

**“Don’t Tread on U.S.:  
The Impact of Federalism in the Formation of American Government”  
An Independent Study**

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In 1775, the first year of the American War for Independence, before the Declaration of Independence had been signed, Benjamin Franklin wrote an anonymous article to the American colonists that described the qualities of the infant nation. Franklin wrote in the *Pennsylvania Journal* on December 27, 1775, that “I observed on one of the drums belonging to the marines now raising, there was painted a Rattle-Snake, with this modest motto under it, ‘Don’t tread on me.’”<sup>5</sup> According to Franklin, the rattlesnake provided several fine examples of the unique American political philosophy and way of life. One of Franklin’s descriptions of the rattlesnake explained that the strength of America rested simultaneously in the fiercely independent nature of the states and the cooperative attitude of those same states in defending their mutual interest in liberty. Using the pseudonym “American Guesser,” Franklin wrote

‘Tis curious and amazing to observe how distinct and independent of each other the rattles of this animal are, and yet how firmly they are united together, so as to never be separated but by breaking them to pieces. – One of those rattles singly, is incapable of producing sound, but the ringing of thirteen together, sufficient to alarm the boldest man living. The Rattle-Snake is solitary, and associates with her kind only when it is necessary for their preservation – In winter, the warmth of a number together will preserve their lives, while singly, they would probably perish – The power of fascination attributed to her, by a generous construction, may be understood to mean, that those who consider the liberty and blessings which America affords, and once come over to her, never afterwards leave her, but spend their lives with her.<sup>6</sup>

The concept of shared sovereignty between the states and national government was older than the first military conflict with Britain. However, when Franklin wrote about the American rattlesnake, the political conflict concerning the division of authority between the national and state governments was not resolved in America. The federal<sup>7</sup> characteristic of the newly formed country caused unique internal factions. In fact, the problems that arose from the division of state and national powers caused America’s founders to replace the ineffective

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<sup>5</sup> Benjamin Franklin. *Benjamin Franklin Writings*. (New York: The Library of America, 1987), 744.

<sup>6</sup> Franklin, 746.

<sup>7</sup> The term “federal” in this paper refers to the political ideology promoting shared sovereignty between local state governments and the collective national government, while the term “national” refers to a centralized institution of authority that represents the country as a whole.

Articles of Confederation with the Constitution. Following the drafting of the Constitution, the document was signed on September 17, 1787, by thirty-nine of the forty-one delegates who were still present in Philadelphia.<sup>8</sup> Despite the unified display of support by delegates, the Constitutional dispute regarding restraints on the national government's power was far from being settled. When the Constitution was sent to be ratified by the states, the nation's leaders split into two primary political groups. The groups were the Federalists, who supported ratification of the Constitution and a strong central government, and the Anti-Federalists, who opposed both ratification and a stronger central government. The outcome of this political conflict ultimately resulted in the successful ratification of the Constitution in June of 1788, but it also led to the first ten amendments to the Constitution, known as the Bill of Rights.<sup>9</sup>

The terms "Federalists" and "Anti-Federalists" designated the key political groups during the ratification process of the Constitution and through the passing of the Bill of Rights. The difference between the two political ideologies was somewhat confusing, for the intended definition of the opposition parties was incongruous with the etymology of the terms. George Bryan, an Anti-Federalist from Pennsylvania explained, "The name of Federalists, or Federal men, grew up at New York and the eastern states, some time before the calling of the Convention, to denominate such as were attached to the general support of the United States, in opposition to those who preferred local and particular advantage."<sup>10</sup> Because those who supported a more centralized government with ratification of the Constitution claimed the misnomer "Federalists," those who were in opposition to the Constitution due to their support of a confederated government authority accepted the misnomer "Anti-Federalists" by default.

Between the signing of the Constitution in September of 1787 and the ratification in June of 1788, the debate on the Constitution reached its zenith in the public arena. Article 7 of the Constitution stated that nine of the thirteen states' legislatures needed to approve the Constitution in order for it to be ratified.<sup>11</sup> Therefore, the Federalists and the Anti-Federalists embarked on separate public campaigns to support or discourage the Constitution. Within the two months after the Constitutional Convention, some of the most influential writings from the Constitution's opponents and supporters began to be published. These included the "Letters from the Federal Farmer to the Republican," which were possibly written by the Anti-Federalist Richard Henry Lee,<sup>12</sup> and The Federalist letters which were written by the Federalists Alexander

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<sup>8</sup> Forrest McDonald. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*. (Lawrence, KS: The University Press of Kansas, 1985), 228.

<sup>9</sup> Bernard Bailyn. *The Debate on the Constitution*. (New York: The Library of America, 1993), 1097.

<sup>10</sup> McDonald, 284.

<sup>11</sup> *Ibid.*, 279.

<sup>12</sup> Robert Allen Rutland, ed. *The Birth of the Bill of Rights: 1776-1791*. (Chapel Hill: The University of North Carolina Press, 1955), 126.

Hamilton, James Madison, and John Jay, all of whom wrote under the title “Publius.”<sup>13</sup>

The Federalists claimed that the rights of Americans were tacit in the nature of the Constitution, while the Anti-Federalists were not convinced that any rights were guaranteed in the document unless specifically expressed. The new Constitution seemed to be destined to the same fate as that of the Articles of Confederation, unless this ambiguity could be clarified for the two rival political factions. In January 1788, Thomas B. Wait, founder of the first newspaper in the district of Maine, wrote a personal letter to George Thatcher, a supporter of Constitutional ratification, in which he explained the need for the clarification of liberties: “Bill of Rights have been the happy instruments of wresting the privileges and rights of the people from the hand of America to defend them against future encroachments of despotism – Bill of Rights, in my opinion, are the grand bulwarks of freedom.”<sup>14</sup> Wait’s quote summarized the Anti-Federalist’s position on the Constitution: a bill of rights was needed in order to safeguard the liberties of the people against an overzealous government.

Pressure to draft amendments to the Constitution was strong, but the Federalists’ desire to prevent the drafting of amendments was also a factor in the formation of the Bill of Rights. One of the most vehement opponents to a bill of rights, Alexander Hamilton contended that such an addition to the Constitution was “unnecessary” and “dangerous.” Hamilton explained his philosophy in “Federalist 84” in May of 1788: “They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”<sup>15</sup> As Hamilton stated, the Federalists were against a bill of rights because the rights of the national government were already limited by the Constitution. According to the Federalists, the U.S. Constitution did not expressly restrict the powers of the federal government. However, liberties of the people were implied because the powers of the national government were limited to the rights enumerated in the Constitution. All other rights automatically went to the people. Adding to the complexity of the argument over the extent of the national government’s powers was the ambiguous nature of two clauses in the Constitution. These clauses were the Necessary and Proper Clause located in article 1, section 8, and the Supremacy Clause located in article 6.

The Necessary and Proper Clause stated “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.”<sup>16</sup> This particular

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<sup>13</sup> Bailyn, 1093-1094.

<sup>14</sup> Bailyn, 728.

<sup>15</sup> Alexander Hamilton, John Jay and James Madison. *The Federalist Papers*. Cynthia Brantley Johnson, eds. (New York: Simon and Schuster, 2004), 613.

<sup>16</sup> U.S. Const. art. 1, sec. 8.

clause followed the listing of all authorities granted to the U.S. Congress, and therefore caused controversy among many of the Founders as to what powers, if any, were restricted from Congressional use. While explaining his opposition to Constitutional ratification, the “Federal Farmer” wrote in reference to the Necessary and Proper Clause in October of 1787: “It is proper the national laws should be supreme, and superior to state or district laws; but then the national laws ought to yield to unalienable or fundamental rights – and national laws, made by a few men, should extend only to a few national objects.”<sup>17</sup> The “Federal Farmer’s” statement reflected many of the Anti-Federalist’s sentiments toward the Constitution. They were not opposed to strengthening the national government by granting it more authority, for most colonial leaders realized that the Articles of Confederation prevented America from making critical decisions that were needed for the growth and development of the country. However, the Anti-Federalists were concerned that the legislative power of the national government would go unchecked by the states, leaving open the possibility that fundamental liberties would be abused. Again, the Constitution’s opponents were reluctant to accept that the Constitution placed ample limits on the power of the national government. This issue of adequate limitations on the national government’s power was addressed by Brutus, an anonymous Anti-Federalist author, in his fifth letter in the *New York Journal*. Brutus referred to the Necessary and Proper Clause when he wrote in December of 1787 that “This amounts to a power to make laws at discretion: No terms can be found more indefinite than these, and it is obvious, that the legislature alone must judge what laws are proper and necessary for the purpose.”<sup>18</sup> The Federalists countered that the Constitution already provided for exactly the sort of limited government that their political opponents wanted.

Much of the writing coming from the Federalists was aimed at convincing the citizens of the states that the Anti-Federalists were exaggerating the possibility of despotism under the jurisdiction of the Constitution. Alexander Hamilton posited this logic when he wrote “to the People of the State of New York” in January of 1788. Hamilton explained to his New York readers in “Federalist 33” that the Necessary and Proper Clause and the Supremacy Clause posed no more threat to liberty than if the clauses were not even included in the Constitution: “They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal government, and vesting it with certain specified powers.”<sup>19</sup> To Hamilton and his political partners, these clauses were simply truisms, so there was no need for increased clarification of liberties or restrictions on the government. The Federalists claimed that the Constitution was already specific enough in defining what powers were legally available to the national government. Moreover, the language of the Constitution, including the Necessary and Proper Clause,

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<sup>17</sup> Bailyn, 276.

<sup>18</sup> *Ibid.*, 500.

<sup>19</sup> Hamilton, 222.

was required in order to make sure that the national government had ample authority to exercise its given responsibilities. In a response to a speech critical of the Constitution by the Anti-Federalist delegate William Findley,<sup>20</sup> a leading Federalist delegate, James Wilson, explained why the Necessary and Proper Clause was indeed necessary.<sup>21</sup> Both men's speeches took place at the Pennsylvania ratifying convention, the first to convene in the country.<sup>22</sup> During Wilson's remarks which took place on December 1, 1787, he stated in reference to the Necessary and Proper Clause: "I hope that it is not meant to give to congress merely an illusive shew of authority, to deceive themselves or constituents any longer. On the contrary, I trust it is meant, that they shall have power of carrying into effect the laws, which they shall make under the powers vested in them by this constitution."<sup>23</sup> Despite Wilson's insistence that the national government needed at least some authority that overruled the authority of the separate states, the Anti-Federalists persisted in contesting the ratification of the Constitution. They still claimed that the Constitution endorsed absolute and uncontested power for the national government.

Besides the Necessary and Proper Clause, the Supremacy Clause, which was located in article 6 of the Constitution, further complicated the debate on exactly how and to what extent the powers of the national government were limited. The Supremacy Clause stated "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be 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."<sup>24</sup> This clause raised specific concern over what restrictions of jurisdiction were placed on the national government. Just as the Anti-Federalists had attacked the Necessary and Proper Clause, they also wrote in opposition to the Supremacy clause. An article was published on December 18, 1787, in the *Pennsylvania Packet* by the group of delegates who dissented from the majority decision to ratify the Constitution at the Pennsylvania Convention.<sup>25</sup> In their letter of explanation to the public, the Pennsylvania minority wrote "It has been alleged that the words 'pursuant to the constitution,' are a restriction upon the authority of Congress; but when it is considered that by other sections they are invested with every efficient power of government, and which may be exercised to the absolute destruction of the state governments, without any violation of even the forms of the constitution, this seeming restriction, as well as every other restriction in it, appears to us be nugatory and delusive; and only introduced as a blind upon

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<sup>20</sup> Bailyn, 1004.

<sup>21</sup> *Ibid.*, 1053.

<sup>22</sup> *Ibid.*, 1183.

<sup>23</sup> *Ibid.*, 826.

<sup>24</sup> U.S. Const. Art. 6

<sup>25</sup> Bailyn, 1050.

the real nature of the government.”<sup>26</sup> When considered in conjunction with the Necessary and Proper Clause, the Anti-Federalists contended that the Supremacy Clause gave absolute and unrestricted authority to the national government. As explained in the quotation from the Pennsylvania minority opinion, the Anti-Federalists also claimed that the language of the Constitution, especially in the Necessary and Proper Clause and the Supremacy Clause, was implemented by Federalists in order to grant the national government superior power over state governments while maintaining the appearance of protecting the states’ rights. The Federalists, however, rejected this concern and continued to insist that the sort of tyranny thought possible by their political opponents was no more likely to arise than if both clauses were removed from the Constitution. Noah Webster, who would later become famous for his dictionaries, responded to the Pennsylvania minority with an article of his own on December 31, 1787. Webster wrote in the New York newspaper, the *Daily Advertiser*: “You harp upon that clause of the New Constitution, which declares, that the laws of the United States, &c. shall be the supreme law of the land; when you know that the powers of the Congress are defined, to extend only to those matters which are in their nature and effects, general. You know, the Congress cannot meddle with the internal police of any State, or abridge its Sovereignty.”<sup>27</sup> Despite the disparity in the language that the Federalists and Anti-Federalists preferred for the Constitution, both groups claimed to be ardent defenders of the liberties that they had just fought against the British to win.

The main difference in opinion continued to be focused on whether or not liberties were preserved by the Constitution. The Federalists and Anti-Federalists even agreed, at least in public documents, that the national government and state governments should both be charged with the responsibility of preserving such liberties. However, the two groups still could not agree on what language would effectively ensure that these principles were defined and protected and that neither the national government nor the state governments held monopolies on power. The Federalists claimed that such protection was already clearly established in the Constitution, while the Anti-Federalists wanted more explicit assurance. Alexander Hamilton assured New York’s citizens that both the national and state governments would continue to hold separate sovereignty after the Constitution’s ratification. Hamilton commented on the subject of state rights in the “Federalist 32,” which was published in the *Independent Journal* on January 2, 1788: “The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor the instrument which contains the articles of the proposed constitution.”<sup>28</sup> The “Federal Farmer” had already warned American

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<sup>26</sup> *Ibid.*, 538.

<sup>27</sup> *Ibid.*, 560.

<sup>28</sup> Hamilton, 220.

citizens against such claims of dual sovereignty. As the “Federal Farmer” explained in his letter from October 12, 1787, “It is to be observed that when the people shall adopt the proposed constitution it will be their last and supreme act; it will be adopted not by the people of New-Hampshire, Massachusetts, &c. but by the people of the United States; and whenever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away...”<sup>29</sup> Ultimately the Constitution was adopted as the official plan for the new U.S. Constitution when it was ratified by the New Hampshire state convention, which was the ninth state to approve the Constitution and the final vote needed for ratification.<sup>30</sup> However, the debate over the Constitution was not settled through ratification by the states. For the debate between Federalists and Anti-Federalists was not just about what wording in the document would properly defend individual liberties; it was concerned primarily with what system of government would allow such liberties to be realistically maintained.

Federalists and Anti-Federalists agreed that dual-sovereignty should be maintained under the form of government. As shown from the several quotes in the paragraphs above, the two groups disagreed over whether the Constitution actually provided for a system of dual sovereignty. But the language was only part of the issue. The two groups’ different political philosophies were instrumental in determining which individuals supported which particular issues. For the Anti-Federalists, the concept of federalism, or the division of authority between the national government and the state governments, was vital to defending the liberties of individuals. For the Federalists, the system of federalism was not necessarily required to preserve individual rights. James Winthrop, the Anti-Federalist author of several essays that appeared in the Boston newspaper, the *Massachusetts Gazette*, explained why federalism was so vital to American liberty. Winthrop’s fourth letter under the pseudonym “Agrippa” appeared on December 4, 1787. It stated

The idea of an uncompounded republick, on an average, one thousand miles in length, and eight hundred in breadth, and containing six millions of white inhabitants all reduced to the same standard of morals, or habits, and of laws, is in itself an absurdity, and contrary to the whole experience of mankind. The attempt by Great-Britain to introduce such a system, stuck us with horreur, and when it was proposed by some theorists that we should be represented in parliament, we uniformly declared that one legislature could not represent so many different interests for the purposes of legislation and taxation.<sup>31</sup>

As “Agrippa” explained, the concept of federalism provided for the possibility

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<sup>29</sup> Bailyn, 275.

<sup>30</sup> Rutland, 162.

<sup>31</sup> Bailyn, 450.

that different regions or states could hold many different standards for rights and laws without directly interfering with the rights and laws of another region or state. The ability of different states to determine separate standards for rights was only limited when such standards interfered with the responsibilities or rights of the national government as defined by the Articles of Confederation or the new United States Constitution. But what language in the new Constitution guaranteed that the states maintained all of the rights that were not specifically defined as belonging to the national government? As was explained earlier, the Anti-Federalists took issue with such clauses as the Necessary and Proper Clause and the Supremacy Clause, which, according to them, made it impossible to determine exactly which rights belonged to which level of government. According to the Federalists, further clarification between state rights and the power of the national government was not needed because such changes in wording were useless. Alexander Hamilton explained why the Federalists took such a position in “Federalist 33” from January 2, 1788: “If the Foederal Government should overpass the just bounds of its authority, and make a tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.”<sup>32</sup> Therefore, Hamilton wrote that under cases of tyranny by the national government, it was the responsibility of the citizens to protect their own inherent freedoms. Mere words would never guarantee protection from a government. Hamilton went on to inquire in the same paragraph: “Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Foederal Legislature should attempt to vary the law of descent in any State; would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?”<sup>33</sup>

This question was not rhetorical to Anti-Federalists. They insisted that, in order to ensure that state rights were not trampled upon, there must be more clearly defined limitations placed on the national government. However, after the Constitution was ratified, the Anti-Federalists could not repeal the unwanted sections of the Constitution or convince citizens to oppose the new document openly. Only one tactic was still available: to demand a Bill of Rights.

The First Federal Congress was the first official meeting of the House of Representatives and the Senate under the U.S. Constitution. Meeting in New York City in March of 1789 and reaching quorum on April 6, the newly elected government body was composed largely of Federalists.<sup>34</sup> Only ten of the fifty-nine members in the House of Representatives and two of the twenty-two members in the Senate were Anti-Federalists. While all of the Anti-Federalists in Congress supported adding a bill of rights to the Constitution, most of the Federalists

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<sup>32</sup> Hamilton, 224.

<sup>33</sup> *Ibid.*, 224.

<sup>34</sup> Helen E. Veit, Kenneth R. Bowling and Charlene Bangs Bickford. *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*. (Baltimore: The Johns Hopkins University Press, 1991), xiv.



in Congress did not support adopting a bill of rights, at least not the list of amendments their political rivals proposed.<sup>35</sup> Despite the Federalists' dominance in numbers, two factors increased the likelihood that a bill of rights would be added to the Constitution. Three of the four remaining states would ratify the Constitution by the end of the summer of 1788,<sup>36</sup> but the New York, Virginia, and North Carolina ratifying conventions all made official commitments to a second national convention in order to adopt amendments.<sup>37</sup> The last of the thirteen original colonies to ratify the Constitution were not the only states to have supported a bill of rights as a method to ensure liberties. Only Rhode Island and Connecticut did not provide for certain rights in the state constitutions, and seven of the states, excluding New York, New Jersey, South Carolina, and Georgia, preserved these rights with some sort of bill of rights in the state constitution.<sup>38</sup> In addition to the fact that most states had first hand experience with some form of a bill of rights, some Federalists such as James Madison were elected to Congress because of the campaign pledge to their constituents that once in office they would support amending the Constitution in order to prevent the national government from abusing certain rights of the people.<sup>39</sup>

Political labels were not always sufficient to distinguish between supporters and opponents of amending the Constitution. Some Anti-Federalists and many Federalists opposed adding a bill of rights to the Constitution based on the principle that rights of the people should not be confined to a list. Such opponents contended that if amendments were made to the Constitution, the rights of the people could be interpreted as being limited to the few enumerated in the amendments, rather than being unrestricted by governments. Patrick Henry inquired as a member of the Virginia ratifying convention,<sup>40</sup> "Do not you Gentlemen see, that if we adopt under the idea of following Mr. Jefferson's opinion, we amuse ourselves with the shadow, while the substance is given away?" In this remark from June 12, 1788,<sup>41</sup> Henry attacked Thomas Jefferson's position that support for the Constitution should be contingent upon the addition of a bill of rights. Jefferson wrote in a letter to James Madison on December 20, 1787: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference."<sup>42</sup> While Jefferson was not a member in the First Federal Congress, in addition to Anti-Federalists, some Federalists in Congress also supported a list of amendments pertaining to individual rights.

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<sup>35</sup> Veit, xii.

<sup>36</sup> *Ibid.*, x-xi. In May of 1790, Rhode Island became the last state of the original thirteen colonies to ratify the Constitution. - Rutland, 217.

<sup>37</sup> *Ibid.*, xi.

<sup>38</sup> *Ibid.*, 87.

<sup>39</sup> Rutland, 198.

<sup>40</sup> Bailyn, 1011.

<sup>41</sup> *Ibid.*, 674.

<sup>42</sup> Rutland, 129.

On October 17, 1787, Madison wrote in a letter to his friend Thomas Jefferson: “My own opinion has always been in favor of a bill of rights,” and added, “provided it be so framed as not to imply powers not meant to be included in the enumeration.”<sup>43</sup> Although James Madison would be known to later Americans as the Father of the Constitution, it was he who first proposed that amendments to protect individual liberties be added to the Constitution.<sup>44</sup> Madison may have supported a bill of rights, but not all of his Federalist partners agreed with him. Even the location of the amendments in the Constitution could not be agreed upon, not to mention the disagreement over the content of the amendments.

The criticism that James Madison received for his proposed version of a bill of rights was one example of the complex nature of the debate surrounding additional amendments. Both Federalists and Anti-Federalists referred to Madison’s proposed bill of rights as a “tube to the whale.” This phrase was, as Veit explained, “a literary allusion to Jonathan Swift’s *Tale of a Tube* (1704),” in which “Swift described how sailors, encountering a whale that threatened to damage their ship, flung it ‘an empty tube by way of amusement’ to divert it.”<sup>45</sup> Madison’s political rivals and partners used the allusion to Swift’s story to point out that his version of a bill of rights was simply a diversion for those members concerned with state rights. The Federalists who supported a bill of rights wanted to make sure that any added amendment would not change the structure of the national government by giving the states additional powers or by hindering any of those powers already afforded to the national government in the Constitution. The goal of the Anti-Federalists was the opposite; they wanted to expand the authority of state governments, while limiting the powers of the national government.

One of the most prominent Anti-Federalist proponents of a bill of rights was Senator Richard Henry Lee from Virginia. Lee summarized the general philosophy of the Anti-Federalist congressmen in the First Federal Congress when in a letter to Patrick Henry from September 14, 1789, he wrote

The most essential danger from the present System arises, [in my] opinion, from its tendency to a consolidated government, instead of a Union of Confederated States – The history of the world and reason concurs in proving that so extensive a Territory [as the] U. States comprehend never was, or can be governed in freed[om] under the former idea – Under latter it is abundantly m[ore] practicable, because extended representation, know[ledge of] character, and confidence in consequence, [are wanting] to sway the opinion of Rulers, without which, fear the offspr[ing] of Tyranny] can alone answer.<sup>46</sup>

Once again, Anti-Federalists like Lee were linking the practice of federalism with the preservation of liberty. The Anti-Federalists viewed the Bill of Rights as an

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<sup>43</sup> Ibid., 192.

<sup>44</sup> Veit, xiv.

<sup>45</sup> Ibid., xv.

<sup>46</sup> Ibid., 295.

opportunity to ensure certain state powers would not be infringed upon by the national government, thereby preserving a broad spectrum of personal liberties consistent with the wide array of opinions represented in the American populace.

Some Federalists, however, expressed their concern in Congress that a bill of rights would actually put many of their constituents' liberties in jeopardy. Originally from Britain, Georgia Congressman James Jackson was one such Federalist who espoused such a view in the national legislature.<sup>47</sup> According to the *Gazette of the United States* printed on June 10, 1789, Jackson warned his fellow members of Congress that "There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, that the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government."<sup>48</sup> In other words, Jackson argued as Patrick Henry had done, that enumerating certain rights would annihilate all other rights not listed in the Constitution. Although Jackson and likeminded Federalists ultimately disagreed with Richard Henry Lee and the other Anti-Federalists in Congress on the issue of adding additional amendments to the Constitution, the same Federalists agreed with Anti-Federalists that a bill of rights providing solely for individual liberties could potentially be abused by the national government. Lee explained in the letter to Henry cited above that "Some valuable Rights are indeed *declared*, but the powers that remain are very sufficient to render them nugatory at pleasure."<sup>49</sup> According to Lee, the rights proposed by Federalists like Madison were well worth protecting, but as long as the national government maintained supreme jurisdiction those rights were worthless. While the rights would have been legally valid, there would have been no way to enforce the protection of the liberties in the absence of increased state powers.

Ultimately, a bill of rights was passed by the First Federal Congress, but the content left the Anti-Federalists disappointed as it did not change the structure of the national government. Richard Henry Lee expressed the mood of the Anti-Federalists to Patrick Henry in the letter from September 14, 1789, when he wrote "We might as well have attempted to move Mount Atlas upon our shoulders – In fact, the idea of subsequent Amendments was delusion altogether, and so intended by the greater part of those who arrogated to themselves the name of Federalists."<sup>50</sup> As Lee explained in this letter, the Anti-Federalists knew that they were facing almost certain defeat in their attempt to restructure the power structure of the national government through amendments. They had already failed to secure restrictions on the national government to their satisfaction at the Constitutional Convention; therefore, they were not surprised that they failed to restructure the government through the amendment process.

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<sup>47</sup> *Ibid.*, 306.

<sup>48</sup> Veit, 87.

<sup>49</sup> *Ibid.*, 295.

<sup>50</sup> *Ibid.*, 295.

The proposed Bill of Rights was passed by the House of Representatives and the Senate by September 25, 1789, and, following the signature of President Washington, was sent to be ratified by the states.<sup>51</sup> Most of the twelve proposed amendments dealt with individual rights. Besides two proposed amendments that dealt with the election and payment process of the Federal Congress and one that dealt with the powers of the states, all other amendments referred to the personal rights of Americans.<sup>52</sup> Madison did attempt to quell the fears of the Anti-Federalists and the general public when he wrote about the limited powers of the federal government in “Federalist 45.” In this article that was printed on January 26, 1788, Madison wrote

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.<sup>53</sup>

As the Anti-Federalists were still not satisfied with the demarcations between national and state powers after the ratification of the Constitution, the Federalists were forced to provide greater assurances to their state rights rivals in the form of a bill of rights. Despite the overwhelming dominance in the numbers of Federalists over the Anti-Federalists at the First Federal Congress, the Federalists were compelled to make at least some show of a concession in the form of a states’ rights amendment. The Federalists recognized their need for Anti-Federalist support if the new plan for government was going to hold any lasting authority. John Page, a Federalist representative from Virginia, explained to his fellow congressional members in New York that “Unless you take early notice of this subject, you will not have power to deliberate. The people will clamor for a new Convention; they will not trust the House any longer.”<sup>54</sup> Page was referring to adding amendments to the Constitution, but as had already been observed in previous debates, the Anti-Federalists would not be satisfied with what they considered to be “a tube to the whale.”

The sole provision for state rights in Madison’s list of nine amendments was found in the last proposition, which stated “The powers not delegated by this constitution nor prohibited by it to the states, are reserved to the states

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<sup>51</sup> Rutland, 215.

<sup>52</sup> Veit, 3-4.

<sup>53</sup> Madison, 333.

<sup>54</sup> Eugene W. Hickok, Jr., ed. *The Bill of Rights: Original Meaning and Current Understanding*. (Charlottesville: The University Press of Virginia, 1991), 460.

respectively.”<sup>55</sup> By presenting the resolution for the rights amendments on June 8, 1789, Madison fulfilled his campaign promise to consider the issue of Constitutional amendments.<sup>56</sup> However, the resolution offered by Madison met resistance from Anti-Federalists who attempted to add more definitive language to his last amendment. For instance, South Carolinian Congressman Thomas Tudor Tucker proposed that Madison’s ninth amendment be modified to state “the powers not expressly delegated by this Constitution.”<sup>57</sup> The addition of the word “expressly” was essential to the Anti-Federalist goal of limiting the national government to specific powers, for without such a declaration of defined powers, the national government would be free to utilize whatever authority it deemed to be “necessary and proper.” On August 18, 1789, the same day that Tucker offered his amendment to Madison’s ninth proposition, *The Congressional Register* reported that Mr. Madison “Objected to this amendment, because it was impossible to confine a government to the exercise of express powers by implication, unless the constitution descended to recount every minutiae.”<sup>58</sup> This argument echoed the same points of debate that had surrounded the constitutional ratification process. Anti-Federalists contended that unless the boundaries of the national government’s authority were expressly defined, the rights of states and therefore individual citizens were in jeopardy. Federalists, on the other hand, contended that expressly defining the powers of the national government, would cripple its ability to fulfill its responsibilities.

After Tucker’s revision failed to pass out of committee, another Anti-Federalist, Elbridge Gerry, also attempted to add the word “expressly” to the Madison amendment. The outcome was the same, with a vote of thirty-two to seventeen in opposition to the changed wording. In September of 1789, Congress sent a final list of twelve amendments to be ratified by the states, leaving Madison’s proposition dealing with the powers of the states basically intact after a few additional changes.<sup>59</sup> The state rights proposition was designated as the twelfth amendment in the congressional list to the states and read “The powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people.”<sup>60</sup> Although the two amendments that dealt with the election and payment process of members of Congress were not ratified by the states, all other amendments were ratified on December 15, 1791, when Virginia became the last necessary state to sign.<sup>61</sup> Therefore, the twelfth proposed amendment by Congress became the Tenth Amendment in the Bill of Rights.

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<sup>55</sup> Veit, 14.

<sup>56</sup> *Ibid.*, xii.

<sup>57</sup> Hickok, 462.

<sup>58</sup> Veit, 197.

<sup>59</sup> Hickok, 462.

<sup>60</sup> Veit, 4.

<sup>61</sup> Rutland, 217

While the Tenth Amendment did not specifically define which powers were denied to the national government, all founders were in agreement that the powers were limited. During the meeting of the First Federal Congress, the “Gazette of the United States” reported on June 10, 1789, that James Madison said, “Fears respecting the judiciary system, should be entirely done away – and an express declaration made, that all rights not expressly given up, are retained.”<sup>62</sup> Of course, the final ratified version of the Bill of Rights did not have this express guarantee. Even the staunchest proponents of a strong national government acknowledged that the Constitution provided for a system of shared authority between the state and national governments. For example, Alexander Hamilton wrote that “The powers of sovereignty are in this country divided between the National and State Governments,” and “each of the *portions* of powers delegated to the one or the other ... is ... sovereign *with regard to its proper objects*.”<sup>63</sup> As Hamilton explained, the national government maintained sovereignty within its realm of designated powers, and the state governments maintained sovereignty within their realm of designated powers. Although the Constitution provided a line of authority between the national government and the state governments, the responsibility for determining the precise limits of authority rested in the hands of the people.

The Constitution was ratified, not by the states and not by the people of the American nation, but by the people of each individual state. As historian Forrest McDonald explained in his book *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, “This unmistakably implied that the residue of sovereignty that was committed neither to the national/federal nor to the state governments remained in them – an implication that was subsequently made explicit by the Tenth Amendment.”<sup>64</sup> Regardless of who held ultimate sovereignty, the national government had gained a considerable amount of power through the ratification of the Constitution. The juxtaposed responses from the Anti-Federalists and Federalists after the Constitution’s ratification were representative of the potential positive and negative effects from the new system of government. Robert Whitehall, a Pennsylvania Anti-Federalist, stated on November 30, 1787, as a member of his state’s ratifying convention: “I have said, with increasing confidence I repeat, that the proposed constitution must eventually annihilate the independent sovereignty of the several states.”<sup>65</sup> The pessimism of the Anti-Federalists was met with great hope by their political opponents. The optimism of the Federalists could be heard in the farewell address of George Washington published on September 19, 1796.<sup>66</sup> Here, Washington emphasized the strength of his young country through its unification when he said, “The unity of government, which constitutes you one people is also now dear to you.”

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<sup>62</sup> Veit, 67.

<sup>63</sup> McDonald, 278.

<sup>64</sup> *Ibid.*, 280.

<sup>65</sup> Bailyn, 811.

<sup>66</sup> *Ibid.*, 1109.

It is justly so; for it is a main pillar in the edifice of your real independence; the support of your tranquility at home; your peace abroad; of your safety, of your prosperity, of that very liberty which you so highly prize.”<sup>67</sup> Both Anti-Federalists and Federalists thought their particular brands of government protected liberty best. By debating whether a strong centralized government balanced with weaker state governments or a weaker centralized government balanced with strong state governments would be more conducive to preserving the people’s rights, they managed to form a government of dual sovereignty that has been in place for over two hundred years. Alexander Hamilton explained the founders’ challenge in creating a working government that would preserve liberty when he wrote on July 12, 1781: “History is full of examples, where in contests for liberty, a jealousy of power has either defeated the attempts to recover or preserve it in the first instance, or has afterwards subverted it by clogging government with too great precautions for its security, or by leaving to wide a door for sedition and popular licentiousness.”<sup>68</sup> It has remained a difficult task to balance the proper amount of power needed by a government to fulfill its responsibilities and the proper safeguards on that government needed to protect the inalienable rights of its citizens. However, the foundation of Federalism provided in the Constitution has allowed the American people to enjoy the liberty to determine that proper balance in their government.

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<sup>67</sup> Rhodi Jeffreys-Jones, and Bruce Collins, eds. *The Growth of Federal Power in American History*. (Dekalb, IL: Northern Illinois University Press, 1983), 11.

<sup>68</sup> McDonald, 2.

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*Image at right: Senator William Ezra Jenner, photographer and date unknown. Courtesy of the Archives at Hanover College.*