

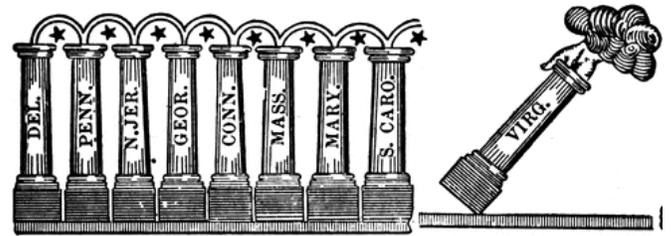
Kicking the Constitutional Can

Fundamental questions left unanswered by the Constitutional Ratification debates

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By the time Abraham Lincoln arrived in Washington in March of 1861 to assume the office of the President, seven states already claimed to have seceded from the eighty-six year old Union. South Carolina's Declaration of Causes, issued the previous December, declared an end to a "contract" between states, and *not* the end to a nation. The distant national government seemed to ignore the concerns of the citizens of South Carolina.¹ Facing the crisis, Lincoln attempted to reassure the anxious South that he felt he could not unilaterally touch the institution slavery, but he also insisted that the Union would be preserved by arms if necessary. Lincoln took the Constitution at its word and saw that it formed "a more perfect union," and not a "contract" between states. Lincoln's United States was a single national entity meant for "perpetuity," and not a league of sovereign states.² A couple generations prior, the same issues took the stage in a continental debate about the fundamental nature of the relationship between states. Facing pressing geopolitical threats, with which Lincoln's generation would not contend, the debating parties in a most gentlemanly way, acquiesced and kicked the proverbial can down the road, leaving fundamental questions about Union unresolved. In the end, the parties in the ratification debate, although deeply divided, valued the benefits of cooperation under the Constitution over the uncertainty of disunion.

After the Constitutional Convention in Philadelphia closed in September of 1787, two camps seemed to coalesce which historians have dubbed the "Federalists" and "Anti-Federalists," each camp carrying within itself a diversity of approaches to Union. Differences between Federalists seemed to



melt away in their single-minded support for ratification in the face of growing external and internal threats, but Anti-Federalist views were naturally more heterogeneous.³ Even if they seemed "men of little faith," as Cecelia Kenyon called them, Anti-Federalist concerns were of a fundamental nature.⁴ They commanded the attention of leading Federalists, who were obliged to answer their concerns both "in-doors" at ratifying conventions and "out-of-doors" in newspapers and public forums, as historian Gordon Lloyd explained.⁵

Madison usually avoided directly debating his rivals "out-of-doors" and instead dismissed the cacophony of their concerns writing that "adversaries to the plan on the convention... have exhausted themselves in a secondary inquiry into the possible consequences..." None of these arguments mattered. The Union, Madison argued persuasively, was "essential to the security of the people of America against foreign danger."⁶ Madison called on the principles of the Declaration of Independence to defend the necessity of Union in the same way the South Carolina Declaration of Causes did so many decades later to dissolve the Union. "If the sovereignty of the states cannot be reconciled to the happiness of the people," Madison wrote, "the voice

¹ "South Carolina Declaration of the Causes of Secession," from *Fifty Core Documents that Tell America's History*, Ashland, OH: Ashbrook Center, <http://teachingamericanhistory.org/library/document/south-carolina-declaration-of-causes-of-secession/> (accessed July 14, 2015).

² Abraham Lincoln, "First Inaugural Address (March 4, 1861)," from the Avalon Project, Yale Law School, http://avalon.law.yale.edu/19th_century/lincoln1.asp (accessed July 12, 2015.)

³ Herbert Storing, *The Anti-Federalist*: 3.

⁴ Cecelia Kenyon, "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," *The William and Mary Quarterly* 12, no. 1 (Jan., 1955): 3-43.

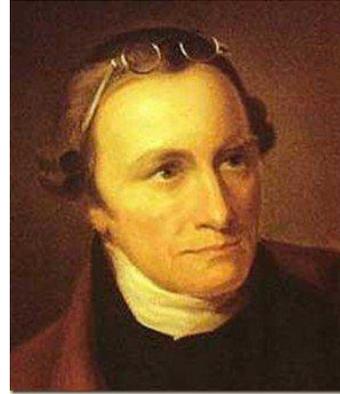
⁵ Gordon Lloyd, "The 'In-doors' and 'Out-of-doors' Conversations," *Ratification of the Constitution*. Ashland, OH: Ashbrook Center. TeachingAmericanHistory.org, (accessed July 8, 2015).

⁶ James Madison, "Federalist #45," from Carey, et. al.: 238.

of every good citizen must be, let the former be sacrificed to the latter.”⁷

With Spain on the frontier controlling trade in the Mississippi Basin and with growing tension between states over issues of land in the West, it seemed to Federalist Alexander Hamilton that the biggest threat to happiness and security was in the West, “an ample theatre for hostile pretensions, without any umpire,” except “the sword.”⁸ The British were also on the minds of Americans as a threat from the East and North. In a letter to Henry Knox following Shays’ Rebellion, George Washington warned that Britain would continue to “foment the spirit of turbulence within the bowels of the United States, with a view of distracting our governments and promoting divisions.”⁹ In the face of these threats it seemed union would provide the security that seemed, as Madison put it, “an essential object of the American union.”¹⁰

These arguments about the urgent necessity of the federal Union drowned out the real and important concerns of the Anti-Federalists who, as their voices faded, warned of future secession if the decision on ratification was made without deep, meaningful debate. The anonymous pamphleteer known as “Federal Farmer” warned, “If men hastily and blindly adopt a system of government, they will as hastily and as blindly be led to alter or abolish it.” The specter of disunion and the wariness it might cause, the Farmer explained, would open the door to despotism as people would be “disposed to accept any government... that shall promise stability and firmness.”¹¹ Patrick Henry, champion of the common yeomen in Virginia, used the “in-doors” debates and his power in state politics to delay ratification in the most populous state, at one point halting the Virginia Convention from taking a “premature” vote on ratification. “The importance of the subject,” Henry noted, echoing other Anti-Federalists, required the most mature deliberation.”¹²



Patrick Henry of Virginia

One of Henry’s chief objections rested on questions of the authority of the Philadelphia Convention to replace the Articles of Confederation government. “The Federal Convention ought to have amended the old system,” Henry noted at the Virginia Convention, “for this purpose they were solely delegated: the object of their mission extended to no other consideration.”¹³ Even during the course of the Constitutional Convention questions arose about the legality of the proceedings foreshadowed later Anti-Federalist objections. New York’s John Lansing, before he left the proceedings altogether, noted he felt his fellow delegates were overstepping the authorization given to them by Congress in even entertaining the nationalistic proposals of Edmund Randolph’s comprehensive Virginia Plan. Randolph, whose opinion seemed to change with the weather, in the first days of the meeting announced the goals of the convention was “to correct” and “enlarge” the Articles of Confederation.¹⁴ Lansing reminded him of this, and felt it “was unnecessary and improper to go further.”¹⁵ Lansing left the Convention altogether on July 10th, frustrated by talk of “a consolidation of the united states into one government.” In a letter published in the *New York Journal* during the New York ratification debates, Lansing wrote, “Our powers were explicit... a system of consolidated government could not, in the remotest degree, have been in contemplation of the legislature of this state.” Beyond that he questioned the national government’s ability to provide for the “happiness” of the people.¹⁶

⁷ Ibid.

⁸ Alexander Hamilton, “Federalist #7,” from Carey et. al.: 27.

⁹ George Washington, letter to Henry Knox (Dec. 26, 1786), from Storing: 508.

¹⁰ James Madison, “Federalist #41,” from Carey, et. al.: 208.

¹¹ “Federal Farmer I,” from Storing: 33.

¹² “Virginia Convention Proceedings (June 24, 1788),” *Jonathan Elliot’s Debates: Volume 3* (1836), from Lloyd, Gordon. “Ratification of the Constitution.” Ashland, OH: Ashbrook Center. <http://teachingamericanhistory.org/ratification/elliott/vol3/june24/> (accessed July 13, 2015).

¹³ Patrick Henry, “Speech before the Virginia Ratifying Convention (June 4, 1788),” from Storing: 297.

¹⁴ James Madison, “Tuesday May 29, 1787,” *Notes of Debates*: 30.

¹⁵ Madison, “Sat. June 16, 1787,” *Notes of Debates*: 122.

¹⁶ Robert Yates & John Lansing, “Reasons for Dissent, Letter to Gov. George Clinton (Dec. 21, 1787),” *New York Journal*, January 14, 1788; reprinted by New York Historical Society, https://www.nyhistory.org/web/crossroads/gallery/all/letter_to_clinton_nyjjournal_jan14_1788.html (Accessed July 13, 2015).

Madison confronted these objections “out-of-doors” in Federalist #40 claiming legitimacy based on the Annapolis Convention and on the assent of Congress, which represents the people. As for the Articles of Confederation, Madison dismissed them as being unfixable. “No alterations,” he wrote, “could possibly mould them into a national and adequate government.”¹⁷ Purposefully quoting the New York legislature’s directions to its delegates (Lansing included), Madison pointed out that the stated direction to the delegates were not so much to amend the Articles as it was “to render the federal constitution adequate to the exigencies of government and the preservation of the union.”¹⁸ National consolidation, or Union, from the Federalist point of view, was less a distraction and more a duty of the Convention delegates.

Some Anti-Federalists worried that adopting a large republic style of government would be the destruction of the unique democratic republic which truly represented the people.¹⁹ An important principle behind the Patriot cause during the American Revolution was that the British idea of “virtual representation” was illegitimate.²⁰ According to guiding principles of the American Revolution, a republican government rested solely on the consent of the governed and personal access of those governed to responsive representatives was of vital importance. According to the Federal Farmer frequent elections were required in a functional republic in order to “make the government feared and respected.”²¹ The Farmer feared a “general government, far removed from people,” would be ineffective and would lead to more revolution and, perhaps, despotism.²² James Winthrop, known by his pseudonym “Agrippa,” worried that representatives who keep a “residence two hundred to five miles from constituents,” would probably not “retain any great affection for the

welfare of the people.”²³ They would have to use the army to maintain their power against the “clamours of their subjects.”²⁴ If the people trusted their government, the Farmer contested, there would be no need for standing armies to keep the peace.²⁵ Another anonymous Anti-federalist pamphleteer from New York called “Brutus” claimed that representation “be constituted as to be capable of understanding the true interests of the society for which it acts.”²⁶ The happiness of constituents was a paramount purpose for government, according to the principles of the Revolution. An out-of-touch, out-of-reach government might not understand what might effect the commonweal, and was not only useless, but a path to tyranny.²⁷ “Self-love,” Brutus argued, “will influence the one to promote the good of the whole.”²⁸

Federalist leaders shrugged off the concern of the out-of-touch representative. Hamilton wondered why the same objection wasn’t made in the states, many of which were composed of districts remote from the capital.²⁹ What Hamilton doesn’t acknowledge in Federalist 84 was that there was, in fact, an effort in the states to move capitals to more central locales to maintain “intimacy” between legislators and constituents as a check against “evils.”³⁰ Hamilton wrote, though, that “citizens who inhabit the country at or near the seat of government will... have the same interest with those who are at a distance.” Public record keeping, as well, would see an open line of communication.³¹ The ever-dismissive Madison took the question back to the necessity argument when he asked whether it was more difficult to send a representative to a distant Congress or “struggle against an invading army.”³²

Class differences between representatives and constituents was another obstacle to “actual” representation. Another New Yorker, Melancton Smith concurred with Brutus about accessibility of

¹⁷ James Madison, “Federalist #40,” from Carey, et. al.: 203.

¹⁸ Ibid: 200.

¹⁹ Melancton Smith, “Speech delivered at Convention of New York on the Adoption of the Federal Constitution (June 20, 1788,) from Storing: 337-8.

²⁰ Gordon Wood, *The American Revolution: A History*, New York, Modern Library (2003): 40-1.

²¹ Federal Farmer II (Oct. 9, 1787), from Storing: 42-3.

²² Ibid.

²³ Agrippa I (Nov. 23, 1787), from Storing: 230.

²⁴ Ibid.

²⁵ Federal Farmer III (Oct. 10, 1787), from Storing: 43.

²⁶ Brutus IV (Nov. 29, 1787), from Storing: 127.

²⁷ Ibid: 130.

²⁸ Ibid: 127.

²⁹ Alexander Hamilton, “Federalist #84,” from Carey, et. al.: 447.

³⁰ Rosemarie Zagari, “Representation and the Removal of State Capitals,” *The Journal of American History* 74, no. 4 (March, 1988): 1242.

³¹ Hamilton, “Federalist #84”: 448.

³² James Madison, “Federalist #14,” from Carey, et. al.: 66.

representatives. Smith feared the creation of an elite class full of men “who have their price” and who “cannot have sympathy with their constituents which is necessary to connect them closely to their interest.” Smith argued that a “representative body, composed principally of respected yeomanry is the best possible security to liberty.”³³ Rule by the elite would see spending out of control and the institution of unfair taxes. This detachment from the mass of “the People,” Anti-Federalists imagined aloud would lead to various disasters which imperiled the victories won by the Revolution. Patrick Henry, as usual, went to the furthest extreme. Before the Virginia ratifying convention, Henry said of the Constitution: “It squints toward monarchy: And does this not raise indignation in the breast of every American?”³⁴

There were even more arguments made by Anti-Federalists, all dismissed by the Necessity argument of the Federalists. Some Anti-Federalists, like Edmund Randolph (whose mind was changed at the Virginia Convention by Madison’s “in-doors” arguments of geopolitical necessity) supported a national Union, but were concerned about specifics of the distribution of power between the states.³⁵ There were financial concerns of investors like Elbridge Gerry who worried that state war bonds might not be honored.³⁶ He was assured by Federalists that the new government would be powerful enough to assume these debts and would have sufficient taxing powers to pay them.³⁷ Hamilton made the assumption of debt and the use of Executive power to collect these taxes important principles of his time as the first Treasury Secretary. Madison, as always, brought the issue back to the Necessity argument when he wondered how burdensome a war would be fought by a lone state, independent of the national government.³⁸

Still others, like Samuel Adams and Patrick Henry, more directly foreshadowed 1861 South Carolina. They were jealous of the power they held in

state governments, and so were not keen to surrender power to a distant national government. This proved to be even more of a fundamental difference than the other arguments. The preamble of the working draft of the Constitution, as it appeared in print for the first time on August 6th, 1787, read, “We the people of the States of New Hampshire, Massachusetts, Rhode-Island, [etc.]... do ordain, declare, and establish the following Constitution.”³⁹ After Gouverneur Morris, on the Committee of Style, simplified it to reflect that legitimacy came from the people and *not* the states. A later version, recorded by Madison on September 12th did not acknowledge the role of states in forming the new government at all.⁴⁰ What was most important to stress was the Union of People and *not* of states. During the Convention, Elbridge Gerry denied that state sovereignty ever existed and claimed that “the states were intoxicated with the idea of their sovereignty.”⁴¹ The delegates knew they were creating a national constitution more than a federal one. For them this made sense. They all agreed that the Articles of Confederation, a federal government, did not function. Madison noted to Jefferson that some delegates went so far as to eliminate the concept of the states altogether.⁴² Although all the delegates felt the Articles of Confederation needed, at least revision, the argument about the federal or national nature of the government was never quite settled at the convention in Philadelphia. Luther Martin disagreed with Madison and pointed out in the debates in Philadelphia that the purpose for the Union’s existence was to protect the sovereignty of the respective states.⁴³ Rufus King worried that they were leaving too many questions of federal-state jurisdiction on the table.⁴⁴

The new national concept disturbed the Anti-Federalists who saw a fundamental change in the placement of political power and a threatening redefinition of polity on a scale far too large. Many

³³ Melancton Smith, letter of June 21, 1788, from Storing: 342.

³⁴ Patrick Henry, “Speech of June 5, 1788,” from Storing: 310.

³⁵ Edmund Randolph, who was a Federalist and Anti-federalist at different points in his career.

³⁶ Initial apprehensions existed despite the fact many bondholders eventually proved ardent supporters of a stable federal government with broad taxation powers, per Charles Beard. See Woody Holton, “‘From the Labour of Others’: The War Bonds Controversy and the Origins of the Constitution in New England,” *The William and Mary Quarterly* 61, no. 2 (Apr., 2004): 273-4.

³⁷ Alexander Hamilton, “Federalist #34,” from Carey, et. al.: 166-7.

³⁸ James Madison, “Federalist #14,” from Carey, et. al.: 66.

³⁹ James Madison, “Monday August 6th, 1787,” *Notes of Debates*: 385.

⁴⁰ James Madison, “Wed. September 12, 1787,” *Notes of Debates*: 616.

⁴¹ James Madison, “Friday, June 29th in Convention,” *Notes on Debates*: 217.

⁴² James Madison, Letter to Thomas Jefferson (Oct. 24, 1787), from Morrison, et. al.: 468.

⁴³ James Madison, “Wednesday, June 20, 1787, in Convention,” *Notes on Debates*: 159.

⁴⁴ James Madison, “Saturday June 30, 1787, in Convention,” *Notes on Debates*: 230.



James Madison of Virginia

went to Montesquieu's *Spirit of the Laws* for inspiration, claiming that, as Brutus does, "in a republic, the manners, sentiments, and interests of the people should be similar." Brutus warns that too big a republic will bring together different interests into an

unnatural polity, which will lead to "constant clashing."⁴⁵ Since hindsight is twenty-twenty, Brutus' insinuations about civil war carry some weight, even if they were dismissed by Federalists like Hamilton. In Federalist #9, Hamilton wondered if the states themselves were already breaking Montesquieu's rules since some like New York and Pennsylvania had huge, diverse populations.⁴⁶ Hamilton attempted to assuage fears of runaway consolidation and the elimination of states when he wrote, "The proposed constitution, so far from implying an abolition of state governments, makes them constituent parts of the national sovereignty... and leaves in their possession certain, exclusive, and very important, portions of sovereign power."⁴⁷ Hamilton threw out the charges of "consolidation" made by his fellow New Yorker Lansing, and instead defined federalism as a separation of jurisdiction.

The Virginian firebrand Patrick Henry was appalled at the ease with which his fellow Virginians parted ways with their state sovereignty. At the Virginia convention he asked, "Who authorized them to speak of 'We, the people,' instead of 'We, the states? States are the characteristic and soul of a confederation."⁴⁸ Henry a few days later bristled at the idea of national passports, coinage, and taxes as an imposition on the sovereignty of Virginia. He saw "consolidation" government as an anchor on the civil liberties of Virginians. Recalling Virginia's Bill of Rights, Henry imagined, "When the people of

Virginia at a future day shall wish to alter their Government, though they be unanimous in this desire, yet they may be prevented therefrom by a despicable minority at the extremity of the United States."⁴⁹

Henry's sentiments mirrored those of the South Carolina secessionists, who complained that Northern states were imposing their will on South Carolina's customs and "peculiar institution" from far away. Henry and his underlings at the Virginia Convention knew that the state was giving up sovereignty if they ratified the Constitution, something they only did when Madison's camp acquiesced to George Wythe's suggestion that they included twenty suggested (but not conditional) amendments with their notice of ratification.⁵⁰

While Federalists and Anti-Federalists agreed that the Articles government needed a change, and while they agreed on basic republican virtue being the cornerstone of a successful polity; they did hold fundamental differences about how to structure a government to effect happiness and liberty. As the state conventions ratified the Constitutions, one after the other, Anti-Federalists focused more and more on trying to limit the government with a national Bill of Rights. The hope for change through amendment was a concession to the Federalists by Anti-Federalists. Massachusetts and Virginia, the points of origin and centers of population in the United States along with their ratifications sent long lists of proposed amendments to the first Congress. James Madison, fearful that his enemies might call a popularly supported Constitutional Convention to replace the 1787 Constitution, decided to begrudgingly support the adoption of a Bill of Rights as a mere "duty" to represent his constituents and "not disregard their wishes."⁵¹ Madison managed to take away the most effective and popular argument of the Anti-Federalists: that the Constitution should include an enumerated Bill of Rights. At that many with reservations surrendered them and joined the new government. By 1798 even the fiery Patrick Henry was speaking out against those (like Madison) who championed a state's right to check a federal law by the Virginia Resolution. Speaking to a crowd at the

⁴⁵ Brutus I (Oct. 18, 1787), from Storing: 114-5.

⁴⁶ Alexander Hamilton, "Federalist #9," from Carey, et. al.: 38-9.

⁴⁷ Ibid.: 41.

⁴⁸ Patrick Henry, "Speech of June 4, 1788," from Storing: 297.

⁴⁹ Patrick Henry, "Speech of June 5, 1788," from Storing: 308-9.

⁵⁰ Gordon Lloyd. "Day-by-day Summary of the Virginia Ratifying Convention," *Ratification of the Constitution*. Ashland, OH: Ashbrook Center. TeachingAmericanHistory.org, (accessed July 8, 2015).

⁵¹ James Madison, "Speeches in the First Congress (June 8, 1789)," from Morrison, et. al.: 434.

Charlotte County Courthouse, Henry asked the crowd to imagine being executed by Washington's army and warned that such talk as the Virginia Resolution would lead to civil war. He claimed that "he had seen with regret the unlimited power over the purse and sword consigned to the general government; but he had been overruled, and it was now necessary to submit to the constitutional exercise of that power."⁵²

As each state ratified the Constitution they entered into a national government and this, even South Carolina admitted in 1861 carried with it certain duties toward the other states in the nation.⁵³ John Marshall, who had been a participant in the Virginia Ratification Convention, in his 1824 *Gibbons v. Ogden* decision, denied state sovereignty. "When these allied sovereigns converted their league into a government," Marshall wrote, "the whole character in which the states appear underwent a change."⁵⁴ The same argument was made only a few days into the convention in Philadelphia when James Madison challenged his fellow delegates to rethink the idea of states.⁵⁵ In Federalist #2 John Jay described the U.S. states under the Constitution as a "band of brethren, united to each other by the strongest ties," and further warned that they "should never be split into a number of unsocial, jealous, and alien sovereignties."⁵⁶ The Anti-Federalists, in conceding political defeat to the Federalists, left many questions about representation, state sovereignty, and the definition of the national government in question. While these fundamental questions never went away and were points of contention well into the 20th century, many were answered as Patrick Henry predicted: on battlefields like Antietam and at the point of a bayonet.

⁵² "Henry's Charlotte County Courthouse Speech (1798)," quoted in Moses C. Tyler, ed., *Patrick Henry: American Statesman*, Boston: Houghton, Mifflin, & Co. (1898): 418; from http://www.archive.org/stream/patrickhenry00tylerich/patrickhenry00tylerich_djvu.txt (accessed July 14, 2015)

⁵³ "South Carolina Declaration of the Causes of Secession,"

⁵⁴ John Marshall, *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁵⁵ James Madison, "Tuesday, May 29th," *Notes on Debates*: 37-8.

⁵⁶ John Jay, "Federalist #2, from Carey, et. al.: 6.