

## Part 5: The Constitution: Taking Sides

### 1. Federalists v. Antifederalists

Virginia was the key state in the ratification process. And in Virginia, there were stalwarts of independence who were openly opposed to the concentration of power in a centralized government that left the states and their citizens with no guarantees their rights would not be infringed.

Those who opposed the Constitution without amendments were called antifederalists and included Patrick Henry, George Mason, Richard Henry Lee, James Monroe, George Clinton, William Grayson, and Edmund Randolph. Without Virginia's consent, even if ratified, the Union would be split and the Constitution ineffective.

Those favoring ratification of the Constitution without amendments were termed federalists and were comprised primarily of George Washington, Thomas Jefferson, John Adams, James Madison, Benjamin Franklin, Alexander Hamilton, and John Jay.

Washington's dream depended on winning the favor of the Voice of Independence, Patrick Henry. Upon his return to Mount Vernon, Washington wrote to Henry:

In the first moments of my return I take the liberty of sending you a copy of the Constitution which the Federal Convention has submitted to the people of these states. I wish the Constitution had been made more perfect, but I sincerely believe it is the best that could be obtained at this time—and as a constitutional door is opened for amendment hereafter—the adoption of it under present circumstances of the Union is in my opinion desirable. The political concerns of this country are suspended by a thread. If nothing had been agreed upon anarchy would soon have ensued—the seeds being ripely sown in every soil.<sup>28</sup>

Henry was not in the mood to receive such correspondence from a man whom he admired most among his fellow patriots. His disgust was so adamantly directed toward the Constitution that he could only respond to Washington in muted tones:

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<sup>28</sup> Harlow Giles Unger, *Lion of Liberty: Patrick Henry and the Call to a New Nation* (Cambridge, Mass.: Da Capo Press, 2010), 198; quoted from: George Washington to Patrick Henry, September 24, 1787, PGW Confed., 5:339–340.

I have to lament that I cannot bring my mind in accord with the proposed Constitution. The concern I feel on this account is really greater than I am able to express. Perhaps mature reflection may furnish me reasons to change my present sentiments into a conformity with the opinion of those personages for whom I have the highest reverence. Be that as it may, I beg you will be persuaded of the unalterable regard and attachment with which I ever shall be, dear sir, your obliged and very humble servant.<sup>29</sup>

Henry's concerns were so numerous that he felt it inappropriate to enumerate them in a letter to Washington. He would save his objections for the upcoming debates.

Certain phrases in the Constitution hinted at inevitable tyranny, such as the threat of unlimited and unbounded power over the states granted in the final paragraph of Article I, Section 8:

To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Henry was further troubled that there were no term limits for the president, members of Congress, or the judiciary. All could serve indefinitely and possibly collude to create tyranny; collude with foreign governments to sell territorial rights as Congress had almost done with Spain regarding the Jay-Gardoqui Treaty.<sup>30</sup> Henry didn't like the government having the power to maintain a standing army, impose taxes without consent of the states, to "negative" state laws, and to enforce federal laws with troops.

His primary concern was that the states lost their sovereignty and the individual rights to freedom of speech, religion, press, trial by jury, redress of grievances, and assembly. These rights were not protected. Virginia's Declaration of Rights guaranteed all these things but they now could be overridden by the "superior" federal government.

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<sup>29</sup> Ibid., 199; quoted from: Patrick Henry to George Washington, October 1787, *ibid.*, 5:384.

<sup>30</sup> This treaty, negotiated by John Jay and Spain's Diego de Gardoqui, would have given Spain navigation rights on the Mississippi River for twenty-five years which Henry successfully opposed.

Many of the grievances expressed in the Declaration of Independence were now again a concern to Henry. The states had abused this power under the Confederation, now it was given to the “superior” Congress: “Representatives and direct Taxes shall be apportioned among the several States” introduces Article I, Section 2, and paragraph 3. Henry had long opposed any permanent national government tax, yet the Constitution granted this power in its very first Article.

Henry’s fears have presently been proved prophetic. In February 1913 the Sixteenth Amendment was ratified that reads, “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived ....” Today the power to tax has allowed Congress to wittingly run up a national debt that is on the verge of \$20 trillion.

Henry’s objections, along with those of George Mason and Richard Henry Lee, had significant impact outside of Virginia. The *Freeman’s Journal* of Philadelphia cautioned about Congress’ power “to lay and collect taxes” (Sept. 26, 1787). Philadelphia’s *Independent Gazetteer* wrote that the Constitution would create “a permanent aristocracy” (Oct. 5, 1787). The *Massachusetts Centinel* warned, “You are forging chains for yourself and your children—your liberties are at stake” (Nov. 17, 1787).

Antifederalists were swaying public opinion against ratification but in the state legislatures the Federals held majorities and were able to call conventions. By February of 1788 Connecticut, Delaware, Georgia, Massachusetts, New Jersey, and Pennsylvania had ratified.

The vote in Pennsylvania was literally stolen by the strong-arm tactics of none other than Benjamin Franklin:

Franklin ignored all principles of self-government by leading the delegation out of the Constitutional Convention and marching into the Pennsylvania Assembly hall in the same building. Interrupting the Assembly’s proceedings, he all but promised that Philadelphia would be the new federal capital if Pennsylvania was first to ratify the Constitution. He urged state legislators to call a state ratification convention immediately, without debate. Like other major property owners in the city Franklin stood to reap enormous profits if the new government established the capital in Philadelphia.

Angry backcountry Antifederalists, however, refused to appear in the Assembly and left it two members short of a quorum. Speaker Thomas Mifflin, the wealthy Philadelphia merchant, ordered a sergeant at arms and a clerk to find at least two absent members and order them to the hall. A mob of federalists followed the two to the boarding house where many Antifederalists lodged and physically dragged two assemblymen back to their seats in the State House, where, despite their shouts of protest, sentries physically restrained them while Federalists voted to hold the ratification convention on November 20.<sup>31</sup>

Patrick Henry was appalled that Pennsylvania was “tricked” into ratifying the Constitution. Governor George Clinton of New York was prepared to secede rather than allow his state to relinquish its sovereignty to a national government.

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<sup>31</sup> Unger, *Lion of Liberty*, 205.

**Part 6: The Fight for the Bill of Rights<sup>32</sup>**

When Patrick Henry arrived in Richmond to participate in Virginia's consideration of the Constitution he felt confident that his arguments held enough weight to convince the delegates to withhold their vote for ratification. If Virginia, the largest state in the Union, declined to ratify, then New York would follow dealing a vital blow to the success of the venture.

Henry was adamant that if the Constitution were to become law it must be amended with a Bill of Rights. Otherwise, he had serious objections to allowing the document to stand alone.

The Declaration had specifically cited King George III "for imposing Taxes on us without our Consent" yet the Constitution gave Congress unlimited power to tax the people without consent of their legislatures.

The Declaration challenged England's deployment of a standing army in the colonies while the Constitution authorized a standing army which could be sent into any state to enforce federal laws.

Henry was also leery of the Constitution's provision in Article VI which stipulates that "all Treaties made, or which shall be made, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Henry's recall of the narrowly defeated Jay-Gardoqui Treaty made him highly suspect of this provision.

Once convened, Henry opened the debates and, as was the custom, he addressed his comments to the Chairman George Mason:

**Mr. Chairman, I consider myself as the servant of the people of this commonwealth, as a sentinel over their rights, liberty, and happiness. I represent their feeling when I say that they are exceedingly uneasy. Before the meeting of the late Federal Convention at Philadelphia, a general peace and a universal tranquility prevailed in this country. But since that period I conceive the republic to be in extreme danger.**

**Whence has risen this fearful jeopardy? It arises from this fatal system—it arises from a proposal to change our government. A proposal that goes to the utter annihilation of the most solemn engagement of the states. That this is a consolidated government instead of a confederation is demonstrably clear, and the danger of such a government is, to my mind very striking.**

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<sup>32</sup> Ibid., see footnote 27.

Henry then accused the Convention of a coup d'état since its permission to assemble in Philadelphia was granted by Congress for the purpose of revising the Articles of Confederation and reporting to the state legislatures alterations and provisions, yet instead it had created a new government. To this he directed his comments to the presumptuousness of its Preamble:

I have the greatest veneration for those worthy characters who composed a part of the late federal convention but, sir, give me leave to demand what right they had to say, *We, the People*? My political curiosity leads me to ask who authorized them to speak the language of *We, the People*? The people gave them no power to use their name. That they exceeded their power is perfectly clear. The federal convention ought to have amended the old system—for this purpose they were solely delegated. The object of their mission extended to no other consideration.

I would demand the cause of their conduct even from that illustrious man who saved us by his valor. I would demand a faithful historical detail of the reasons that actuated its members in proposing an entire alteration of government—and to demonstrate the dangers that awaited us. Disorders have arisen in other parts of America, but here, Sir, no dangers, no insurrection or tumult has happened—everything has been calm and tranquil. What are the causes for this proposal to change our government?<sup>33</sup>

One of the more prominent Antifederalists, the sitting governor of Virginia, Edmund Randolph, followed Henry and it was expected that he would complement Henry's remarks. That he did not resulted in the tide shifting in Washington and the Federalists' favor:

... as a member of the Constitutional Convention, I refused to sign, and if the same were to return, again would I refuse, but I never will assent to the scheme that will operate a dissolution of the Union or any measure which may lead to it. The Union is the anchor of our political salvation, and I will assent to the lopping of this limb before I assent to the dissolution of the Union.

Randolph then looked at Henry:

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<sup>33</sup> Unger, 211–12.

I shall follow the honorable gentleman in his enquiry ... why we assumed the language of "We, the People." I ask why not? The government is for the people. Is it unfair? Is it unjust? I take this to be one of the least and most trivial objections that will be made to the Constitution. In the whole of this business, I have acted in the strictest obedience to my conscience, in discharging what I conceive to be my duty to my country. I refused my signature. I would still refuse, but as I think that those eight states which have adopted the Constitution will not recede, I am a friend to the Union.

Henry and George Mason were livid at the betrayal by Edmund Randolph and Henry believed the Tidewater aristocracy of Virginia of which Randolph was one, sought to recapture the powers it held in the state's colonial House of Burgesses.

Federalist Light-Horse Harry Lee began the next day's debates by taking up where Randolph had left off:

I feel every power of my mind moved by the language of the honorable gentleman yesterday. The *éclat* \ā-klā\ and brilliancy which have distinguished that gentleman, the honors with which he has often been dignified, and the brilliant talents which he has so often displayed have attracted my respect and attention. On so important an occasion I expected a new display of his powers of oratory, but instead of proceeding to investigate the merits of the new plan of government, the worthy character informed us of the horrors which made him tremblingly fearful of the fate of the commonwealth.

The gentleman sat down as he began, leaving us to ruminate on the horrors which he opened with, but, sir, this system is to be examined on its own merit. Mr. Chairman, was it proper to appeal to the fear of this house? I trust he is come here to judge and not to alarm.

All Lee's comments did were to steel Henry's resolve even more than did Randolph's the day before. Henry's retort to Lee isolated the reasons free men should be wary of offering unfettered power to a central government:

I am much obliged to the very worthy gentleman for his encomium. I wish I was possessed of talents, or possessed of any thing that might enable me to elucidate on this great subject. I rose yesterday to ask a question. I thought the meaning was obvious. Here is a revolution as radical as that which separated us from Great Britain ... if in this transition, our rights and privileges are endangered, and the sovereignty of the states be relinquished. And cannot we plainly see that this is actually the case? The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges are rendered insecure, if not lost.

'Is this tame relinquishment of rights worthy of freemen?' he cried out.



‘No!’ came the cry from gallery buckskins. Presiding officer George Wythe gaveled the hall to order.

‘Is the relinquishment of the trial by jury necessary and the liberty of the press necessary for your liberty?’

‘No!’ And again, the rap of Wythe’s gavel.

Will the abandonment of your most sacred rights tend to the security of your liberty?

‘No!’

The new form of government will oppress and ruin the people!

The gallery erupted in angry nos until Wythe’s gavel restored order.

It is said eight states have adopted this plan. I declare if twelve and one half had adopted it, I would with manly firmness reject it!

The gallery cheered.

But I am fearful I have lived long enough to become an old-fashioned fellow. If so, I am contented to be so. Twenty-three years ago I was supposed a traitor to my country.

‘No-o-o-o-o!’ the gallery protested.

I was then said to be a bane of sedition, because I supported the rights of my country. I say now our privileges and rights are in danger. Is not the ancient trial by jury preserved in the Virginia Bill of Rights?

‘Yes!’ they answered.

And is that the case in the new plan?

‘No!’ the gallery responded angrily.

No, sir! he echoed their response.

Why do we love this trial by jury? Because it prevents the hand of oppression from cutting yours off. They may call everything rebellion and deprive you of a fair trial by an impartial jury of your neighbors. Shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. It gives me comfort that as long as I have existence my neighbors will protect me. Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately nothing will preserve it but downright force; whenever you give up that force you are inevitably ruined. Something must be done to preserve your liberty and mine.

Henry turned to Federalist chairman Wythe.



The Constitution is said to have beautiful features. But when I come to examine these features, Sir, they appear to me horribly frightful. Among other deformities, it has awful squinting; it squints towards monarchy. And does not this raise indignation in the breast of every American? Your President may easily become King. Where are your checks in this government? There will be no checks, no real balances in this government. It is on a supposition that your American governors shall be honest that all the good qualities of this government are founded; but its defective and imperfect construction puts it in their power to perpetrate the worst of mischiefs, should they be bad men.

Show me that age and country where the rights and liberties of the people were placed on the sole chance that their rulers being good men, without a consequent loss of liberty. If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute!

If Congress in the execution of their unbounded powers shall have done wrong, how will you come at them to punish them?<sup>34</sup>

Henry then focused his attention on arguments in favor of ratification without the appending of a Bill of Rights. He reviewed the powers given the president and Congress: the power of unlimited direct taxation, powers to counteract and suspend states laws, and powers to send troops into any state to enforce federal laws—powers that in the hands of Parliament had provoked the War for Independence. The dangers were amplified by the power granted Congress under Article 1, Section 8, “to make all laws necessary for carrying their powers into execution.” Then he shouted:

Will you be safe when you trust men at Philadelphia with power to make any law that will enable them to carry their acts into execution? By this, they have a right to pass any law that may facilitate the execution of their acts. Is there any act, however atrocious, which Congress cannot do by virtue of this clause? Congress will become the supreme power.

A wonderful and unheard experiment it will be, to give unlimited power unnecessarily. This is dishonorable and disgraceful. It will be as oppressive in practice as it is absurd in theory.

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<sup>34</sup> Ibid., 216–20.

I trust that gentlemen will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right secured before they agree to that paper. You have a bill of rights to defend you against the state government and you have none against Congress. If you intend to reserve your unalienable rights, you must have the most express stipulation. It is expressly declared in our Articles of Confederation that every right was retained by the states which was not given up to the government of the United States. But there is no such thing here. You therefore by a natural and unavoidable implication give up your rights to the general government.

Why not give us our rights? In express terms! In language that could not admit of evasions or subterfuges? We are giving power. They are getting power!

If you will stipulate that there are rights which no man under heaven can take from you, you shall have me going along with you. Not otherwise. I speak as one poor individual—but when I speak, I speak the language of thousands!<sup>35</sup>

As the Convention continued Henry continued to plead for the inclusion of rights before ratification could be voted. Washington consistently rebuked the need for amendments since the document contained a “constitutional door for amendment,” to which Henry fired back his polemic:

I am constrained to make a few remarks on the absurdity of relying on the chance of getting it amended afterwards. When it is confessed to be replete with defects, is it not offering to insult your understandings to attempt to reason you out of the propriety of rejecting it till it be amended? Does it not insult your judgments to tell you—adopt first, and then amend? Is your rage for novelty so great that you are first to sign and seal, and then to retract? You agree to bind yourselves hand and foot—for the sake of what? Of being unbound? You go into a dungeon—for what? To get out? Is there no danger when you go in that the bolts of federal authority shall shut you in? Human nature never will part from power! Have we not a right to say, “Hear our propositions.” If this moment goes away we will never see its return.<sup>36</sup>

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<sup>35</sup> Unger 220–222.

<sup>36</sup> Unger, 228.

By the next morning, James Madison approached moderate Antifederalists with the pledge to fight for passage of a bill of rights in the First Congress if they switched their votes for ratification. The result of the crossover voters gave the Federalists an 89-79 vote in favor of ratification. It was agreed by most of the delegates that Madison's pledge to promote a bill of rights was the key factor in the Federalist victory.

After the vote the delegates assumed Henry would again regale the convention about the inherent dangers lurking behind their act. He was however quite constrained:

If I shall be in the minority, I shall have those painful sensations which arise from a conviction of being overpowered in a good cause. Yet I will be a peaceable citizen! My head, my hand, my heart shall be at liberty to retrieve the loss of liberty and remove the defects of that system—in a constitutional way. I wish not to go to violence, but will wait with hopes that the spirit which predominated in the revolution is not yet gone, nor the cause of those who are attached to the revolution yet lost. I shall therefore patiently wait in expectation of seeing that Government changed so as to be compatible with the safety, liberty and happiness of the people.<sup>37</sup>

Once the new government was seated, Washington gave Madison approval to fulfill his pledge to Henry to propose a bill of rights. After taking his seat in the House of Representatives, he moved for “Amendments that may serve the double purpose of satisfying the minds of well-meaning opponents, and of providing additional guards in favor of liberty.” Madison failed to address the issue of states' rights, however, and Antifederalist Senator William Grayson expressed his outrage to Henry:

Some gentlemen here have it in contemplation to effect amendments which shall affect personal liberty alone, leaving the great points of the judiciary, direct taxation, etc., to stand as they are. Their object is unquestionably to break the spirit of the Antifederalist party. After this I presume many of the most sanguine expect to go on coolly in sapping the independence of the state legislatures.<sup>38</sup>

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<sup>37</sup> Ibid. 234-35.

<sup>38</sup> Unger, 243.

Four months later, Madison resolved that the Constitution be amended with “a declaration of the rights of the people” to ensure “the tranquility of the public mind, and the stability of the government.” Although members proposed seventy-five amendments, the House approved only seventeen, and the Senate reduced the number to twelve. The states ratified ten, which became known collectively as the Bill of Rights.

After reading them, Henry exploded with rage over the failure of the amendments to restrict the national government’s powers over the states:

“I wrote the first of those amendments in these words, ‘Each state in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government.’ But they have omitted it and changed it into this *equivocal* thing ‘or to the people.’ My sons, this Constitution cannot last. It will not last a century. We can only get rid of it by the most violent and bloody struggle.”<sup>39</sup>

After Henry’s first reading of the Constitution, he observed, “It squints towards monarchy.” Now, in the twenty-first century, it no longer squints. It is being used by the powers that be, with wide-eyed resolve, to arrogate powers Henry feared some “bad men” would do.

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<sup>39</sup> Ibid., 244.