic states where “nationalist” republicanism manifested itself in a preference for stronger and more dynamic government.

In the remaining three periods, on the other hand, Professor Jillson asserts that these alignments, premised on large principles of government, gave way to voting patterns reflecting more concrete interests. The groupings of states described were somewhat different in each period and depended on the questions under discussion.

To begin with, there is some doubt whether Jillson is correct in maintaining that prior treatments have consistently emphasized ideology at the expense of interest or vice versa. Christopher and James Collier, in their enlightening and highly readable recent account of the Convention, explicitly acknowledge the importance of both kinds of influence.<sup>3</sup> And Forrest McDonald, whose earlier work is cited by Jillson as an example of the interest-based, economic interpretation of the convention, felt it necessary to complete his analysis with a volume focusing on the “intellectual

---

3. Christopher Collier and James Lincoln Collier, *Decision in Philadelphia: The Constitutional Convention of 1787* xi-xii (Random House, 1986) (“*Decision in Philadelphia*”).

dimension.”<sup>4</sup>

It is apparent, in any event, that the sharp distinction drawn between these two classes of issues is, at best, problematic. Jillson defines “higher level” issues as those relating to “regime type and . . . the basic options for institutional design.” The “lower level” issues are those concerning the “rules that will regulate and order behavior within the regime’s primary institutions.” The former questions were decided based on broad political philosophies—largely because the participants were less able to forecast on which side of the controversy their more immediate interests lay.

Such a distinction makes intuitive sense but appears to break down as soon as an attempt is made to relate it to the particular questions at issue in the convention. Thus we can understand that the apportionment of representatives in the national legislature might be thought directly to engage material interests. Therefore, it would likely have been fought out on the “lower level.” But then why wasn’t the method of selection of the executive, which Jillson finds was contested on the “higher level,” the same kind of issue?

A dramatic example of the problems of classification is the issue of slavery. Jillson places it on the “lower level.”<sup>5</sup> Certainly the character of any national regulation of slavery and the slave trade had profound economic consequences for certain states and was, moreover, closely related to questions of representation and therefore of relative political power. But it does not take too much reflection to realize that its resolution was fundamentally related to larger questions of the kind of polity the delegates were framing. It could not but be influenced by convictions of deep principle. There is ample evidence that many delegates were conscious of that dimension.<sup>6</sup>

The centerpiece of Professor Jillson’s picture of the convention is a statistical analysis of the 569 roll call votes. The technique employed is known as “factor analysis.” Unfortunately for the uninitiated, Jillson provides almost nothing in the way of explaining the rationale or methodology of this device. The statistically innocent reader is confronted with table after terrifying table of rows and

---

4. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* viii-ix (U. Press Kansas, 1985) (“Novus Ordo Seclorum”).

5. At a different point, however, Jillson speaks of the slavery controversy as illustrative of a “more general conflict between an expansive Americanism and a restricted regionalism.” This formulation is more consistent with the definition of “higher level” issues.

6. See e.g., McDonald, *Novus Ordo Seclorum* at 50-55 (cited in note 4). But see Max Farrand, *The Framing of the Constitution of the United States* 110 (Yale U. Press, 1913) (“Framing”) (“[S]lavery was not the important question, it might be said it was not the moral question, that it later became. . . . As a matter of fact, there was comparatively little said on the subject in the convention.”)

columns of numbers with such daunting headings as "Large States versus Small States: Power and Interest: Five Factor Solution to Roll-Call Votes 37-156, June 11 - July 17, Varimax Rotation (Ortho)."

Factor analysis is, I have learned elsewhere,<sup>7</sup> a way of trying to make sense of a great mass of data. Correlations of individual elements are discovered and those correlations are further examined to see whether they can be accounted for by some smaller number of common factors. In Jillson's analysis of the roll call votes at the convention, for example, correlations of votes between pairs of individual states are examined to determine whether these individual associations cluster together in a way that indicates the presence of some common explanatory factors. It is in this way that Jillson has teased out of the data stable patterns of voting by coalition over particular periods, as well as the moments when these coalitions dissolved and formed again. The work done to execute this project is impressive. At least as far as I am able to judge, the methods employed seem sensible and the results statistically significant.

In addition to this statistical demonstration, Jillson provides a textual discussion of the formation and shifts in the coalitions he has discovered. Going over the same periods which have emerged from the factor analysis, he examines these coalitions in action, noting the issues that dominated debate in each period and the underlying reasons that might explain the particular alignments associated with them. It is in this connection that he posits the distinction between higher and lower level issues mentioned.

There are obvious limits to the understanding which can be taken from an analysis that focuses on the divisions at the convention. That is because, to a very remarkable degree, certain critical convictions were held almost universally. For example, Professor Jillson observes that by May 30 the distinct nationalist and localist perspectives on the shape of the new government had already developed. But, in fact, on May 31 the Convention approved a resolution giving the national legislature the power to legislate "in all cases to which the State Legislatures were individually incompetent" by a vote of 9-0-1. Nor did the division of opinion he observes appear on July 17 when Roger Sherman's motion to confine this power so as not to extend to "any matters of internal police which respect the government of such states only" was defeated by a vote

---

7. See Frederick Williams, *Reasoning with Statistics: How to Read Quantitative Research* 165-83 (Holt, Rinehart and Winston, 3d ed. 1986). Noreen Channels of the Sociology Department of Trinity College was kind enough to explain it to me. She should not be blamed for my, no doubt, imperfect understanding.

of 8-2.<sup>8</sup>

Even when the convention was plainly of more than one mind, the structure emerging from the factor analysis is often discernible only with great difficulty in the heuristic description that accompanies it. Jillson quite properly focuses his textual discussion on the significant votes on the central issues confronting the convention. When he does this, however, the arrangement of votes often does not fall obviously into the pattern to be expected from the statistical study. Indeed, on occasion one gets the sense that the delegations' positions on related votes on the same issue were almost random.

An example is a series of votes taken on July 17 and 19 on the term and selection of the executive. According to Jillson, this period and this question were dominated by "higher level" considerations and, therefore, the votes can be best explained in light of the two voting coalitions mentioned. The first, "peripheral," coalition consisted, at that moment, of four states: Massachusetts, North Carolina, South Carolina and Georgia. It favored a "dependent executive package" based on selection by the national legislature, a relatively long term and ineligibility for reelection. The opposing "Middle Atlantic" coalition consisted of six states: Connecticut, New Jersey, Pennsylvania, Delaware, Maryland and Virginia.<sup>9</sup> This coalition favored an "independent executive package" based on election by popular vote or an electoral college, a relatively short term and the possibility of reelection.

Now consider the actual voting on the eleven roll call votes on questions involving these issues on these two days. It is unnecessary to recount the actual issues involved in each vote. They all concern the interrelated issues of term, selection and reelectability<sup>10</sup> and we should therefore expect to see the two coalitions listed above. The lists below group the delegations by how they voted (aye, no, divided) on each roll call:

---

8. Max Farrand, ed., *2 Records of the Federal Convention 25-26* (Yale U. Press, 1911) ("Records").

9. Neither New Hampshire nor New York had delegations present on these days.

10. These votes are taken from Farrand, *2 Records*, as Jillson does not give a complete breakdown of each vote. Votes 1-6 were taken on July 17, and are found in id. at 24. Votes 7-11 were taken on July 19 and are found in id. at 51. The subject matter of each vote was as follows. 1. To choose executive by popular election. 2. To choose executive by electors. 3. To choose executive by national legislature. 4. To strike ineligibility for second term. 5. To substitute "good behavior" for seven year term. 6. To strike seven year term. 7. To choose executive by electors. 8. To choose electors by state legislatures. 9. To make executive ineligible for second term. 10. To set seven year term. (In Madison's notes, Connecticut is shown voting aye and New Jersey no. Id. at 58.) 11. To set six year term.

1.	Penn.	Mass. Conn. N.J. Del. Md. Va. N.C. S.C. Ga.	2.	Del. Md.	Mass. Conn. N.J. Penn. Va. N.C. S.C. Ga.	3.	Mass. Conn. N.J. Penn. Del. Md. Va. N.C. S.C. Ga.		
4.	Mass. Conn. N.J. Penn. Md. Ga.	Del. Va. N.C. S.C.	5.	N.J. Penn. Del. Va.	Mass. Conn. Md. N.C. S.C. Ga.	6.	Mass. Penn. Del. N.C.	Conn. N.J. Md. Va. S.C. Ga.	
7.	Conn. N.J. Penn. Del. Md. Va.	N.C. S.C. Ga.	Mass.	8.	Mass. Conn. N.J. Penn. Del. Md. N.C. Ga.	Va. S.C.	9.	N.C. S.C.	Mass. Conn. N.J. Penn. Del. Md. Va. Ga.
10.	N.J. S.C. Ga.	Conn. Penn. Del. Md. Va.	Mass. N.C.	11.	Mass. Conn. N.J. Penn. Md. Va. N.C. S.C. Ga.	Del.			

It is difficult to see how these votes exemplify a stable pattern of coalition voting. While this example may be extreme, it illustrates a common and unsatisfying lack of fit between the general thesis, founded on the statistical study, and the textual explanation of particular debates and votes. Necessarily it makes the reader skeptical of the former.

A critical difficulty may be the assumption—at the heart of this analysis—that the proceedings of the Convention can be best understood as the decisions of state delegations. The almost anthropomorphic emphasis on states (“During the first week of September . . . Connecticut, New Jersey, and Maryland struggled to maintain

the integrity of the states in the new system.”) casts an air of unreality on the description.

It is true that votes were taken by states. Indeed, the Convention rejected a rule allowing the recording of individual votes.<sup>11</sup> Consequently, state votes provide the only available data for this kind of study. Moreover, the delegates certainly consulted the interests of their states when casting their votes. But an exclusive focus on the states as the critical units obscures the role of the individual delegates, the real actors in the drafting process. This is made obvious by the numerous instances in which a state delegation was unable to vote because its members were divided. What could it mean, for example, to refer to the position of “New York” at the convention? Two of its three delegates, Robert Yates and John Lansing, opposed the creation of a strong national government and (until they left the Convention in mid-July, leaving the state with no vote) controlled the votes of the delegation over the opposition of their colleague, Alexander Hamilton.<sup>12</sup> Hamilton’s impact on the convention has never been thought to be substantial,<sup>13</sup> but Jillson’s analysis leaves him out altogether. Similarly, the differences between George Mason and James Madison on such matters as a national veto of state legislation or a bill of rights are submerged in the actions of a single vote of Virginia.<sup>14</sup>

In the end, *Constitution Making* contains a great deal of useful information and more than a few interesting insights. It is hard to resist the conclusion, however, that its depiction of the convention is too much the captive of the numbers that form its foundation. As such it is more valuable for its description than its explanation.

---

11. Farrand, 1 *Records* at 10.

12. See Farrand, *Framing* at 29, 73, 81, 105 (cited in note 6); Collier and Collier, *Decision in Philadelphia* at 56-57 (cited in note 3).

13. See Collier and Collier, *Decision in Philadelphia* at 56 (cited in note 3).

14. See *id.* at 197-98, 254.