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# VIRGINIA AND THE RATIFICATION OF THE BILL OF RIGHTS, 1789-1791

*J. Gordon Hylton\**

## I. INTRODUCTION

Historians and constitutional scholars have paid scant attention to the process by which the states ratified the Bill of Rights.<sup>1</sup> The states' ratifying conventions of 1787 and 1788 have been examined in great detail, as have the debates of the first Congress which led to the presentation of the Bill of Rights to the states. Scholars, however, have treated the ratification of the first ten amendments as little more than an historical formality.<sup>2</sup> Why more than two full years passed between the Congressional adoption of the proposed amendments and the approval by the requisite number of states has never been adequately answered.<sup>3</sup>

This cursory treatment is unwarranted. A detailed examination of the ratification of the Bill of Rights in Virginia reveals that the matter was anything but perfunctory. The debate it engendered was part of a much larger contest over the future of the American constitutional experiment, a contest that began at the Philadelphia convention and was not resolved by the state's ratification of the United States Constitution in the summer of 1787. It was still not resolved in the fall of 1789, when the antifederalist Virginia legislature refused to approve the Bill of Rights; nor was it resolved two

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1. See R. BEEMAN, S. BOTEIN, & E. CARTER, *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* (1987) [hereinafter *BEYOND CONFEDERATION*]; *THE BILL OF RIGHTS AND AMERICAN LEGAL HISTORY: THE HISTORIC BACKGROUND OF THE BILL OF RIGHTS* (P. Murphy ed. 1990) [hereinafter *HISTORIC BACKGROUND*]; E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* (1957); *THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM* (B. Schwartz ed. 1980) [hereinafter *THE ROOTS OF THE BILL OF RIGHTS*]; R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* (1983); Bowling, *A Tub to the Whale: The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 *J. EARLY REPUBLIC* 223 (1988).

2. See, e.g., E. DUMBAULD, *supra* note 1, at 49-50 (discussing the ratification process in a single sentence); R. RUTLAND, *supra* note 1, at 213-15 (devoting less than three pages to the subject); Bowling, *supra* note 1, at 247-50 (covering the topic in only four pages).

3. Tarter, *Virginians and the Bill of Rights*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 3 (J. Kukla ed. 1987).

years later, when Virginia reluctantly ratified the Bill of Rights.

Virginia played a pivotal role in the planning and ratification of the Bill of Rights. The 1776 Virginia Declaration of Rights, drafted by George Mason and adopted at the time the colony declared its independence from Great Britain, was the first American bill of rights. In 1787, it was the refusal of Mason and his fellow Virginia delegate, Edmund Randolph, to sign the proposed Constitution at the conclusion of the Philadelphia Convention that highlighted the need for a national bill of rights, and it was Virginia's James Madison who introduced one on the floor of the first Congress. Later, in the fall of 1791, it was Virginia that provided the critical eleventh vote necessary for ratification.

The Virginians who initially rejected the Bill of Rights were, with few exceptions, the same individuals who had earlier opposed the new United States Constitution. Their position was not that a bill of rights was unnecessary; in fact, their original complaints about the Constitution had included the absence of a bill of rights. Nor did they find any of the specific rights enumerated in the proposed amendments objectionable. The problem, as they saw it, was that the Congressional amendments did not go far enough. The amendments failed to provide necessary checks on the power of the central government, and they offered state-based minorities too little protection from a potentially hostile national majority. Even when new political alignments growing out of the events of 1789 to 1791 made ratification acceptable, the adoption of the amendments was accompanied by little confidence that they provided any true protection against the excesses of national power.

## II. THE VIRGINIA RATIFICATION CONVENTION

The Virginia debate over the Bill of Rights was a direct outgrowth of events that occurred during the ratifying convention of 1789.<sup>4</sup> When the Virginia General Assembly convened in the fall of

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4. This convention is one of the most carefully studied events in Virginia history. *See, e.g.,* R. BEEMAN, *THE OLD DOMINION AND THE NEW NATION, 1788-1801* 1-11 (1972) [hereinafter *OLD DOMINION*]; R. BEEMAN, *PATRICK HENRY: A BIOGRAPHY* 213-69 (1971) [hereinafter *PATRICK HENRY*]; I. BRANT, *MADISON: FATHER OF THE CONSTITUTION, 1787-1800* 185-228 (1950); *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (J. Elliot ed. 1886) [hereinafter *THE DEBATES*]; 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES* (J. Kaminski & G. Saladino eds. 1981) [hereinafter *Vol. 8 Kaminski & Saladino*]; 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES* (J. Kaminski & G. Saladino eds. 1981) [here-

1787 to discuss the proposed United States Constitution, supporters and opponents alike agreed that Virginia's ratifying convention should be scheduled as late as possible in 1788, so that the state would be in a position to act decisively.<sup>5</sup> When the convention opened on June 2, this desire was realized. Eight of the necessary nine states had ratified, but significant antifederalist sentiment existed in the other four.<sup>6</sup>

Delegates to the Virginia convention appeared to be almost evenly divided between supporters and opponents, with a small but critical number of delegates undecided.<sup>7</sup> Uncertain also, was the number of delegates who would be willing to support the new Constitution if ratification was conditioned on the inclusion of certain amendments. Virginia politics in the 1780's had possessed a distinctly sectional flavor, and attitudes toward the new Constitution generally split along geographic lines.<sup>8</sup> Tidewater, the Northern Neck, the Shenandoah Valley, and the Alleghenies were

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inafter Vol. 9 Kaminski & Saladino]; H. GRIGSBY, *THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788* (1969) (The first edition was published 1890-1891); R. KETCHAM, *JAMES MADISON: A BIOGRAPHY* 231-69 (1971); D. MAYS, 2 *EDMUND PENDLETON, 1721-1803: A BIOGRAPHY* 228-72 (1952); F. McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 255-83 (1958); N. RISJORD, *CHESAPEAKE POLITICS, 1781-1800* (1978) (incorporating a number of influential earlier studies by the same author); R. RUTLAND, *supra* note 1, at 182-253; Banning, "To Secure These Rights:" *Patrick Henry, James Madison and the Revolutionary Legitimacy of the Constitution*, in *TO SECURE THE BLESSINGS OF LIBERTY: FIRST PRINCIPLES OF THE CONSTITUTION* 280 (S. Thurow ed. 1987) [hereinafter Banning, *To Secure These Rights*]; Banning, *Virginia: Sectionalism and the General Good*, in *RATIFYING THE CONSTITUTION* (M. Gillespie, & M. Lienesch eds. 1989) [hereinafter Banning, *Virginia*]; Briceland, *Virginia: The Cement of the Union*, in *THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION* (D. Conley & J. Kaminski eds. 1988); Thomas, *The Virginia Convention of 1788: A Criticism of Beard's AN ECONOMIC INTERPRETATION OF THE CONSTITUTION*, 19 *J. S. HIST.* (1953).

5. N. RISJORD, *supra* note 4, at 300.

6. Delaware, Pennsylvania, Georgia, New Jersey, Massachusetts, South Carolina, Maryland, and Connecticut had ratified the Constitution; New York, New Hampshire, North Carolina, and Rhode Island had not. The New York and New Hampshire conventions were also in session during the summer of 1788, and both ratified. New Hampshire ratified before Virginia, and New York ratified after Virginia.

7. This article refers to the supporters of the proposed constitution as "federalists" and to their opponents as "antifederalists." Although it is now conventional to use the upper case "Federalists" and "Antifederalists," such use creates a misleading impression of a high degree of political and organizational cohesion resembling that of a political party, which these alignments were not.

8. See Hylton, *James Madison, Virginia Politics, and the Bill of Rights*, 31 *WM. & MARY L. REV.* 275 (1990); Main, *Sections and Politics in Virginia, 1781-1787*, 12 *WM. & MARY Q.* 96 (3d Series 1955); Risjord & DenBoer, *The Evolution of Political Parties in Virginia 1782-1800*, 60 *J. AM. HIST.* 961 (1974).

predominantly in support of the Constitution, while the Southside, the Southwest, and Kentucky were generally opposed. Only in the Virginia Piedmont, north of the James River, was sentiment apparently equally divided.<sup>9</sup> To a great extent, this split paralleled the division on matters of state economic policy that had preoccupied the Virginia General Assembly between 1776 and 1787.<sup>10</sup>

For three weeks, the convention considered the merits of the proposed Constitution. The actual debate was carried on by a group that included only twenty-one of the 170 delegates. The remainder were silent throughout the proceedings, and, for all practical purposes, a dozen individuals dominated the convention.<sup>11</sup> The antifederalists were led by the already legendary Patrick Henry whose speeches alone account for one quarter of the deliberations.<sup>12</sup> Throughout the spring of 1787, Henry's ability to persuade those within the sound of his voice was a cause for concern among the leaders of the pro-Constitution forces, and Henry spoke to virtually every issue before the convention.<sup>13</sup> No single individual so dominated the federalist position, but James Madison was generally understood to be this group's principle spokesman.<sup>14</sup>

Early on, it became clear that the federalist group could lay claim to a majority of the delegates, but a majority so narrow that they could not risk forcing an early vote for fear of alienating some of the less committed majority members. Consequently, both sides agreed to a clause-by-clause debate of the proposed Constitution. In spite of the agreement, both sides spent the first twelve days directing their remarks to the general desirability of a new constitution.<sup>15</sup>

As part of their strategy to wrest away the support of part of the federalist group, the antifederalist leaders, principally Henry, Mason, and William Grayson of Prince William County, seized upon

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9. See Briceland, *supra* note 4, at 210; N. RISJORD, *supra* note 4, at 316 (demonstrating that voting at the Ratification Convention followed regional patterns).

10. Hylton, *supra* note 8. There were, however, some important exceptions to this general rule. Many antifederalist leaders, including George Mason, William Grayson, and Richard Henry Lee, had sided with the "Northern Neck" position during the legislative debates of the 1780's. However, their concern over northern-state dominance under the new constitution ultimately pushed them into the antifederalist camp.

11. Briceland, *supra* note 4, at 212.

12. *Id.* at 211.

13. PATRICK HENRY, *supra* note 4, at 143-44.

14. Briceland, *supra* note 4, at 212.

15. *Id.* at 217.

the plan to delay ratification until the Constitution could be amended, presumably by a second constitutional convention. To accomplish this objective, the group began to draft amendments at the end of the first week of the convention, ultimately producing a bill of rights containing twenty provisions that was ready for circulation on June 11.<sup>16</sup> These amendments were modeled on Mason's Virginia Declaration of Rights, although certain material changes were made, including the deletion of two provisions in the original and the addition of six new sections.<sup>17</sup>

These amendments spoke to Mason's primary concern, the protection of individual liberties against government infringement, but they did not address what many antifederalists considered to be a more fundamental defect of the proposed constitution. Although the need for a Bill of Rights had been a hallmark of antifederalist thought, it was not the primary concern of Henry and Grayson nor most of the antifederalist block at the convention.<sup>18</sup> Henry himself at times even appeared to agree with the federalist argument that a Bill of Rights was undesirable, because an enumeration of rights could be interpreted as a denial of the existence of other rights not included in the enumeration.<sup>19</sup> In response to federalist George Wythe's suggestion that antifederalist concerns could be allayed by a single amendment guaranteeing freedom of press and religion and other essential liberties, Henry argued, "when you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered."<sup>20</sup>

The primary antifederalist objection instead was that the new Constitution provided far too little protection for state sovereignty.<sup>21</sup> The principal problem was not that the national govern-

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16. *Id.* The amendment strategy did not originate at the Convention. Virginia representative Richard Henry Lee had attempted to attach several amendments to the proposed Constitution before it was approved by the Confederation Congress. See Bowling, *supra* note 1, at 225.

17. Briceland, *supra* note 4, at 217.

18. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 540-43 (1969) (discussing the place of the Bill of Rights in antifederalist thought).

19. See *id.* at 539-40.

20. 3 *THE DEBATES*, *supra* note 4, at 594.

21. *Id.* In December of 1787, Madison had forecast a potential split in antifederalist ranks between those, like Mason, who generally approved of the new Constitution but favored "a few additional guards in favor of the Rights of the States and of the People," and those, like Henry, who opposed any increase in federal power and were willing to use the amendments issue to bring down the new Constitution. 10 *THE PAPERS OF JAMES MADISON* 310, 312 (1952)

ment would tread upon the rights of individual citizens, but that a national majority, particularly a northern majority, could someday strip the citizens of Virginia of their collective rights of self-government. To address these concerns, a second list of amendments was prepared to guarantee that the sovereign rights of the states would be protected and that one region of the United States might not impose its will on another simply by possessing a majority of the population. The second set of amendments limited the power of Congress to enact commercial legislation and raise military forces, placed restrictions on its ability to forcibly collect taxes, prohibited the establishment of lower federal courts for any purpose other than admiralty, and otherwise restricted the powers of the new central government.<sup>22</sup>

On June 24, fearing that a prolonged convention might lead to an antifederalist triumph, the pro-Constitution leadership moved for a vote on unconditional approval. It was at this point that Henry presented both sets of amendments and proposed that the convention vote to delay its ratification until after the Constitution had been amended by a second convention.<sup>23</sup> After a brief debate on the merits of Henry's proposals, James Madison rose and delivered the master stroke of the convention. Instead of opposing Henry's proposals, as he had throughout the convention, Madison announced that he would be willing to recommend some amendments once the Constitution was adopted, "not because they are necessary, but because they can produce no possible danger."<sup>24</sup>

The following day, June 25, the convention voted on ratification with 168 of 170 delegates present. Although the initial motion by George Nicholas called for unconditional ratification, it was quickly amended by Henry's supporters to make ratification conditional upon the adoption of Henry's proposed amendments. In what proved to be the critical vote of the convention, the amended motion failed by a vote of eighty to eighty-eight.<sup>25</sup> Immediately thereafter, the convention ratified the Constitution without reservation, by a vote of eighty-nine to seventy-nine, with only one

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[hereinafter all volumes to be cited as MADISON PAPERS] (letter from James Madison to Thomas Jefferson (Dec. 9, 1787)).

22. For the full text of these amendments, see Appendix I.

23. See I. BRANT, *supra* note 4, at 220-25.

24. *Id.* at 225-26; Briceland, *supra*, note 4, at 219-20.

25. See I. BRANT, *supra* note 4, at 224-26; Briceland, *supra* note 4, at 219-20.

delegate switching his vote.<sup>26</sup> After the defeat of a motion to strike out the preamble to the Constitution, the convention authorized the appointment of two committees, the first committee would prepare the formal resolution of ratification to be sent to Congress, and the second “[would] report such amendments as by them shall be deemed necessary.”<sup>27</sup>

The second committee was chaired by College of William and Mary law professor George Wythe and included eleven supporters and nine opponents of the new Constitution. Its ranks included such notable federalists as James Madison, John Marshall, and Governor Edmund Randolph, who had resolved his earlier reservations about the new constitution, as well as antifederalists Patrick Henry, George Mason, and James Monroe. When the committee reported to the convention two days later, its proposals clearly represented a victory for its antifederalist minority. In spite of Madison’s efforts to eliminate a number of the most “objectionable” of Henry’s amendments, his federalist colleagues had been unwilling to risk a confrontation.<sup>28</sup> Having achieved the ratification of the Constitution, most federalist members of the committee had no desire to provoke the convention by appearing hostile to amendments, particularly since antifederalist Benjamin Harrison had on the day of the final vote predicted that the federalist promise of support for subsequent amendments would disappear as soon as the Constitution was ratified.<sup>29</sup>

The committee proposed a total of forty amendments.<sup>30</sup> The first twenty constituted a bill of rights and were essentially those prepared by Mason earlier in the convention. The second set was an expanded version of Henry’s proposals of two days earlier. Individual amendments in the second group would place tight restrictions on the new national government. These amendments emphasized that the new federal government was restricted to powers specifically delegated to it by the main text of the Constitution. The amendments also provided for the publication of the deliberations of the United States Congress and a full accounting of all public moneys, as well as required a two-thirds vote in the Senate for the

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26. 3 THE DEBATES, *supra* note 4, at 654-55.

27. *Id.* at 362.

28. R. KETCHAM, *supra* note 4, at 264.

29. Briceland, *supra* note 4, at 220.

30. 3 THE DEBATES, *supra* note 4, at 657-62. For the full text of these amendments, see Appendix I.



approval of any commercial treaty and a three-quarters vote for any treaty "ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States or any [state]." <sup>31</sup>

The proposed amendments also required a two-thirds vote of each house of Congress for any law regulating commerce or for any law establishing a standing army in peacetime, prohibited military enlistments for more than four years, preserved the rights of the states to preserve their own militia, and limited the presidential term of any individual to no more than eight years in any sixteen year period. <sup>32</sup> Other amendments limited the jurisdiction of the United States Supreme Court, prohibited the creation of lower federal courts for matters other than admiralty, prohibited Congress from controlling the election of representatives and senators and from giving its members raises that take effect prior to the next scheduled election, restricted the right of Congress to raise judicial salaries, and removed from the Senate the right to try impeachments of its own members. Perhaps most importantly, one amendment required that before Congress could implement a direct tax, it had to first request an amount proportional to its population from each state, and if the state paid its quota on time, the taxes adopted by Congress could not be collected in that state. <sup>33</sup>

Once the committee report was presented to the convention, federalists in the body singled out the prohibition on direct taxes as the provision most vulnerable to challenge. At this point, a number of the committee's antifederalist members returned to a more confrontational position. A motion to strike the taxation amendment was supported by most of the federalist members of the committee, including Wythe and Madison. However, at least twelve members of the federalist coalition, including two members of the committee, broke ranks and voted with the antifederalists, so the motion to strike failed. <sup>34</sup>

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31. 3 THE DEBATES, *supra* note 4, at 660.

32. *Id.* at 657.

33. *Id.* at 657-61.

34. *Id.* at 661-62. The motion failed by a vote of either 65 to 85 or 65 to 80. The records of the convention list the former, but the list of individual votes contains the names of only 80 opponents. If the latter is complete, the vote on the motion to strike the proposed taxation amendment reveals the following: Of the 88 delegates who opposed Henry's June 23 motion to condition ratification upon prior amendment, 65 supported the motion to strike the taxation amendment, 12 opposed it, and 11 failed to vote, presumably because they had already left the convention. The most prominent of the "defectors" was convention president Edmund Pendleton. On the antifederalist side, no supporter of Henry's motion voted in favor of the motion to strike, 68 opposed it, and 12 failed to vote. Of the committee members

The unsuccessful effort to strike the proposed amendment on taxation revealed the shaky nature of the federalist coalition and dissuaded its leaders from challenging any of the remaining amendments. It also revealed that the prevailing sentiment in the convention was in opposition to a much more powerful central government. Had the shift of the twelve votes occurred at the time of Henry's original motion, the new constitution would have failed by a vote of ninety-two to seventy-six. The convention closed by authorizing that copies of *both* the letter of ratification and the proposed amendments be transmitted to the United States Congress, the executive or legislature of every state, and to every Virginia county.<sup>35</sup>

### III. THE VIRGINIA LEGISLATURE RESPONDS, FALL 1788

In the summer of 1788, there were many reasons to believe that substantial amendments of the recently adopted Constitution would be forthcoming. Virginia was hardly alone in having coupled its ratification with a call for amendments. Massachusetts, South Carolina, and New Hampshire had done so prior to the end of the Virginia Convention, and when New York ratified the Constitution on July 26, by a vote of only thirty to twenty-seven, it issued a circular calling for a second convention to consider additional amendments.<sup>36</sup> On August 2, North Carolina adopted a list of amendments even more extensive than those proposed by Virginia, and opposed ratification until the Constitution was amended by a second convention.<sup>37</sup>

A number of the Virginia federalists feared that their recent accomplishments might soon unravel. The day the convention concluded, Madison wrote to George Washington that he feared his opponents would use the issue of amendments to gain control of the new government, in order "to get a Congress appointed in the first instance that will commit suicide on its own authority."<sup>38</sup> This

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themselves, seven of the 12 federalists supported the motion, two opposed it, and two failed to vote. Eight of nine antifederalist members opposed the motion, and the other failed to vote. *Id.* at 662.

35. *Id.* at 663.

36. *Id.* at 413-14; see also 8 Kaminski & Saladino, *supra* note 4, at xx-xxi (providing basic dates and information).

37. See generally 4 THE DEBATES, *supra* note 4, at 251-52 (regarding North Carolina's ratification).

38. 11 MADISON PAPERS, *supra* note 21, at 182-83 (letter from James Madison to George Washington (June 27, 1788)).

was, in fact, the intention of Patrick Henry, who vowed to "seize the first moment that offered for shaking off the yoke in a constitutional way."<sup>39</sup> Two months later, Madison wrote to Thomas Jefferson that he was convinced that Henry and his allies from the southern part of Virginia would lead a drive for "an early Convention composed of men who will essentially mutilate the System, particularly in the article of taxation, without which in my opinion the system cannot answer the purposes for which it intended."<sup>40</sup> Much to the dismay of Madison the idea of a second convention was quickly endorsed, not just by militants like Henry, but also by more moderate antifederalists like James Monroe. More embarrassingly, a number of federalists also endorsed the idea, including Edmund Pendleton, the convention president, and Governor Edmund Randolph, whose switch to the federalist side had been so crucial at the convention.<sup>41</sup>

As Madison feared, when the Virginia General Assembly convened in October, 1788, Henry and his antifederalist allies were in complete control. Although John Beckley, the clerk of the House of Delegates, estimated that the antifederalists possessed a fifteen-vote majority in the 168-man assembly, the antifederalist plan for a second constitutional convention was supported by approximately two-thirds of the delegates.<sup>42</sup> Moreover, virtually none of the leaders of the federalist bloc at the ratifying convention were present in the Assembly. Madison was in the Continental Congress, George Wythe was on the bench, and George Washington and George Nicholas were temporarily retired from public life.<sup>43</sup>

After demonstrating its ability to unseat federalist Edward Carrington by invoking a rule that prevented members of the legislature from holding office under the continental government, the an-

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39. *Id.* at 183. At the conclusion of the Virginia Convention, Henry had announced, "My hand and my heart shall be at liberty to retrieve the loss of liberty, and remove the defects of the system, in a constitutional way." 3 THE DEBATES, *supra* note 4, at 652.

40. 11 MADISON PAPERS, *supra* note 21, at 238 (letter from James Madison to Thomas Jefferson (Aug. 23, 1788)).

41. *Id.* at 231-32 (letter from Edmund Randolph to James Madison (Aug. 13, 1788)); *id.* at 246-47 (letter from Edmund Randolph to James Madison (Sept. 3, 1788)) (an admittedly tentative endorsement).

42. *Id.* at 314-15 (letter from Edward Carrington to James Madison (Oct. 24, 1788)); *id.* at 336-37 (letter from Edward Carrington to James Madison (Nov. 9, 1788)); *id.* 381-84 (letter from James Madison to Thomas Jefferson (Dec. 8, 1788)); *see* OLD DOMINION, *supra* note 4, at 14.

43. 11 MADISON PAPERS, *supra* note 21, at 323 (letter from Richard Bland Lee to James Madison (Oct. 29, 1788)); *see* OLD DOMINION, *supra* note 4, at 15-17.

tifederalist majority began to undo the results of the previous Convention.<sup>44</sup> On October 30, Henry moved that the legislature call for a second convention to consider amendments proposed by Virginia and other states.<sup>45</sup> A federalist effort to amend the resolution, by providing that Congress be given the first opportunity to act on the Virginia amendments, was defeated by better than a two-to-one margin.<sup>46</sup> The original resolution then passed without a recorded vote.<sup>47</sup>

The antifederalists' next step was to ensure that both of Virginia's United States senators would be devoted to the principle of state sovereignty and committed to the drastic alteration of the Constitution. For these two positions, which were elected by the state legislature until the adoption of the seventeenth amendment in 1913, the antifederalists nominated William Grayson and Richard Henry Lee.<sup>48</sup> Realizing that they were too weak to compete for both positions, the federalists advanced James Madison as their only candidate. Their strategy called for each federalist delegate to use only one of his two votes, and then rely upon Madison's reputation as a man of ability to attract some antifederalist votes.<sup>49</sup> The plan failed, however, as Madison's candidacy was openly attacked by Patrick Henry and others, who viewed his "federal politics" as "adverse to the opinions of many members" and believed that, if chosen, he would be unlikely to follow legislative instructions on the matter of direct taxation.<sup>50</sup> When the legislature voted

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44. JOURNAL OF THE VIRGINIA HOUSE OF DELEGATES OF 1788 at 4 (Oct. 23 & 24, 1788) [hereinafter, HOUSE JOURNAL]; 11 MADISON PAPERS, *supra* note 21, at 312 (letter from Edward Carrington to James Madison (Oct. 24, 1788)). Some federalists had already anticipated Carrington's ouster. *Id.* at 311-12 (letter from Edmund Randolph to James Madison).

45. Although the House records do not identify the author of the proposal, both Richard Beeman and Norman Risjord attribute this resolution to Patrick Henry. *Old Dominion*, *supra* note 4, at 16-17; Risjord, *supra* note 4.

46. HOUSE JOURNAL, *supra* note 44 (Oct. 30, 1788). Forty-four delegates were either absent or chose not to participate in the 39 to 85 vote. *Id.*

47. *Id.* at 13. According to George Lee Turberville, the vote on this resolution was also 85-39. 11 MADISON PAPERS, *supra* note 21, at 340 (letter from George Lee Turberville to James Madison (Nov. 8, 1788)).

48. See OLD DOMINION, *supra* note 4, at 18.

49. This election strategy was discussed in a letter written by Edmund Randolph just prior to the balloting. 11 MADISON PAPERS, *supra* note 21, at 336 (letter from Edmund Randolph to James Madison (Nov. 5, 1788)).

50. *Id.* at 338-39 (letter from Edmund Randolph to James Madison (Nov. 10, 1788)). Henry also reportedly proclaimed that Madison was "unworthy of the confidence of the people in the station of Senator," and that his election would "terminate in rivulets of blood throughout the land." *Id.* at 335-37 (letter from Henry Lee to James Madison (Nov. 19, 1788)).

on November 8, Madison finished third, garnering seventy-seven votes to eighty-six for Grayson and ninety-eight for Lee.<sup>51</sup> Henry, who was not a candidate, received twenty-six votes.<sup>52</sup> A total of 164 legislators, an unusually high number, cast ballots.<sup>53</sup>

The following week, the antifederalist majority used its power to draw the lines of the new congressional districts in such a way as to give their candidates maximum advantage.<sup>54</sup> Anticipating that James Madison would be a candidate for election to the new Congress, his home county of Orange was attached to a number of central Virginia counties in which Henry and the antifederalist Cabell family were believed to have large followings.<sup>55</sup> Moreover, to prevent Madison from moving to a friendlier part of the state, the antifederalist majority enacted a requirement that candidates had to reside in their districts for twelve months prior to the election.<sup>56</sup>

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51. *Id.* at 339 (letter from Edmund Randolph to James Madison (Nov. 10, 1788)); *see also* JOURNAL OF THE VIRGINIA STATE SENATE OF 1788, at 20 (Nov. 8, 1788), [hereinafter SENATE JOURNAL]; HOUSE JOURNAL, *supra* note 44, at 24 (both Houses reporting only the winners).

52. SENATE JOURNAL, *supra* note 51, at 20 (Nov. 8, 1788); HOUSE JOURNAL, *supra* note 44, at 24 (Nov. 8, 1788); 11 MADISON PAPERS, *supra* note 21, at 341 (letter from Edward Carrington to James Madison (Nov. 12, 1788)). Henry had declined to have his name placed in nomination, according to Governor Edmund Randolph, because he was unwilling to take an oath to support the new Constitution. 11 MADISON PAPERS, *supra* note 21, at 312 (letter from Edmond Randolph to James Madison (Oct. 23, 1788)).

53. 11 MADISON PAPERS, *supra* note 21, at 339 (letter from Edmund Randolph to James Madison (Nov. 10, 1788) (reporting that 164 legislators voted)). Further, Madison received numerous single votes, *i.e.* although all voters were entitled to cast two ballots, several who voted for Madison used their other vote for an individual who was not nominated. *Id.* Votes for those not nominated were not included in the count. *Id.* at 336 (letter from Edward Carrington to James Madison (Nov. 9, 1788)). Turberville indicated Madison received 63 single votes. *Id.* at 340 (letter from George Turberville to James Madison (Nov. 10, 1788)). However, Carrington's letter reports that the total number of legislators voting was 162, and that Madison received 62 single votes. *Id.* at 336 (letter from Edward Carrington to James Madison (Nov. 9, 1788)). Mathematically, the most accurate account of the events appears to be that 162 voted, with 63 single votes for Madison. (The votes for nominees Grayson (86), Lee (98) and Madison (77) total 261. Backtracking, if 162 legislators voted, but there were 63 single votes, this would leave 99 legislators casting 2 votes. Thus,  $2 \times 99 = 198$  votes attributable to those legislators, plus the 63 single votes, equals the 261 total votes which counted).

54. OLD DOMINION, *supra* note 4, at 19; HOUSE JOURNAL, *supra* note 44, at 40 (Nov. 13, 1788).

55. *Id.*

56. I. BRANT, *supra* note 4, at 238; OLD DOMINION, *supra* note 4, at 19; *see also* HOUSE JOURNAL, *supra* note 44, at 31 (Nov. 13, 1788) (the bill passed and was titled, "An act for the election of Representatives, pursuant to the Constitution of Government of the United States"). Although most historians believe that the majority in the General Assembly used its power to place Madison in a congressional district in which antifederalist sentiment prevailed, Norman Risjord argues that there is no hard evidence to support this claim. N. RISJORD, *supra* note 4, at 326. Many of Madison's supporters clearly hold this view. *See, e.g.*, 11

An attempt to repeal this provision, sponsored by Madison's supporter and confidant, Edward Carrington, was defeated by a vote of thirty-two to eighty.<sup>57</sup>

On November 14, the legislature entertained three additional proposals from Patrick Henry.<sup>58</sup> The first proposal was an address to Congress expressing Virginia's displeasure with the new constitution in its present form and the desire for a second constitutional convention to correct the current defects.<sup>59</sup> The second proposal authorized a favorable reply to the letter of New York Governor George Clinton, which called for a second constitutional convention, and the third proposal provided for a circular letter to be sent to the other states on behalf of that cause.<sup>60</sup> A federalist-sponsored alternative, designed to endorse the amendments proposed by the Virginia convention in 1787, but to do so in language less hostile to the existing national government, fooled no one in the antifederalist camp and failed in a vote of seventy-two to fifty.<sup>61</sup> The original proposal was then adopted by voice vote.<sup>62</sup>

The adoption of Henry's proposals did not end antifederalist efforts in the 1788 legislative session. In early December, opponents of the new national government secured the election of an antifederalist governor (Beverley Randolph), and, as a final gesture, adopted, by a 71-52 vote, a bill that prohibited federal office-holders (including soldiers in the national militia) from holding state office.<sup>63</sup> Although he actually made the observation in mid-Novem-

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MADISON PAPERS, *supra* note 21, at 343-44 (letter from George Lee Turberville to James Madison (Nov. 13, 1788)); *id.* at 345-46 (letter from Edward Carrington to James Madison (Nov. 15 [actually 14], 1788)).

57. HOUSE JOURNAL, *supra* note 44, at 42-43 (Nov. 14, 1788).

58. HOUSE JOURNAL, *supra* note 44, at 42-43 (Nov. 14, 1788); *see also* 11 MADISON PAPERS, *supra* note 21, at 348 (letter from Richard Bland Lee to James Madison (Nov. 17, 1788)) (indicating that Patrick Henry sponsored these proposals); OLD DOMINION, *supra* note 4, at 20-21.

59. HOUSE JOURNAL, *supra* note 44, at 31-32 (Nov. 14, 1788).

60. *Id.*; *see also* 11 MADISON PAPERS, *supra* note 21, at 348 (letter from Richard Bland Lee to James Madison (Nov. 17, 1788)); OLD DOMINION, *supra* note 4, at 20-21.

61. HOUSE JOURNAL, *supra* note 44, at 32 (Nov. 14, 1788) (official record stating that 72 delegates voted against the motion, but lists the names of only 71 dissenters. In a letter to Madison, Edward Carrington reported the result as 49 yeas and 71 nays. 11 MADISON PAPERS, *supra* note 21, at 345 (letter from Edward Carrington to James Madison (Nov. 15 [actually 14], 1788)).

62. HOUSE JOURNAL, *supra* note 44, at 33 (Nov. 14, 1788).

63. HOUSE JOURNAL, *supra* note 44, at 48 (Dec. 3, 1788), at 50 (Dec. 8, 1788). The previous governor, Edmund Randolph, had decided not to seek reelection and had reentered the state legislature. 11 MASON PAPERS, *supra* note 21, at 271 (letter from John Dawson to James Madison (Sept. 30, 1788)). Beverley Randolph defeated Benjamin Harrison by four

ber, George Turberville summed up the events of the 1788 legislative session for his federalist colleagues when he bemoaned, “[t]he triumph of Antifederalism is compleat [sic].”<sup>64</sup> Theodorick Bland, speaking from the perspective of the victors, boasted, “[t]he gentlemen on the federal side, . . . finding themselves stript [sic] of the Lion’s skin, with great dexterity put on the Fox’s tail, but neither art or strength would avail them.”<sup>65</sup>

Throughout the session, little attention was paid to the specific need for a bill of rights for the new national Constitution. Since the federalist position was still that no additional amendments were necessary, the federalists lacked the incentive to raise the issue. The antifederalists, on the other hand, while still believing that a bill of rights was necessary, were under no illusions that such a measure would remedy the defects of the new Constitution by itself. The ability of Congress to dominate the states through its control of taxation, commerce, and the army was the immediate threat, and one that could be met only by substantive amendments restricting its powers.

This attitude was consonant with the view of “rights” shared by most Virginians who embraced the antifederalist cause. As Chief Justice John Marshall would later observe, the antifederalists believed that “liberty” would not be encroached by the government acting directly against individuals but “could only be endangered by encroachments upon the states; and that it was the great duty of patriotism to restrain the powers of the general government within the narrowest possible limits.”<sup>66</sup> A bill of rights, standing alone, could not accomplish this task.

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votes. Harrison was also identified with the antifederalist cause. *Id.* at 380 (letter from Alexander White to James Madison (Dec. 4, 1788)). On Beverley Randolph’s antifederalist views, see 10 MADISON PAPERS, *supra* note 21, at 383 (letter from Edward Carrington to James Madison (Jan. 18, 1788)). (RISJORD, *supra* note 4, at 323 mistakenly states that Harrison was elected.)

64. 11 MADISON PAPERS, *supra* note 21, at 340 (letter from George Lee Turberville to James Madison (November 10, 1788)).

65. N. RISJORD, *supra* note 4, at 324 (quoting letter from Theodorick Bland to Richard Henry Lee (November 9, 1788)).

66. 2 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE AMERICAN FORCES, DURING THE WAR WHICH ESTABLISHED THE INDEPENDENCE OF HIS COUNTRY, AND FIRST PRESIDENT OF THE UNITED STATES 205-06 (2d ed. 1843).

## IV. THE CONGRESSIONAL ADOPTION OF A BILL OF RIGHTS

In spite of its triumphs in the state legislature in the fall of 1788, the antifederalist cause in Virginia suffered a series of setbacks in the months that followed. First, the movement for a second constitutional convention failed to attract the support of any of the states ratifying the Constitution, other than New York and Virginia. (North Carolina and Rhode Island had yet to ratify.) This meant that the demand for amendments would have to be addressed to the newly elected Congress. Furthermore, antifederalist claims that they represented the sentiments of four-fifths of the state's voters<sup>67</sup> proved unduly optimistic as federalist candidates captured seven of the ten congressional elections held in Virginia on February 2, 1789. The effort to deny Madison a seat in the new Congress also failed. In an aggressively waged campaign in which he promised to support limited amendments, Madison triumphed over his opponent, James Monroe, by a vote of 1308 to 972.<sup>68</sup>

Outside Virginia, antifederalist candidates fared even worse. Federalists swept the congressional elections in seven states; New Hampshire, Connecticut, Pennsylvania, New Jersey, Delaware, Maryland, and Georgia, capturing a total of thirty seats. In Massachusetts, New York, and South Carolina, antifederalist candidates did better, but their opponents still prevailed in twelve of nineteen contests. The final results gave the antifederalists only ten of fifty-nine seats in the House of Representatives, and only Virginia elected any antifederalists to the Senate.<sup>69</sup>

For Virginia antifederalists, the only positive development during the congressional campaign came when many of the federalist candidates, including Madison, announced their support for some amendments.<sup>70</sup> However, not everyone believed the sincerity of Madison's conversion. George Mason dismissed Madison's statements as mere campaign promises and refused to take seriously his claim to be the primary patron of the amendments in the first Congress. "Perhaps some Milk & Water Propositions may be made . . ." Mason wrote, "by Way of throwing out a Tub to the Whale;

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67. For a report of the antifederalist predictions of victory, see 12 MADISON PAPERS, *supra* note 21, at 40 (letters from George Lee Turberville to James Madison (Mar. 30, 1789)).

68. For a description of this campaign, see 11 MADISON PAPERS, *supra* note 21, at 301-04 (editorial note) and I. BRANT, *supra* note 4, at 236-42.

69. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989 51-52 (U.S. Gov't Printing Office 1989) (listing the roster of the first Congress of the United States).

70. OLD DOMINION, *supra* note 4, at 26, 56-57.



but of important & substantial amendments, I have not the least Hope."<sup>71</sup> Senator Richard Henry Lee agreed, writing to Patrick Henry that Madison's "ideas, and those of our convention, on this subject [amendments], are not similar."<sup>72</sup>

In spite of the continued complaints of antifederalist spokesmen, Madison and his federalist supporters seemed to believe that the 1788 legislative session was the high water mark for antifederalism. The favorable results in the congressional elections and the elections of nine of twelve federalist candidates as presidential electors were widely interpreted as signs that the Virginia public had decided to accept the new Constitution. In May, Edward Carrington wrote to Madison, "[o]ur Antifederal districts have become perfectly calm and generally shew [sic] a disposition to acquiesce in whatever may be the fate of the proposed alterations, relying upon their meeting with due consideration."<sup>73</sup> Throughout the summer of 1789, such sentiments were repeatedly voiced in federalist circles.<sup>74</sup>

Nevertheless, Madison felt obligated to fulfill his campaign promise on the subject of amendments.<sup>75</sup> He began to push for a bill of rights based upon the first set of recommendations of the Virginia Ratifying Convention shortly after Congress achieved a quorum in April of 1789.<sup>76</sup> Initially, Madison had trouble gaining the attention of his federalist colleagues who generally did not share his sense of urgency on this issue.<sup>77</sup> The antifederalist delegation was also reluctant to support Madison's proposals, because they suspected that they would fall far short of what they believed necessary to remedy the defects of the new Constitution.<sup>78</sup>

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71. 3 THE PAPERS OF GEORGE MASON, 1725-1792 1164 (1970) (letter from George Mason to John Mason (July 31, 1789)).

72. W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 388 (1891) [hereinafter, HENRY CORRESPONDENCE] (letter from Richard Henry Lee to Patrick Henry (May 28, 1789)).

73. 12 MADISON PAPERS, *supra* note 21, at 156 (letter from Edward Carrington to James Madison (May 12, 1789)).

74. *See, e.g., id.* at 215-16 (letter from Walter Jones to James Madison (June 12, 1789)); *id.* at 222-25 (letter from George Lee Turberville to James Madison (June 16, 1789)); *id.* at 298 (letter from Edmund Randolph to James Madison (July 19, 1789)); *id.* at 319-20 (letter from Archibald Stuart to James Madison (July 31, 1789)); *id.* at 343 (letter from Alexander White to James Madison (Aug. 17, 1789)); *id.* at 393 (letter from Edward Carrington to James Madison (Sept. 9, 1789)).

75. Bowling, *supra* note 1, at 234.

76. *Id.* at 233-35.

77. *Id.* at 234.

78. *Id.* at 235.

Madison's amendments were introduced on June 8, but were not referred to committee until July 21.<sup>79</sup> Discussion on the floor of the House finally began on August 13, and in the debate that followed, most of the House antifederalists predictably repudiated Madison's proposal as inadequate.<sup>80</sup> Aedanus Burke described Madison's amendments as "frothy and full of wind, formed only to please the palate,"<sup>81</sup> while Thomas Tudor Tucker also from South Carolina and the brother of Virginia's St. George Tucker, sought unsuccessfully to convince Congress to add a limitation on the federal taxing power to Madison's list.<sup>82</sup>

A modified version of Madison's Bill of Rights was adopted on August 24. In the Senate, Lee and Grayson campaigned to expand the list of amendments to include all of the Virginia proposals. Writing to Patrick Henry, William Grayson identified the problem with Madison's amendments.<sup>83</sup> They were not objectionable; rather, they accomplished too little. According to Grayson, Madison's proposals effected "personal liberty alone, leaving the great points of the Judiciary, direct taxation, &, to stand as they are."<sup>84</sup> In Grayson's mind, Madison's true objective was to break the ranks of the antifederalist movement by dividing it over the issue of amendments.<sup>85</sup>

Grayson and Lee's failure could not have been more complete. Rather than be convinced of the necessity of reviving the substantive amendments recommended by the Virginia convention, the Senate greatly weakened the House proposals.<sup>86</sup> Provisions that reiterated the constitutional requirement of a strict separation of powers, guaranteed freedom of conscience and the right to conscientious objection to military service, required that appeals to the United States Supreme Court involve sums of at least one thousand dollars, and guaranteed the right to a trial by jury in one's own vicinage were abandoned.<sup>87</sup>

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79. *Id.* at 234-35, 239.

80. *See id.* at 240-41.

81. *Id.* at 241.

82. *Id.* at 243-44.

83. 3 HENRY CORRESPONDENCE, *supra* note 72, at 391 (letter from William Grayson to Patrick Henry (June 12, 1789)).

84. *Id.*

85. *Id.*

86. 3 HENRY CORRESPONDENCE, *supra* note 72, at 399-401 (letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789)).

87. *See* E. DUMBAULD, *supra* note 1, at 213-19 (listing the amendments approved by the House of Representatives on Aug. 24, 1789, and the Senate on Sept. 9, 1789).

After the House acquiesced to the Senate modifications, which reduced the number of amendments from seventeen to twelve, Grayson wrote to Henry,

The lower house sent up amendments which held out a safeguard to personal liberty in [a] great many instances, but this disgusted the Senate. They are so mutilated and gutted that in fact they are good for nothing, and I believe, as many others do, that they will do more harm than benefit.<sup>88</sup>

Although Madison himself objected to the changes, the Senate version was accepted by the House with only minor modifications and forwarded to the states on September 25, 1789.<sup>89</sup>

## V. VIRGINIA DEBATES THE BILL OF RIGHTS

When the Virginia General Assembly convened three weeks later, it became the first state legislature to consider the twelve proposed amendments. At the outset, it was unclear whether the antifederalist representatives would accept the amendments because their specific content was unobjectionable, or oppose them as a way of expressing continued support for amendments of a more substantive nature.

Although Madison's persistence on behalf of the amendments had gained him new respect among some antifederalists, only a few antifederalist leaders were satisfied with the result of his efforts.<sup>90</sup> Henry felt that the proposed amendments tended "to injure rather than serve the cause of liberty" and were only impediments in the path of those who sought to return power to the people.<sup>91</sup> George Mason, who in contrast to most antifederalists was primarily con-

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88. 3 HENRY CORRESPONDENCE, *supra* note 72, at 405-06 (letter from William Grayson to Patrick Henry (Sept. 29, 1789)).

89. For the text of these amendments, see Appendix II.

90. See 12 MADISON PAPERS, *supra* note 21, at 368-69 (letter from Edmund Pendleton to James Madison (Sept. 2, 1789)); *id.* at 393 (letter from Edward Carrington to James Madison (Sept. 9, 1789)); *id.* at 453 (letter from James Madison to George Washington (Nov. 20, 1789)).

91. Henry voiced these views on a number of occasions. See, e.g., 3 HENRY CORRESPONDENCE, *supra* note 72, at 398 (letter from Patrick Henry to Richard Henry Lee (Aug. 28, 1789)); *id.* at 414 (letter from Patrick Henry to Richard Henry Lee (Jan. 29, 1790)); *accord id.* at 402-04 (letter from Richard Henry Lee to Patrick Henry (Sept. 27, 1789)); *id.* at 421-22 (letter from Richard Henry Lee to Patrick Henry (June 10, 1790)). Henry, however, spoke favorably of the need for a Bill of Rights during the Ratification Convention. 3 THE DEBATES, *supra* note 4, at 43-64 (1836).

cerned with the protection of the liberties of individuals, was also dissatisfied with the list as it had emerged from Congress.<sup>92</sup> Even Thomas Jefferson, who claimed to be more a federalist than an antifederalist, agreed that additional amendments, which would go beyond those proposed by Congress, were still desirable.<sup>93</sup>

Moreover, nothing had happened since the previous legislative session to convince the antifederalists that their fears were ungrounded. Although the actions of the first Congress had resulted in no immediate threats to Virginia's sovereignty, many Virginia antifederalists remained suspicious of the new enterprise. The Judiciary Act of 1789's creation of lower federal courts of general jurisdiction was a potential threat to state authority, and would have been unconstitutional if the Virginia amendments had been in effect. Some antifederalists believed they had seen indications of a potentially tyrannical central government in the Congressional debate over proper use of formal titles and in the desire of many northern congressmen to establish the proposed national capital in Pennsylvania, not on the Potomac as agreed at the convention.<sup>94</sup> While some antifederalists were heartened by the fact that the federalists in the state's congressional delegation seemed willing to break from their northern counterparts when Virginia's interests seemed threatened, this alone was not enough to allay their distrust of the new government.<sup>95</sup>

Perhaps the boldest criticism of the new government at the outset of the 1789 legislative session came from the state's two United States senators. In a September 28 letter to the Speaker of the Virginia House of Delegates, Lee and Grayson formally apologized to the legislature for their failure to obtain approval for more radical measures and then issued the following warning:

It is impossible for us not to see the necessary tendency to consolidated empire in the natural operation of the constitution, if no further amended than as now proposed; and it is equally impossible for us not to be apprehensive for Civil Liberty, when we know of no instance in the records of history, that shew [sic] a people ruled in

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92. 3 MADISON PAPERS, *supra* note 21, at 1172 (letter from George Mason to Samuel Grifin (Sept. 8, 1789)); 16 THE PAPERS OF THOMAS JEFFERSON 1789-1790 232 (J. Boyd ed. 1961) (letter from George Mason to Thomas Jefferson (Mar. 16, 1790)).

93. Bowling, *supra* note 1, at 249 & n. 50.

94. OLD DOMINION, *supra* note 4, at 59-60.

95. *Id.* at 60-61.

freedom, when subject to one undivided government, and inhabiting a territory so extensive as that of the United States.”<sup>96</sup>

Unless more substantive amendments were adopted, they warned, the existing United States Constitution would lead to “the annihilation of the state governments.”<sup>97</sup>

Formal announcement of the proposed amendments reached the Virginia legislature during the first week of November. Henry attempted to rouse the old coalition to defeat the amendments outright, but his initial efforts were met with only limited enthusiasm. His proposal that the House of Delegates issue a formal resolution thanking Grayson and Lee for their efforts to obtain more substantial amendments died for lack of support, as did his subsequent suggestion that debate on the Congressional amendments be postponed until after the following year’s elections.<sup>98</sup> These preliminary defeats apparently convinced Henry that the legislature was inclined to ratify the amendments. Consequently, he saw little reason to remain in Richmond and abruptly departed for his home in Prince Edward County.<sup>99</sup>

In the debate that followed, the House of Delegates expressed virtually unanimous approval for the first ten of the twelve proposed amendments.<sup>100</sup> This unanimity broke down, however, in the debate over the proposed eleventh and twelfth amendments<sup>101</sup> which were later adopted as the ninth and tenth amendments to the Constitution. Addressing the issue of unenumerated rights and reserved powers, these amendments provided: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people,” and “[t]he powers not delegated to the United States by the Constitution, nor pro-

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96. *Id.* at 61 (letter from Richard Henry Lee and William Grayson to the Honorable Speaker of the House of Representatives in Virginia (Sept. 28, 1789)).

97. *Id.*

98. 12 MADISON PAPERS, *supra* note 21, at 463-64 (letter from Edward Carrington to James Madison (Dec. 20, 1789)).

99. *See id.* Henry also had suffered a major defeat on November 13, when, by a vote of 88 to 51, the House of Delegates defeated his proposal to require the state to accept hemp and tobacco in payment of public taxes. *Id.* at 453 (letter from James Madison to George Washington (Nov. 20, 1789)); HOUSE JOURNAL, *supra* note 44, at 50 (Nov. 13, 1789). For the significance of this and related issues in Virginia in the 1780’s, see generally Hylton, *supra* note 8.

100. 12 MADISON PAPERS, *supra* note 21, at 464 (letter from Edward Carrington to James Madison (Dec. 20, 1789)).

101. *See id.*

hibited by it to the States, are reserved to the States respectively, or to the people."<sup>102</sup>

To the surprise of many, opposition to these amendments was led by former Governor Edmund Randolph who argued that the amendments were too vague. Randolph insisted that the purpose of the two amendments could be accomplished more effectively by revised amendments explicitly limiting the powers of the new government, particularly the new Congress. This assertion was the crux of the antifederalist argument. Initially, the House rejected both amendments, but on November 30, a rejuvenated coalition of federalists, who supported the amendments, and antifederalists, who were uncomfortable with the possibility of Virginia ratifying only the first ten amendments, reversed the earlier action and ratified the entire list of twelve.<sup>103</sup> Although there was no recorded roll call vote on this issue, a contemporary observer reported that the proposed amendments passed by a majority of thirteen.<sup>104</sup>

After Henry's departure, the primary objective of the antifederalists in the House of Delegates was not the defeat of the proposed amendments, but the adoption of a harshly worded resolution criticizing Congress for failing to act in accordance with its earlier instructions and calling for the immediate enactment of the remaining proposals suggested in Virginia's ratifying convention.<sup>105</sup> Motions to approve the resolution were twice defeated during the early part of the session, but the debate over the amendments produced an upswing in antifederalist sentiment. A number of delegates who favored the Congressional amendments, but were concerned that their assent might be misconstrued as a vote of support for the national government, were now ready to support such a resolution. Consequently, on December 5, the proposal was introduced for the third time.<sup>106</sup>

At this point, Henry's departure from Richmond proved to be a tactical blunder. The roll call vote on the resolution resulted in a sixty-two to sixty-two tie, which was broken by the negative vote

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102. See Appendix II—Amendments Proposed by Congress to the States, Sept. 25, 1789.

103. HOUSE JOURNAL, *supra* note 44, at 90-91 (Nov. 30, 1789).

104. 12 MADISON PAPERS, *supra* note 21, at 471 (letter from George Lee Turberville to James Madison (Jan. 20, 1790)).

105. Madison's correspondent, Hardin Burnley, believed that an opposition to the Congressional power of direct taxation motivated this strategy. See 12 MADISON PAPERS, *supra* note 21, at 456 (letter from Hardin Burnley to James Madison (Nov. 28, 1789)).

106. See HOUSE JOURNAL, *supra* note 44, at 101-02 (Dec. 5, 1789). The proposal was introduced on this occasion as a substitute for a more moderate resolution that merely urged Congress to consider the remaining Virginia amendments.

of federalist Speaker of the House Thomas Matthews.<sup>107</sup> Had Henry remained in Richmond, his vote alone would have secured the resolution's passage. Moreover, his efforts on its behalf probably would have persuaded approval by additional delegates.<sup>108</sup> Even without Henry, a milder resolution calling on Congress to adopt the remaining Virginia amendments passed the House overwhelmingly, and the antifederalist block was able to soundly defeat a subsequent federalist-backed effort to amend the Virginia Constitution.<sup>109</sup>

For the twelve amendments, all that now remained was approval by the Senate. Ordinarily, this approval would have been little more than a *pro forma* matter. Under the 1776 Virginia Constitution, however, legislative powers were concentrated in the lower house of the assembly. The twenty-four-man Senate lacked the power to introduce legislation on its own. It was limited instead to approving, amending, or rejecting legislation initiated by the House of Delegates.<sup>110</sup> It was widely understood that the real power rested within the lower house, and the acquiescent Senate rarely disagreed with the House of Delegates.<sup>111</sup>

In December, 1789, however, the antifederalist majority in the Senate abandoned the tradition of institutional deference. In a series of eight to seven votes, with nine senators either absent or not voting, the Senate refused to confirm the actions of the House.<sup>112</sup> Instead, it voted to postpone ratification of four of the twelve amendments, including the third (which provided for freedom of press, speech, and religion), the eighth (trial by jury), the eleventh, and the twelfth.<sup>113</sup> In taking this action, the Senate majority declared: "We are satisfied that the people of Virginia would never have ratified the Constitution of the United States, but from a confident hope and firm persuasion of speedily seeing it much more materially altered and amended than it would be by ratifying the propositions lately submitted by Congress to the State Legisla-

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107. *Id.* at 102.

108. 12 MADISON PAPERS, *supra* note 21, at 464-65 (letter from Edward Carrington to James Madison (Dec. 20, 1789)).

109. *See* HOUSE JOURNAL, *supra* note 44, at 101-02 (Dec. 5, 1789) (substitute resolution); *id.* at 107-11 (Dec. 8, 1789) (state constitutional reform).

110. OLD DOMINION, *supra* note 4, at 33 & n. 9.

111. *Id.*

112. *See* SENATE JOURNAL, *supra* note 51, at 51-52 (Dec. 8, 11, 12, 1789).

113. *Id.* at 51; *see also id.* at 61-66 (Dec. 12, 1789).

tures."<sup>114</sup> Rejection of the proposed third amendment was justified because the religious guarantee was not sufficient to protect the rights of conscience.<sup>115</sup> Although the establishment of a national church was rightly prohibited, the Senate majority maintained that the amendment did not rule out the possibility that Congress might "levy taxes to any amount for the support of religion or its teachers."<sup>116</sup> It was "totally inadequate" and "betray[ed] an unreasonable, unjustifiable, but studied departure from the amendments proposed by Virginia and other states."<sup>117</sup> The proposed eighth amendment was found lacking because it did not guarantee trial by jury in the defendant's domicile while the eleventh and twelfth were too vague to place any meaningful restriction on the power of Congress.<sup>118</sup>

Supporters of the amendments were furious with the Senate action.<sup>119</sup> Few believed that the eight-man majority was sincere in its concern for rights of conscience.<sup>120</sup> Only one member of the majority had an established legislative record in support of religious freedom, while three had voted earlier to weaken the landmark Virginia Statute of Religious Liberty, and two had voted in 1784 for the continued collection of taxes for the support of religion.<sup>121</sup> According to one federalist member of the House, opposition in the Senate was based, not on the amendments per se, but on the apprehension that "the adoption of them at this time will be an obstacle to the chief object of their pursuit, the amendment on the subject of direct taxation."<sup>122</sup> Others viewed it as a nakedly political attempt to win support for the antifederalist cause from Vir-

114. *Id.* at 62 (Dec. 12, 1789).

115. *Id.*

116. *Id.*

117. *Id.* at 62-63.

118. *Id.* at 63-64. Once it became clear that the Senate majority would delay notification on four of the amendments, the seven federalists in the Senate, with only isolated exceptions, voted against ratification of the other amendments. The antifederalists, however, voted as a bloc in favor of the other eight. *Id.* at 51-52. (Dec. 8, 1789). The Senate also divided along federalist/antifederalist lines on the propriety of allowing the majority to enter its reasons for opposing ratification of the proposed amendments into the *Senate Journal*. *Id.*

119. I. BRANT, *supra* note 4, at 286-87.

120. *Id.*

121. *Id.*

122. 12 MADISON PAPERS, *supra* note 21, at 460 (letter from Hardin Burnley to James Madison (Dec. 17, 1789)).



ginia's Baptists and members of other dissenting religious groups.<sup>123</sup>

Whatever the motivation of the Senate majority, it was unwilling to alter its position. Attempts to reconcile the House and Senate positions failed, and even though eight of the twelve amendments had been independently ratified by both houses of the legislature, no further action was taken.<sup>124</sup> Supporters of the amendments were unwilling to accept ratification without recognition of the rights of speech, religious liberty, and trial by jury, so consideration was delayed until another legislature was elected.<sup>125</sup>

Because of the surprise turn of events in December, the 1789 legislative session ended as a triumph for the antifederalists. After two months of debate, the General Assembly had effectively approved Henry's original motion to postpone voting on the amendments for a year, and the House had adopted a resolution encouraging Congress to again consider the Virginia amendments. Furthermore, the more strongly worded antifederalist resolution chastising Congress had failed only because of the inopportune absence of Henry, its primary champion. Certainly the session provided little evidence that Virginians were comfortable with the new national Constitution. Even before the session adjourned, federalist Henry Lee, cousin of Richard Henry Lee, wrote to Madison, "The enmity to govt. is I believe as strong as ever in this state. Indeed I have no doubt of this fact if the assembly be considered as a just index of the feelings of the people. Never adventure direct taxation for years. This event now would be attended with serious consequences."<sup>126</sup>

## VI. RATIFICATION IN OTHER STATES

Although the actions of the Virginia legislature amounted to a defeat for the Congressional amendments, other states proved to be far more receptive. The New Jersey legislature ratified eleven of the twelve amendments in late November, and shortly after the conclusion of the Virginia session, both Maryland and the antife-

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123. OLD DOMINION, *supra* note 4, at 65-66.

124. 12 MADISON PAPERS, *supra* note 21, at 461 (letter from John Dawson to James Madison (Dec. 17, 1789)); HOUSE JOURNAL, *supra* note 44, at 119-20 (Dec. 13, 14, 1789); SENATE JOURNAL, *supra* note 51, at 58-59 (Dec. 10, 1789), at 65-66 (Dec. 12, 1789).

125. *Id.*

126. 12 MADISON PAPERS, *supra* note 21, at 454-55 (letter from Henry Lee to James Madison (Nov. 25, 1789)).

eralist stronghold of North Carolina assented to all twelve.<sup>127</sup> The following month, South Carolina, New Hampshire, and Delaware ratified the amendments; although Delaware rejected the first proposed amendment and New Hampshire rejected the second.<sup>128</sup>

Massachusetts was next to take up the issue, but with results that still remain unclear. On January 29, 1790, both houses of the legislature rejected proposed amendments one and two, and approved amendments three through eleven.<sup>129</sup> They differed, however, on the twelfth proposal (the current tenth amendment), with the Senate approving and the House rejecting it.<sup>130</sup> Three days later, the House again rejected the twelfth amendment, and the Senate subsequently concurred in this decision.<sup>131</sup> The legislature then appointed two committees, one to prepare a bill "declaratory of their assent," and the other "to take into consideration what further amendments to the Federal Constitution are necessary to be proposed to Congress."<sup>132</sup> The first committee apparently never prepared the required bill and no replacement committee was ever appointed. As a consequence, Massachusetts did not officially ratify the amendments until 1939.<sup>133</sup>

Nevertheless, the movement toward ratification continued. Although some New York antifederalists, like their Virginia counterparts, found the proposed amendments "trivial, equivocal, and unimportant since the states lacked the power to enforce them,"<sup>134</sup> the New York legislature approved all but the second amendment on February 27, 1790.<sup>135</sup> Two weeks later, Pennsylvania ratified all but the first. The Pennsylvania ratification came in spite of a reinvigorated antifederalist opposition led by Samuel Bryan who characterized the proposed amendments as "an opiate prescribed to subjugate the people" and proclaimed that Madison had gone be-

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127. THE ROOTS OF THE BILL OF RIGHTS, *supra* note 1, at 1171-1203.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1174-75.

132. *Id.* at 1175-76 (letter from Christopher Gore to Thomas Jefferson (Aug. 18, 1791)) (referring to first committee); *id.* at 1176 (citing *New York Journal and Weekly Register* (Feb. 11, 1790)(referring to second committee)).

133. Whether this was an oversight on the part of the committee or a conscious decision to withhold approval is not recorded. See generally D. P. MEYERS, MASSACHUSETTS AND THE FIRST TEN AMENDMENTS (1936); E. DUMBAULD, *supra* note 1, at 49-50.

134. Bowling, *supra* note 1, at 248 (letter from DeWitt Clinton to Charles Clinton (Feb. 8, 1790)).

135. *Id.* at 347.

yond Machiavelli in his efforts to deceive the people.<sup>136</sup> In June, Rhode Island ratified the Constitution and all of the proposed amendments.<sup>137</sup>

With the Rhode Island ratification, ten of the necessary eleven states had notified Congress of their approval of all or most of the proposed amendments. At this point, however, the movement for ratification stalled. Staunchly federalist Connecticut and Georgia, opposed to any changes in the Constitution, had refused to consider the amendments, and Massachusetts declined to send Congress official notice of its apparent ratification of nine of the twelve amendments.<sup>138</sup>

Approval by Virginia was, therefore, still necessary in the fall of 1790. However, by the time the Virginia legislature reconvened in October, ratification seemed less likely than it had a year earlier. Controversial actions of the new national government now seemed to vindicate the warnings issued by Henry and his colleagues over the previous three years, and Virginia's growing opposition to these policies caused attention to shift away from the proposed amendments.

## VII. THE REPUBLICAN OPPOSITION AND THE BILL OF RIGHTS

The estrangement of many Virginia federalists from the new government began on January 14, 1790, when Secretary of the Treasury, Alexander Hamilton, issued his First Report on the Public Credit.<sup>139</sup> Hamilton's report called for the redemption of all securities issued by the Continental Congress at face value plus four percent and, more significantly, for the federal assumption of the debts of the individual states.<sup>140</sup>

Virginia's political leaders, federalist and antifederalist alike, opposed these proposals. Even Madison, who had supported the idea of national assumption of state debts in 1783, joined the opposition, as did four of his six federalist colleagues in the Virginia Congressional delegation.<sup>141</sup> While the funding and assumption acts

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136. *Id.*

137. THE ROOTS OF THE BILL OF RIGHTS, *supra* note 1, at 1171-1203.

138. *Id.*

139. OLD DOMINION, *supra* note 4, at 68.

140. *Id.* For Hamilton's financial policies, see E.J. FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 (1961); J. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION (1959).

141. OLD DOMINION, *supra* note 4, at 70-73; I. BRANT, *supra* note 4, at 296-305.

became the focus of Virginia's hostility, the decision on the part of Congress to discuss Quaker anti-slavery petitions also did little to reassure disgruntled Virginians.<sup>142</sup>

These policies revived antifederalist fortunes in the spring and summer of 1790. Henry Lee wrote to Madison that "[Patrick] Henry already is considered as a prophet, his predictions are daily verifying. His declarations with respect to the division of interests which would exist under the constitution . . . has [sic] been undeniably proved."<sup>143</sup> David Stuart, another Virginia federalist, wrote to President Washington, "If Mr. Henry has sufficient boldness to aim the blow at its existence, which he has threatened, I think he can never meet with a more favorable opportunity."<sup>144</sup>

#### VIII. 1790 SESSION OF THE VIRGINIA GENERAL ASSEMBLY

When the General Assembly convened in October 1790, there was little discussion of the status of the proposed Bill of Rights. Instead, a coalition of antifederalists and disgruntled federalists supported a resolution introduced by Patrick Henry which declared that the act providing for the assumption of state debts was "repugnant to the constitution of the United States, as it goes to the exercise of a power not expressly granted to the General Government."<sup>145</sup> A federalist-backed alternative, which would have condemned the Assumption Act on all grounds but its constitutionality was defeated by a vote of eighty-eight to forty-seven.<sup>146</sup> Immediately thereafter, the House approved Henry's resolution denouncing the Act as unconstitutional by a seventy-eight to fifty-two margin.<sup>147</sup>

The General Assembly sent an even more critical message to Congress, when it approved the *Address of the General Assembly*

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142. OLD DOMINION, *supra* note 4, at 76.

143. See 13 MADISON PAPERS, *supra* note 21, at 136-37 (letter from Henry Lee to James Madison (Apr. 3, 1790)).

144. OLD DOMINION, *supra* note 4, at 77 (quoting letter from David Stuart to George Washington (June 2, 1790)).

145. OLD DOMINION, *supra* note 4, at 78; HOUSE JOURNAL, *supra* note 44, at 35-36 (Nov. 3, 1790).

146. *Id.*

147. *Id.* at 36. The resolution was subsequently approved by the Senate. SENATE JOURNAL, *supra* note 51, at 77-78 (Dec. 21, 1790). Of the 42 known antifederalists in the House of Delegates, 38 supported Henry's resolution denouncing the assumption of state debts, while only six of 30 federalists did so. Of the remaining 58, whose prior positions are unknown, 34 supported the resolution, and 24 opposed it. N. RISFORD, *supra* note 4, at 395-96.

of the Commonwealth of Virginia to the United States in Congress Assembled.<sup>148</sup> The address accused the government generally, and Alexander Hamilton in particular, of imitating English financial policies, of desiring to "perpetuate a large monied interest," and of discriminating against those states, like Virginia, that had paid off much of their own debt. The address also denounced the Assumption Act as unconstitutional.<sup>149</sup>

The assumption crisis also seemed to vindicate the antifederalist opponents of the proposed amendments. No one suggested that the ratification of the Congressionally approved amendments would have prevented Congress from adopting Hamilton's plan, and this was exactly the problem that the antifederalists predicted. The proposed amendments dealt only with individual liberties. They offered no protection when the national government unconstitutionally discriminated against the interests of an individual state. Only more substantial amendments to the Constitution, specifically designed to limit the financial powers of the federal government, could accomplish this objective. Consequently, the still unratified congressional amendments were not an issue during the 1790 legislative session.

## IX. VIRGINIA RATIFIES THE BILL OF RIGHTS

By 1791, a new political alignment was in place in Virginia. Anti-federalists had combined with a significant number of disillusioned federalists to form what would soon be known as the Republican Party.<sup>150</sup> The new coalition controlled the General Assembly. The Commonwealth's Congressional delegation was united by the opposition of its members to the financial, and later the foreign policies of the Washington administration. By 1791, it was also clear that for better or worse the Constitution ratified in 1788 was going to remain in effect. The key to limiting federal usurpation of power lay, not in the hopes of a different constitution, but in the development of a theory of strict construction for the existing one and, as

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148. HOUSE JOURNAL, *supra* note 44, at 141-42 (Dec. 16, 1790).

149. OLD DOMINION, *supra* note 4, at 80-82. As Richard Beeman has noted, an earlier draft of the *Address*, approved by the House but not the Senate, appeared to anticipate the Kentucky and Virginia Resolutions of the late 1790's by raising the possibility of state legislative nullification of unconstitutional acts of congress. *Id.* at 80.

150. *Id.* at 90. Norman Risjord's study of the subsequent careers of 61 federalist members of the 1788 Virginia Ratifying Convention revealed that 38 supported the Washington administration in the 1790's while 23 joined the ranks of the Republican opposition. Risjord, *The Virginia Federalists*, 33 J. of S. Hist. 486, 487 (1967).

soon as possible, control of the national government. Even Patrick Henry acknowledged this change. His denunciation of Hamilton's policies as "repugnant to the Constitution" during the 1790 legislative session implied that the debate over the legitimacy of the Constitution itself had ended,<sup>151</sup> and after the conclusion of session, he privately conveyed his acceptance of the new Constitution to James Monroe.<sup>152</sup>

In this revised political climate, the participants ceased to view the Congressional amendments as a referendum on the national government. Even so, supporters of the amendments did not assume that ratification would be automatic in the fall of 1791. More than a year had passed since any state had ratified the proposed amendments, and the admission of Vermont to the union as the fourteenth state on March 14, 1791 had raised the number of necessary states from ten to eleven. When the General Assembly convened in October 1791, the challenge confronting the supporters of the amendments was to present them in such a way that the issue of ratification could be kept separate from the state's attitude toward the Federalist national government. Presumably, this task was made easier by the retirement of Patrick Henry from the legislature,<sup>153</sup> and by the fact that five of the eight antifederalist senators who had defeated the amendments in 1789 had also left the legislature.<sup>154</sup>

Nevertheless, the strategy adopted by the proponents of the amendments in 1791 was a cautious one. Rather than introduce the amendments as a group, as had been done in 1789, only the proposed first amendment (which pertained to congressional apportionment and guaranteed that the House of Representatives would contain at least one representative for every fifty thousand people) was presented to the House of Delegates. This amendment passed without controversy on October 25, and was ratified by the Senate on November 3.<sup>155</sup> Notification of the ratification was immediately dispatched to Congress.<sup>156</sup>

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151. N. RISJORD, *supra* note 4, at 395.

152. PATRICK HENRY, *supra* note 4, at 175-76 (letter from Patrick Henry to James Monroe (Jan. 24, 1791)).

153. *Id.* at 175-76.

154. Tarter, *supra* note 3, at 14.

155. HOUSE JOURNAL, *supra* note 44, at 14 (Oct. 25, 1791); SENATE JOURNAL, *supra* note 51, at 9 (Nov. 3, 1791).

156. THE ROOTS OF THE BILL OF RIGHTS, *supra* note 1, at 1201. Yet the first amendment "never received the approval of enough legislatures to become part of the Constitution." Tarter, *supra* note 3, at 14.

Convinced that opposition to the Congressional amendments was no longer the policy of the antifederalists and their allies, supporters introduced the remaining eleven amendments.<sup>157</sup> The amendments were then passed by the House on December 5, with only a single dissenting vote.<sup>158</sup> Apparently, Henry did make a brief appearance in Richmond while the General Assembly was in session, and federalist Francis Corbin was convinced that he might try to derail the amendments in the Senate as had been done two years earlier.<sup>159</sup> However, Henry departed Richmond on December 7, and the Senate approved the remaining amendments eight days later.<sup>160</sup> Official notification of ratification reached Congress on December 30.<sup>161</sup>

Unknown to members of the Virginia General Assembly, Vermont had ratified the full slate of amendments on November 3. Official notification of that state's ratification, however, did not reach Congress until January 18, 1792, more than two weeks after Virginia's had become official. The ratification by the two states brought to eleven the number of states which had adopted proposed amendments three through eleven.<sup>162</sup> The adopted amendments officially became amendments one through ten of the United States Constitution on March 1, 1792, when Secretary of State Thomas Jefferson notified the governors of the several states of "the ratifications by three fourths of the Legislatures of the Several States, of certain articles in addition and amendment of the Constitution of the United States, proposed by Congress to the said Legislatures."<sup>163</sup>

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157. Francis Corbin discussed the strategy of the amendment supporters. 14 MADISON PAPERS, *supra* note 21, at 140-41 (letter from Francis Corbin to James Madison (Dec. 7, 1791)).

158. *Id.* at 141; HOUSE JOURNAL, *supra* note 44, at 103 (Dec. 5, 1791).

159. 14 MADISON PAPERS, *supra* note 21, at 141 (letter from Francis Corbin to James Madison).

160. SENATE JOURNAL, *supra* note 51, at 60 (Dec. 15, 1791).

161. THE ROOTS OF THE BILL OF RIGHTS, *supra* note 1, at 1201-02. The acts themselves are recorded in W. W. HENING, 13 THE STATUTES AT LARGE, BEING A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 (1823) 327-29.

162. Proposed amendments one and two, however, had been endorsed by only nine and eight states, respectively.

163. THE ROOTS OF THE BILL OF RIGHTS, *supra* note 1, at 1203 (letter from Thomas Jefferson to the Governors of the Several States (Mar. 1, 1792)).

## X. VIRGINIA'S RATIFICATION OF THE BILL OF RIGHTS: AN APPRAISAL

At the time it finally adopted the proposed amendments that now make up the Bill of Rights, the Virginia General Assembly gave little evidence that it believed it had participated in an event of historical significance. Even Madison and his correspondents expressed little sense of elation. When Francis Corbin wrote to Madison to report that the amendments had been approved by the Senate, he dispensed of the matter in a single sentence and devoted most of his letter to reporting his plan for a resolution congratulating the National Assembly of France on the establishment of a new French constitution.<sup>164</sup> Moreover, Madison's own correspondence in the following months makes no mention of Virginia's ratification.<sup>165</sup>

The events of the preceding two years, as well as the new controversy over the constitutionality of the recently chartered Bank of the United States, had established that the great constitutional issues of the 1790's were not going to be resolved by a Bill of Rights. Further evidence was provided in 1798 by the Congressional adoption of the Federalist Sedition Act, which made it a crime to criticize the national government and its leadership, in spite of the guarantee of free speech in the new first amendment.<sup>166</sup>

The limited significance of the Bill of Rights at the time of its adoption was not lost on contemporaries. Alexander Hamilton, writing in 1801, noted that in its final form, the Bill of Rights had accomplished "scarcely any of the important objections which were urged [by the critics of the new constitution], leaving the structure of the government, and the mass and distribution of its powers where they were."<sup>167</sup> The amendments were, in Hamilton's mind, "too insignificant to be with any sensible man a reason for being reconciled to the system if he thought it originally bad."<sup>168</sup> There is also little reason to believe that Madison himself ever departed fundamentally from his initial characterization of his amendments

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164. 14 MADISON PAPERS, *supra* note 21, at 151-52 (letter from Francis Corbin to James Madison (Dec. 15, 1791)).

165. *See id.* at 152-160.

166. *See generally* J. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951)(discussing Federalist Sedition Act).

167. 25 PAPERS OF ALEXANDER HAMILTON 346 (1977)(Hamilton, "An Address to the Electors of the State of New York" (Mar. 21, 1801)).

168. *Id.*



as the product of political expedience. In an 1821 letter to John G. Jackson, in which he reflected upon the events of the late 1780's, Madison described the amendments he introduced on the floor of Congress as "safe, if not necessary" and "politic, if not obligatory."<sup>169</sup> Finally, United States Supreme Court Justice Joseph Story, writing from the vantage point of the late 1820's, echoed Hamilton's evaluation, attributing the original demand for a Bill of Rights to a "matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution."<sup>170</sup>

Prominent antifederalists also continued to downplay its significance. In his 1803 commentary on the United States Constitution, St. George Tucker argued that the addition of the Bill of Rights to the Constitution was justified, not because it actually added any new protection of liberty, but because it provided citizens with information as to the nature of their rights.<sup>171</sup> Tucker explained that "[b]y reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated; a circumstance, of itself, sufficient, I conceive, to counterbalance every argument against one."<sup>172</sup> As to whether the addition of the Bill of Rights had satisfied the concerns that had led many to oppose the Constitution, Tucker's answer was clearly that it had not. Throughout his 238-page survey of the United States Constitution, he noted the need for additional amendments to "remedy some radical defects in the system."<sup>173</sup> He concluded his observations with an enumeration of the "most important of those [amendments] which have not yet received the approbation of both houses of congress,"<sup>174</sup> by which he meant the substantive proposals advanced by the Virginia Ratifying Convention.

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169. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 244 (1865) (letter from James Madison to Andrew Jackson (Dec. 27, 1821)).

170. R. RUTLAND, *supra* note 1, at 218 (quoting 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 602 (1873)).

171. 1 TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, Appendix I, at 308 (1803).

172. *Id.* at Appendix I, Note D at 308.

173. *Id.* at 372.

174. *Id.* at 372-75.

## XI. CONCLUSION

The Virginia ratification of the Bill of Rights was part of the fabric of Virginia politics of the late eighteenth century, and as such, it offers the modern citizen little direct guidance as to either the meaning of its provisions or the proper role it ought to play in the contemporary American constitutional system. The experience did, however, help establish a pattern of divergent attitudes toward the Constitution, which ultimately would be a recurring theme in the history of the Old Dominion.

The federalist-antifederalist division over the meaning of the Constitution in the 1780's had its counterpart in the debates between Chief Justice John Marshall and his critics, Spencer Roane and John Taylor of Caroline, in the 1810's and 20's, between the representatives of the east and west in the state constitutional conventions of 1830 and 1850, between the unionists and the secessionists in 1860 and 1861, between the founders and readjusters of the post-Civil War era, and in the twentieth century, between those who sought to impose the Constitution as a barrier between Virginia and the civil rights movement and the modern welfare state and those who accepted the constitutional holdings of the modern Supreme Court. There are two constitutional traditions in Virginia, one local in its orientation, the other national. It is, of course, the resilience of the former, traceable in its origins to the antifederalists of the 1780's, that has given the state its distinctive place in American constitutional history.<sup>175</sup>

Finally, it is ironic that the Bill of Rights has in the twentieth century, come to stand for a constitutional principle quite different from what late eighteenth century Virginians understood it to represent. Initially endorsed as a mechanism for protecting the rights of the individuals from an oppressive national government and for assuring the defenders of state sovereignty that they had nothing to fear, it now, through the incorporation of the Bill of Rights into the Fourteenth Amendment, operates as a powerful limitation on the sovereign power of the states. It has provided a constitutional mechanism through which a single, uniform national standard has been imposed on the states, and in doing so has led to a realization

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175. On the survival of antifederalism as a political and constitutional force, see Ellis, "The Persistence of Antifederalism after 1789" in *BEYOND CONFEDERATION*, *supra* note 1, at 295-314.

of the very fear that led Virginia antifederalists to oppose its ratification more than two centuries ago.

## APPENDIX I

*Amendments Proposed by Virginia Convention**June 27, 1788*

That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following;

*First*, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

*Second*, That all power is naturally vested in and consequently derived from the people; that Magistrates, therefore, are their trustees and agents and at all times amenable to them.

*Third*, That Government ought to be instituted for the common benefit, protection and security of the People; and that the doctrine of non-resistance against arbitrary power and oppression is absurd slavish, and destructive of the good and happiness of mankind.

*Fourth*, That no man or set of Men are entitled to exclusive or separate [*sic*] public emoluments or privileges from the community, but in Consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator or Judge, or any other public office to be hereditary.

*Fifth*, That the legislative, executive, and judiciary powers of Government should be separate [*sic*] and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should, at fixt periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct.

*Sixth*, That elections of representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest with and attachment to the Community ought to have the right of suffrage: and no aid, charge, tax or fee can be set, rated, or levied upon the people without their own

consent, or that of their representatives so elected, nor can they be bound by any law to which they have not in like manner assented for the public good.

*Seventh*, That all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people in the legislature is injurious to their rights, and ought not to be exercised.

*Eighth*, That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial Jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

*Ninth*, That no freeman ought to be taken, imprisoned, or dis-seised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.

*Tenth*, That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

*Eleventh*, That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable.

*Twelfth*, That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, compleatly [*sic*] and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust.

*Thirteenth*, That excessive Bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*Fourteenth*, That every freeman has a right to be secure from all unreasonable searches and siezures [*sic*] of his person, his papers and his property; all warrants, therefore, to search suspected places, or sieze [*sic*] any freeman, his papers or property, without

information upon Oath (of affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

*Fifteenth*, That the people have a right peaceably to assemble together to consult for the common good, or to instruct their Representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

*Sixteenth*, That the people have a right to freedom of speech, and of writing and publishing their Sentiments; but the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated.

*Seventeenth*, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

*Eighteenth*, That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct.

*Nineteenth*, That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

*Twentieth*, That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.

#### AMENDMENTS TO THE BODY OF THE CONSTITUTION

*First*, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitu-

tion delegated to the Congress of the United States or to the departments of the Foederal [*sic*] Government.

*Second*, That there shall be one representative for every thirty thousand, according to the Enumeration or Census mentioned in the Constitution, until the whole number of representatives amounts to two hundred; after which that number shall be continued or increased [*sic*] as the Congress shall direct, upon the principles fixed by the Constitution by apportioning the Representatives of each State to some greater number of people from time to time as population encreases [*sic*].

*Third*, When Congress shall lay direct taxes or excises, they shall immediately inform the Executive power of each State of the quota of such state according to the Census herein directed, which is proposed to be thereby raised; And if the Legislature of any State shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected, in such State.

*Fourth*, That the members of the Senate and House of Representatives shall be ineligible to, and incapable of holding, any civil office under the authority of the United States, during the time for which they shall respectively be elected.

*Fifth*, That the Journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy.

*Sixth*, That a regular statement and account of the receipts and expenditures of all public money shall be published at least once in every year.

*Seventh*, That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no Treaty ceding, contracting, restraining or suspending the territorial rights or claims of the United States, or any of them or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers shall be [made] but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

*Eighth*, That no navigation law, or law regulating Commerce

shall be passed without the consent of two thirds of the Members present in both houses.

*Ninth*, That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two thirds of the members present in both houses.

*Tenth*, That no soldier shall be inlisted [*sic*] for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.

*Eleventh*, That each State respectively shall have the power to provide for organizing, arming and disciplining it's own Militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments as shall be directed or inflicted by the laws of its own State.

*Twelfth*, That the exclusive power of legislation given to Congress over the Foederal [*sic*] Town and its adjacent District and other places purchased or to be purchased by Congress of any of the States shall extend only to such regulations as respect the police and good government thereof.

*Thirteenth*, That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.

*Fourteenth*, That the judicial power of the United States shall be vested in one supreme Court, and in such courts of Admiralty as Congress may from time to time ordain and establish in any of the different States: The Judicial power shall extend to all cases in Law and Equity arising under treaties made, or which shall be made under the authority of the United States; to all cases affecting ambassadors other foreign ministers and consuls; to all cases of Admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or [more] States, and between parties claiming lands under the grants of different States. In all cases affecting ambassadors, other foreign ministers and Consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction; in all other cases before mentioned the supreme Court shall have appellate jurisdiction as to matters of law only: except in cases of equity, and of admiralty and maritime jurisdiction, in which the Supreme Court



shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. But the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this Constitution; except in disputes between States about their Territory, disputes between persons claiming lands under the grants of different States, and suits for debts due to the United States.

*Fifteenth*, That in criminal prosecutions no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the Jury.

*Sixteenth*, That Congress shall not alter, modify or interfere in the times, places, or manner of holding elections for Senators and Representatives or either of them, except when the legislature of any State shall neglect, refuse or be disabled by invasion or rebellion to prescribe the same.

*Seventeenth*, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

*Eighteenth*, That the laws ascertaining the compensation to Senators and Representatives for their services be postponed in their operation, until after the election of Representatives immediately succeeding the passing thereof; that excepted, which shall first be passed on the Subject.

*Nineteenth*, That some Tribunal other than the Senate be provided for trying impeachments of Senators.

*Twentieth*, That the Salary of a Judge shall not be increased [*sic*] or diminished during his continuance in Office, otherwise than by general regulations of Salary which may take place on a revision of the subject at stated periods of not less than seven years to commence from the time such Salaries shall be first ascertained by Congress.

## APPENDIX II

*Amendments Proposed by Congress to the States**September 25, 1789*

*Article the first . . .* After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

*Article the second . . .* No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

*Article the third . . .* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Article the fourth . . .* A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

*Article the fifth . . .* No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

*Article the sixth . . .* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Article the seventh . . .* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

*Article the eighth . . .* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Article the ninth . . .* In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Article the tenth . . .* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*Article the eleventh . . .* The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*Article the twelfth . . .* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.