

Articles

THE SECOND CONVENTION MOVEMENT, 1787-1789

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The delegates at the Constitutional Convention of 1787 created an extraordinary document. The issues they confronted during that difficult summer in Philadelphia were complex and divisive. They had to decide the best way to balance power between the individual states and the new federal government; how Congress should regulate trade between the states and with other countries; the structure and jurisdiction of the federal court system; how the states would be represented in the national legislature and its members elected; whether to let the people choose the president; and what the new nation should do about slavery.

James Madison, the shy intellectual from Orange County, Virginia, had played a central role in organizing the convention. Although Madison was greatly relieved that the Constitution had been written and approved, he knew that challenging times were ahead. He would be particularly worried about efforts by Anti-Federalists to call a second federal convention and the lack of concern shown by the Constitution's supporters over the possibility of such a gathering.

Virginia was the largest state—including what is today Virginia, West Virginia, and Kentucky, with almost twice the population of the next nearest state—and of immense political importance. Its leading citizens were among the most prominent in the nation. They had helped promote the movement for independence, developed much of the intellectual and philosophical

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foundation on which the new government would be based, and set examples—such as providing for explicit protection of individual rights—that other states followed. The opinions of its most active citizens were widely disseminated and highly influential.¹

Without Virginia, there would be no union. Its refusal to approve the Constitution would not only have likely given New York Anti-Federalists enough momentum to reject the Constitution there, it would have deprived the nation of the services of George Washington as the first president. Because so many people had agreed to the Constitution only because Washington would become the first chief executive, support for the new plan would have quickly eroded once word spread that he was ineligible.

Ratification in Virginia was likely to be especially difficult because two of its most important citizens had refused to sign the Constitution, and there would be strong demand there for another convention. Governor Edmund Randolph and George Mason had expressed serious concerns about the proposed plan throughout the Philadelphia convention. Randolph disapproved of the Senate's role in trying impeachments; the two-thirds majority required for Congress to override a presidential veto; the size of the House of Representatives; congressional authority to create a standing army and to pass navigation laws; and the vagueness of the "necessary and proper" clause giving Congress substantial discretion to exercise powers granted in Article I, among other sections. Randolph also objected to the lack of a bill of rights. That would be its most conspicuous flaw and the most difficult for supporters of the Constitution to defend.²

Mason objected for many reasons, including the failure to create a government that would protect the interests of the South, be responsive to the people, and especially because of the lack of a bill of rights.³ Mason had been the primary author of the Virginia Declaration of Rights, the document approved along with the state constitution at the Virginia Convention of 1776. When he criticized the lack of protection for individual rights in the new Constitution, he did so with special authority. During the final weeks of the convention, Mason announced that

1. *See generally*, SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999).

2. JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 614-15 (Adrienne Koch ed., Norton 1987) (1966) (hereinafter *Madison's Notes*).

3. *Madison's Notes*, *supra* note 2, at 630; *id.* at 651. *See generally*, JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* (2006).

he would "sooner chop off his right hand than put it to the Constitution as it now stands."⁴ Coming from Mason, such a colorful expression of disdain for the new Constitution was guaranteed to be repeated in newspapers and to lodge in the memory of citizens and delegates at ratifying conventions.⁵

Mason had tried to convince his fellow delegates that the Constitution should not be forwarded to the Confederation Congress and the states without a statement of rights. Five days before the Philadelphia convention adjourned, Mason said he "wished the plan had been prefaced with a Bill of Rights. . . It would give great quiet to the people." And Mason added, "with the aid of the State declarations [of rights], a bill might be prepared in a few hours."⁶

Roger Sherman, the sixty-six-year-old statesman from Connecticut, opposed Mason's recommendation, arguing that rights protected by state constitutions "are not repealed by this Constitution; and being in force are sufficient."⁷ And referring to the new federal Congress, he said the "Legislature may be safely trusted."⁸ Mason responded by warning that the "Laws of the U.S. are to be paramount to State Bills of Rights." Madison remained silent.⁹

With delegates voting as states, they unanimously rejected Mason's plea for a bill of rights. Fatigue was certainly a factor. The delegates had been hard at work for four months creating the Constitution. They were eager to go home to tend to personal and business matters and to report the results of their work. Some were concerned that instead of a few hours being required to prepare a list of rights, as Mason had predicted, it could take days or weeks and could lead to the unraveling of precarious compromises reached in other sections of the document.

But the primary objection to adding a bill of rights to the original Constitution was that the government to be formed under it would be one of limited powers. Unlike state governments, which had plenary authority to act on behalf of its citizens, the federal Constitution would create a government whose powers

4. Madison's Notes *supra* note 2, at 566.

5. Brent Tarter, *George Mason and the Conservation of Liberty*, 99 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY, 292-97 (1991).

6. Madison's Notes, *supra* note 2, at 630.

7. *Id.*

8. *Id.*

9. *Id.*

would mostly be confined to those authorized in the document. Because the plan did not repeal individual rights protected in state constitutions, and because the new general government had no authority to abuse such rights, there was no need to grant them explicit protection. Moreover, once a list was begun, it would be inevitable that some important rights would be left off. This would suggest that the federal government was authorized to abridge such rights since, it may be assumed, only the enumerated ones would be entitled to constitutional protection.

No one defended this argument more eloquently than Alexander Hamilton. He did so not at the convention, but a few months later in *Federalist 84*. Hamilton wrote that a bill of rights would be “not only unnecessary in the proposed constitution, but would even be dangerous.” And he asked, “why declare things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”¹⁰

Mason did not have an opportunity at the convention to challenge this position, but if the debate had continued, he would have asked a question for which supporters of the Constitution would have no easy answer. If Hamilton believed that the Constitution did not permit the new government to oppress individual liberty and therefore no list of rights was needed, why then were certain rights protected in the original document? For example, the Constitution preserved the right to a jury in a criminal trial and prohibited bills of attainder (laws imposing criminal penalties by a legislative body without involvement of the courts) and ex post facto laws (punishing acts that were not criminal at the time they were committed). Why, Mason would have asked, would the new government be prohibited from violating the rights not listed?

Hamilton’s answer was that those sections of the Constitution “in favour of particular privileges and rights” adopt the “common and statute law of Great Britain, by which many other rights, not expressed, are equally secured.”¹¹ And he concluded that the “constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights.”¹²

10. THE FEDERALIST NO. 84, at 445 (Alexander Hamilton) (George W. Carey and James McClellan eds., 2001).

11. *Id.* at 443.

12. *Id.* at 447. See also LANCE BANNING, JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING 8–13 (2002).

The decision not to include a list of individual rights was a misjudgment on the part of supporters of the Constitution that would have dire consequences, some of which could be seen immediately at the Philadelphia convention. Even as the document was being finalized, several prominent delegates demanded that a second constitutional convention be held to correct what they considered to be serious defects in the Constitution they were writing. It had been a substantial undertaking to organize this first convention and to bring it to a successful conclusion. A second convention could create political instability, even chaos.

A few weeks before the convention adjourned, George Mason warned that if his concerns were not addressed, "his wish would then be to bring the whole subject before another general Convention."¹³ Gouverneur Morris of Pennsylvania agreed, telling the delegates "he had long wished for another Convention, that will have the firmness to provide a vigorous Government, which we are afraid to do."¹⁴ Governor Randolph also supported another convention. He told his colleagues that if the final form of the Constitution was such that he could not sign it, then "State [ratifying] Conventions should be at liberty to propose amendments to be submitted to another General Convention which may reject or incorporate them, as shall be judged proper."¹⁵

Randolph repeated this argument a week before the Constitution was signed, interrupting the discussion of how the document should be submitted to the states for ratification. Randolph said that "State Conventions should be at liberty to offer amendments to the plan; and that these should be submitted to a second General Convention, with full power to settle the Constitution finally."¹⁶

Randolph was determined to be heard on this subject, if not at the convention in Philadelphia, then in the months ahead as state ratifying conventions debated the Constitution. When his colleagues seemed to ignore his plea and resumed their discussion of the plan for ratification, Randolph again tried to get them to focus on a second convention. "Was he to promote the establishment of a plan which he verily believed would end in Tyranny?" the governor asked.¹⁷ He urged the delegates to support his motion for submitting the Constitution to state legislatures,

13. Madison's Notes, *supra* note 2, at 566.

14. *Id.* at 567.

15. *Id.*

16. *Id.* at 612.

17. *Id.* at 615.

which in turn would give it to “State Conventions having power to adopt reject or amend; the process to close with another General Convention with full power to adopt or reject the alterations proposed by the State Conventions, and to establish finally the Government.”¹⁸ Benjamin Franklin then seconded Randolph’s motion without elaborating.¹⁹ If someone of Franklin’s stature were to publicly support a second convention, the chances that one would be called would be increased.

Two days before the Constitution was signed, Randolph again urged his colleagues not to submit the document in its current form. He moved “that amendments to the plan might be offered by the State [ratifying] Conventions, which should be submitted to and finally decided on by another general Convention.”²⁰ Randolph warned that “should this proposition be disregarded, it would. . . be impossible for him to put his name to the instrument.”²¹ Mason seconded the motion, arguing that “This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it.”²²

It was left to Charles Pinckney of South Carolina to respond to the demands for a new convention, and he did so two days before adjournment. He cautioned his colleagues that the “states will never agree in their plans [of proposed amendments], and the Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not to be repeated.”²³

The last to comment on the subject was Elbridge Gerry, the influential political figure from Massachusetts who explained why he—along with Randolph and Mason—would withhold his signature from the Constitution. After identifying his objections to the plan, he said the “best that could be done” to fix the Constitution was to “provide for a second general Convention.”²⁴ The delegates, voting as states, unanimously rejected Randolph’s motion.²⁵

18. *Id.*

19. *Id.*

20. *Id.* at 651.

21. *Id.* See also, *id.* at 567; and *id.* at 612.

22. *Id.* at 651.

23. *Id.* See generally, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 306–43 (1969).

24. Madison’s Notes, *supra* note 2, at 652.

25. *Id.*

Article V, the amending provision of the Constitution, would turn out to be of critical importance during the ratification period. Not only could no Bill of Rights be proposed by Congress without it, it also was the authority for organizing a second constitutional convention. Yet despite its significance, the Philadelphia delegates gave it relatively little attention.²⁶

Some at the Constitutional Convention even suggested that no amendment mechanism was needed. After all, of the original thirteen states, the constitutions of five of them contained no such provision.²⁷ Perhaps because these state constitutions were written during a time of revolutionary fervor, their framers may have believed that replacing a constitution rather than amending it provided the best way to institute a new government when—to paraphrase the Declaration of Independence—it became destructive of the people’s rights.²⁸

The first time the issue of amending the Constitution was raised was four days after the Philadelphia convention began when Governor Randolph presented the Virginia Plan. Resolution XIII of the plan suggested that “provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”²⁹ The Convention did not discuss the amending process again until early June, when Elbridge Gerry said he favored a process for amending the Constitution, arguing that the “novelty & difficulty of the experiment requires periodical revision.”³⁰

A week later, Article V began to take shape. According to Madison’s notes, “several members did not see the necessity of the Resolution [XIII of the Virginia Plan] at all, nor the propriety of making the consent of the Natl Legisl. unnecessary.”³¹ George Mason strenuously objected to any suggestion that an

26. For an insightful discussion of Article V, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993) and AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 285–99 (2005). Amar argues that Article V is not the exclusive method for proposing and ratifying amendments and that the people, as ultimate sovereigns, have the authority to initiate and complete the process outside of the requirements of Article V.

27. JOHN R. VILE, *THE CONSTITUTIONAL AMENDMENT PROCESS IN AMERICAN POLITICAL THOUGHT* 25 (1992).

28. See generally, WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 137–42; 298–99 (2001).

29. Madison’s Notes, *supra* note 2, at 33.

30. *Id.* at 69.

31. *Id.* at 104.

amending provision should be left out of the Constitution, insisting that the “plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.” Mason worried about giving Congress the sole power to propose amendments: “It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent [to amendments] on that very account.”³² The delegates agreed that the Constitution would include an article on amendments, but they postponed a decision on what the role of Congress would be.

What became the amending section of Article V was written mostly by the Committee of Detail, which was given the responsibility of drafting the actual language of the Constitution to reflect the votes and debates of the Convention. Because so many of the resolutions agreed to by the delegates in the first months of the Convention were general in nature, the committee had substantial discretion when transforming those resolutions into specific language. The Committee included for the first time a provision requiring Congress to call a convention to “revise or alter” the Constitution upon the submission of petitions from two-thirds of the states. Perhaps in reaction to Mason’s statement about an oppressive Congress obstructing constitutional reform, the committee did not give Congress the authority to propose amendments or call a convention on its own. When the Convention delegates—voting by state—unanimously adopted the committee’s language, Gouverneur Morris objected to excluding Congress. He did not want Congress to have to wait for the states to request such a gathering, arguing that the “Legislature should be left at liberty to call a Convention, whenever they please.”³³

Only a week before the Constitution was signed, the delegates again debated Article V. By a 9-1 vote, with one state divided, the Convention accepted Gerry’s recommendation that the amending provision be reconsidered because of the possibility that a majority of states could “bind the Union to innovations that may subvert the State Constitutions altogether.”³⁴ Alexander Hamilton, who had been away for much of the summer and

32. *Id.* at 104–05.

33. *Id.* at 560.

34. *Id.* at 609.

who, at times, seemed uninterested in the proceedings when he was there, made an important and likely influential argument that Congress should be more involved in the amending process.³⁵ He seconded Gerry's motion and persuaded his colleagues that it would be dangerous to leave it solely in the hands of state legislatures and argued that Congress should not only be able to propose amendments, but call a convention as well. He told his colleagues that:

the State Legislatures will not apply for alterations but with a view to increase their own powers. The National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought also to be empowered, whenever two-thirds of each branch should concur to call a Convention.³⁶

The delegates discussed the role of Congress and state legislatures in proposing and ratifying amendments. One of the crucial decisions they made was to narrowly reject the requirement that two-thirds of states ratify proposed amendments, choosing instead the stricter requirement of three-fourths.³⁷

Madison, who was busy taking notes and had said little during this discussion, felt compelled to ask several important questions that the delegates were either too tired to answer or that they assumed future generations would work out. He wanted to know "How was a Convention to be formed? by what rule decide? what the force of its acts?"³⁸ Madison was troubled by the lack of guidance provided by the Constitution on how a second convention would be organized and would conduct its business.

Madison then offered a motion, seconded by Hamilton, to give Congress the authority to propose amendments by a two-thirds vote in each house, but not the power to call a convention. The motion meant that amendments could be offered by either Congress or a convention organized after two-thirds of the states submitted petitions. Ratification for both methods would be by three-fourths of state legislatures or state conventions. With one state divided, the delegates approved the Madison motion 9-1.³⁹

35. Rossiter wrote that Hamilton was "[f]ar and away the most disappointing" delegate at the convention and that he "had so much to give, and he gave so little." CLINTON ROSSITER, *1787: THE GRAND CONVENTION*, 252-53 (Norton 1987) (1966).

36. Madison's Notes, *supra* note 2, at 609.

37. *Id.* at 610. Under Article V, Congress chooses whether amendments—proposed by itself or a convention—will be ratified by state legislatures or state conventions.

38. *Id.* at 609.

39. *Id.* at 610-11.

After the delegates added several additional sections—guaranteeing states their representation in the Senate and protecting the importation of slaves until 1808—Article V was approved.⁴⁰ The amending section of the Constitution was finally in place, but not everyone was pleased with it. George Mason objected to the exclusion of the people from any role in directly proposing or ratifying amendments. Mason said that “no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive.”⁴¹

Article V was a compromise between the overly strict requirements of the Articles of Confederation—which required all state legislatures to give their approval to amendments—and making it so easy to alter the Constitution that it would be deprived of the stability necessary to be firmly established as the nation’s charter of government. Madison later argued in *Federalist* 43 and 49 that changing the Constitution—especially using the convention method for proposing amendments—should be approached cautiously.⁴²

When he helped write the *Federalist* essays, Madison could not have known that within the next two years, his home state and New York would formally petition Congress to hold a convention, and Anti-Federalists would use various forums to demand such an assembly. When Article V was being debated in Philadelphia, Madison was less attuned to the potential problems of such a gathering. After Morris and Gerry moved to add a provision to Article V to require a convention on the application of two-thirds of the states, Madison suggested that such a provision was not necessary because he “did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.”⁴³ But then he agreed that an alternative to Congress proposing amendments would be acceptable, telling his colleagues that “he saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.”⁴⁴

40. *Id.* at 649–50.

41. *Id.* at 649.

42. THE FEDERALIST NOS. 43, 49 (James Madison).

43. Madison’s Notes, *supra* note 2, at 649.

44. *Id.*

The Constitution was published in Virginia newspapers beginning a few days after it was signed.⁴⁵ By early November, the proposed plan had been printed twice in pamphlet editions, twice in broadsides—one or two page documents similar to small posters—and in at least six of Virginia's nine newspapers.⁴⁶

It did not take long for those who objected to the Constitution to make their views known. As early as September 25, eight days after the convention adjourned, John Dawson, a legislator and lawyer from Fredericksburg, Virginia, wrote to Madison that “altho there are many warm friends to the plan, be assur'd that the opposition will be powerful.”⁴⁷ Five days later, Governor Randolph told Madison that the opposition would be “formidable.”⁴⁸

As the fall of 1787 continued, Madison wrote letters to supporters and encouraged them to discuss with as many people as possible the arguments in favor of ratification. In mid-November, he sent George Washington the first seven essays of *The Federalist*, and all but admitted that he was one of the authors of the essays written under the name “Publius.” He asked Washington to send the papers to his “confidential correspondents” at Richmond so they could be reprinted there.⁴⁹ Washington complied with this request and before the end of the year, the essays began appearing in Virginia newspapers.⁵⁰

Madison and other supporters of the Constitution tried to slow the momentum toward a convention by arguing that it would take far longer for amendments to be proposed by a convention than by Congress. During the time the convention process dragged on, state governments and foreign nations would not know the eventual form the Constitution would take. Because a second convention would likely consider both personal rights and structural amendments, it was possible that proposed changes would drastically alter the relative power of the states and new federal government. Foreign nations would be hesitant

45. 8-10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Ratification of the Constitution by the States (Virginia, Vols. I-III) 17-18 (John P. Kaminski and Gaspare J. Saladino eds. 1988-1993) (hereinafter DHRC)

46. *Id.* at 19.

47. Letter from John Dawson to James Madison (Sept. 25, 1787), in 10 THE PAPERS OF JAMES MADISON at 173 (Robert R. Rutland ed., 1962) (hereinafter PJM vol. 10).

48. Letter from Edmund Randolph to James Madison (Sept. 30, 1787), *supra* note 47, at 182.

49. Letter from James Madison to George Washington (Nov. 18, 1787), *supra* note 47, at 254.

50. DHRC, *supra* note 45, at 180-83.

to loan money during a period of such uncertainty, and the danger that some states would form regional confederacies would increase.⁵¹ Madison told George Lee Turberville that a second convention would propose too many amendments and would consider itself “as having greater latitude than the Congress appointed to administer and support as well as to amend the system.”⁵² Madison doubted that “the deliberations of the body [a second convention] could be conducted in harmony, or terminate in the general good.”⁵³ As Madison also explained to Henry Lee, amendments were “much more attainable from Congress than from attempts to bring about another Convention.”⁵⁴

In October 1787, the Virginia General Assembly met to enact a law authorizing the calling of a ratifying convention and the procedures under which the delegates would be chosen. One of the most contentious issues was whether the ratifying convention would be able to propose amendments to the Constitution. After the House approved a bill to hold a convention, it was discovered that something was missing from the statute. The resolution did not provide for the expenses of convention delegates. On the last day in November, the House of Delegates debated how to compensate those who would travel to Richmond and spend most of the month of June debating the Constitution.⁵⁵

Anti-Federalists, who controlled the General Assembly by a substantial margin, saw an opportunity to further efforts to organize a second federal convention. They agreed that the delegates to the ratifying convention had to be paid, but they also adopted, over strenuous objections from pro-Constitution members, the policy of reimbursing delegates who incurred expenses by traveling to confer with convention delegates in other states. Anti-Federalists clearly believed that defeating the Constitution required a multi-pronged attack and that communication with other opponents around the country was essential. They wanted both to influence those in other states and to learn what objections to the Constitution were raised at their ratifying conventions. Anti-Federalists hoped that as concerns mounted in other

51. See Letter from George Washington to David Stuart (Nov. 30, 1787) in DHRC, *supra* note 45, at 193–94.

52. Letter from James Madison to George Lee Turberville (Nov. 2, 1788) in 11 THE PAPERS OF JAMES MADISON at 331 (Robert R. Rutland ed., 1962) (hereinafter PJM vol. 11)

53. *Id.*

54. Letter from James Madison to Henry Lee (Nov. 30, 1788) *id.* at 372.

55. DHRC, *supra* note 45, at 185.

states, Virginia's delegates would become increasingly apprehensive about approving the new plan of government.

But the Anti-Federalists did not stop there. One of them, Samuel Hopkins, Jr., who represented Mecklenburg County in the House of Delegates, introduced a resolution not only to provide for "the expences or allowance" of delegates to the June convention, but also to reimburse "deputies to a federal convention, in case such a convention should be judged necessary."⁵⁶

Supporters of the Constitution had reason to be concerned. It was troublesome enough that the delegates in Richmond would be able to propose amendments, thus suggesting that the largest state believed that immediate changes to the Constitution were needed. Now Virginia was going on record as implicitly planning for a second constitutional convention to add amendments to the work of the Philadelphia delegates even before the Constitution was ratified. Madison criticized these efforts by the General Assembly: "The only surprize I feel at the last steps taken with regard to the new Constitution, is that it does not strike the well meaning adversaries themselves with the necessity of some anchor for the fluctuations which threaten shipwreck to our liberty."⁵⁷ And he knew everything his state did on this subject would be important: "The vote of [Virginia]. . .will either dismember the Union, or reduce her [Virginia] to a dilemma . . .mortifying to her pride. . .[There is] difficulty and danger in every Stage of [this]. . .experiment."⁵⁸

The debate raged over the next few weeks. The House of Delegates, meeting as a committee of the whole, initially approved the resolution allowing delegates to the ratifying convention to propose amendments, confer with other states, and, if necessary, to appoint deputies to a second constitutional convention. After the debate, the final bill that would enact Hopkins's proposal deleted explicit references to a second convention or to delegates conferring with other conventions. But the amended bill was vague enough for the Anti-Federalists still to claim that the General Assembly had reserved the right to send delegates to a second convention. It provided for "Such reasonable ex-

56. *Id.* at 184-86.

57. Letter from James Madison to Archibald Stuart (Dec. 14, 1787) in *PJM* vol. 10, *supra* note 47, at 325. See Letter from Rufus King to Jeremiah Wadsworth (Dec. 23, 1787) in *DHRC*, *supra* note 45, at 258; and Letter from George Washington to James Madison (Jan. 10, 1788) in *PJM* vol. 10, *supra* note 47, at 357-58.

58. Letter from James Madison to Archibald Stuart (Dec. 14, 1787) in *PJM* vol. 10, *supra* note 47, at 325-26.

penses as may be incurred in case the [ratifying] Convention. . . should deem it necessary to hold any Communications with any of the sister states. . . or should in any other manner incur any expence in collecting the sentiments of the union respecting the proposed Federal Constitution.”⁵⁹ The bill was passed unanimously on December 11 and the Senate, which also had a majority opposed to the Constitution, accepted the measure the next day.

Patrick Henry, a member of the House of Delegates and a dominating force in the General Assembly, thought this language left too much to chance because it did not specifically authorize the paying of expenses of those attending a second federal convention. He knew that if Virginia formally recognized the potential need for a convention, it would greatly enhance the demand for such a gathering, which had already been made by leading figures around the country, including Governor Randolph.⁶⁰ Henry declared his intention to propose a bill specifically about a convention. The *House Journal* does not provide details about the proceedings of the committee of the whole, but apparently enough members objected to including an explicit funding provision for a constitutional convention that it was removed from the language of the final legislation. Henry would have to be content with the imprecise language of the original bill.⁶¹

Archibald Stuart, a member of the House, recognized the advantage of not explicitly stating whether expenses should be paid for delegates to attend a federal convention. He told Madison that it was better that the law providing for payment to the delegates “be made in General terms which should not discover the sense of the house on ye Subject.”⁶² Stuart was also relieved that most other states would have already decided whether to approve the Constitution by the time of the June [ratifying] con-

59. For amendments to the bill, see DHRC *supra* note 45, at 189. For the final bill, see 191. After the words “Federal Constitution,” the General Assembly added this language: “in such manner as to keep up that friendly intercourse and preserve that unanimity respecting any great change of government, which it is the duty and wish of the legislature to promote and cherish.” *Id.* at 191.

60. See generally, Richard E. Ellis *The Persistence of Antifederalism after 1789 in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 295–314 (Richard Beeman, Stephen Botein, and Edward C. Carter II eds., 1987).

61. DHRC, *supra* note 45, at 184–85.

62. Letter from Archibald Stuart to James Madison (Dec. 2, 1787) in *PJM* vol. 10, *supra* note 47, at 291.

vention, “for I now have my doubts whether She [Virginia] would afford them as usual a good Example.”⁶³

Although Anti-Federalists around the country were calling for amendments, opponents of the Constitution in Virginia were the most active in demanding them. Shortly after the Philadelphia convention ended and Congress forwarded the Constitution to the states, Richard Henry Lee sent Sam Adams a detailed explanation of the defects of the Constitution—particularly the lack of protection for individual rights—and told the Massachusetts patriot that a new convention could make the necessary changes: “Why may not such indispensable amendments be proposed by the [state ratifying] Conventions and returned With a new plan to Congress that a new general Convention may so weave them into the proffer’d system as that a Web may be produced fit for freemen to wear?” Lee wondered why there was such a hurry to approve the current version of the Constitution, “as if the subject of Government were a business of passion, instead of cool, sober, and intense consideration.”⁶⁴

A week later, Lee notified Randolph that he was joining the call for a second convention, asking the governor that “If with infinite ease, a convention was obtained to prepare a system, why may not another with equal ease be procured to make proper and necessary amendments?” Lee reminded Randolph that “Good government is not the work of a short time, or of sudden thought.”⁶⁵ He asked the governor to join him in proposing amendments and to “suggest the calling of a new convention for the purpose of considering them.”⁶⁶

But a few months later, Lee was having second thoughts about whether a convention was the best way to obtain amendments. He recommended that the Richmond convention pass a motion giving Virginia, if it ratified the Constitution, the discretion to rescind that ratification if amendments were not forthcoming. He told George Mason that amendments “may be obtained from the new Congress without endangering a total loss of the proposed constitution.” Lee suggested that if amendments were not proposed within “two years after the meeting of the new Congress, that Virginia shall, in that case, be considered as disengaged from this ratification.” It would be safer, Lee said,

63. *Id.*

64. Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787) in DHRC, *supra* note 45, at 38.

65. Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787) *id.* at 61.

66. *Id.* at 64.

for Congress to propose amendments because it could be done “without risking the convulsion of conventions.”⁶⁷

As the drive for a second convention gained momentum, supporters of the Constitution began to worry that enough states would ask that a convention be held prior to ratification or that a sufficient number would formally petition Congress under Article V if the Constitution had been ratified. Federalists knew that a second convention could be disastrous. Edward Carrington was one of the first to sound the alarm, telling Thomas Jefferson that unlike the first convention, the delegates to the second would arrive with specific and inflexible orders from their state legislatures, thus making compromise difficult. A new convention would be “clogged with instructions and biassed by the sentiments of their constituents,” Carrington warned.⁶⁸

Madison knew firsthand what it had taken to organize and conduct the first convention, and he was understandably worried about what a second would do. A few months before the Virginia ratifying convention met, he tried to persuade Randolph to reconsider his position. Madison told the governor that a:

conditional ratification [by Virginia] or a second convention appears to me utterly irreconcilable in the present state of things with the dictates of prudence and safety. . . a second experiment [convention] would be either wholly abortive, or would end in something much more remote from your [Randolph’s] ideas and those of others who wish a salutary Government, than the plan [Constitution] now before the public.

Madison told Randolph that those determined to defeat the Constitution would use the new convention to “carry on their schemes, under the mask of contending for alterations.” Madison especially worried about efforts by prominent Virginia Anti-Federalists—such as Patrick Henry, Richard Henry Lee and George Mason—to coordinate plans for a new convention with opponents of the Constitution in New York: “Every danger of this sort might be justly dreaded from such men as this state [Virginia] and N. York only could furnish, playing for such a purpose, into each others hands.”⁶⁹

67. Letter from Richard Henry Lee to George Mason (May 7, 1788) *id.* at 785–86. *See also* Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788) *id.* at 880.

68. Letter from Edward Carrington to Thomas Jefferson (Oct. 23, 1787) *id.* at 95.

69. Letter from James Madison to Edmund Randolph (April 10, 1788) *in* *PJM* vol. 11, *supra* note 52, at 19.

Madison had the same message for Jefferson, informing the U.S. envoy in Paris that the “Constitution and the Union will be both endangered” if a second convention were held. Madison did not expect the “same spirit of compromise will prevail” in a second convention as the “amicable result” of the first. As he had told Randolph, those who had “latent views of disunion” could use a demand for new amendments as a way of attaining their goals.⁷⁰ Later, using even stronger language, Madison described to Jefferson the potential dangers of another convention. He told his fellow Virginian that it would be “composed of men who will essentially mutilate the system, particularly in the article of taxation. . . . An early Convention is in every view to be dreaded in the present temper of America.”⁷¹

The Virginia ratifying convention, meeting in Richmond in June 1788, would provide center stage for some of the most important political figures of the era. Despite advancing age and health problems, Patrick Henry would stand on his feet for hours at a time while exhorting, scolding and occasionally berating his fellow delegates. He had no faith in his opponents’ promise that if Virginia approved the Constitution unconditionally, they would see to it that the First Congress offered amendments. In Henry’s view, the Philadelphia delegates had made it almost impossible to change the Constitution. “To encourage us to adopt it [the Constitution], they tell us that there is a plain easy way of getting amendments: When I come to contemplate this part, I suppose that I am mad, or, that my countrymen are so: The way to amendment, is, in my conception, shut,” declared Henry.⁷² He considered the idea of approving the Constitution first, then asking for amendments, “absurd”: “I am at a loss what to say. 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?”⁷³

Henry did not know at the time that New Hampshire would become the ninth state to ratify, on June 21, 1788, four days before Virginia’s ratification vote. With New Hampshire’s approval, the Constitution went into effect, replacing the Articles of Confederation. Any convention held outside the provisions of Article V—even if organized by such prominent Anti-Federalists

70. Letter from James Madison to Thomas Jefferson (April 22, 1788) *id.* at 28.

71. Letter from James Madison to Thomas Jefferson (Aug. 23, 1788) *id.* at 238.

72. June 5, 1788, in DHRC, *supra* note 45, at 955.

73. June 9, 1788, *id.* at 1070.

as Henry and Lee, and endorsed by supporters of the Constitution such as Governor Randolph—would have no legal standing. Furthermore, if Virginia rejected the Constitution and remained out of the union, it could not petition Congress under Article V to call a convention for the purpose of proposing amendments, and it could not vote to ratify or reject amendments proposed by Congress.

Henry hoped that if Virginia rejected the Constitution or ratified contingent upon the proposing of amendments by either a convention or the First Congress, one of two developments would take place: The states that had not yet voted on the Constitution would freeze the ratification process by also demanding amendments before giving their approval; or some states that had already ratified would be so moved by Virginia's principled stand in defense of civil liberties that they would rescind their endorsement until amendments were offered.⁷⁴

At the ratifying convention, Governor Randolph defended his position on the Constitution and urged ratification. He also continued the demand he had made in Philadelphia, that a second convention be held to propose amendments. Anti-Federalists at the Richmond convention and Governor Randolph may not have agreed on much, but they did share the view that Virginia should work with other states to organize a new convention. Early in the Richmond proceedings, Patrick Henry told the delegates that under Article V, it would be nearly impossible to secure amendments and that a second convention was needed prior to ratification. First, he doubted whether Congress would propose them: "The most unworthy characters may get into power and prevent the introduction of amendments."⁷⁵ Then, Henry argued, even if two-thirds of state legislatures submitted petitions, there was no guarantee that a convention would be called. He doubted that even if a convention proposed amendments that they would be ratified: "There must necessarily be some designing bad men: To suppose that so large a num-

74. Lance Banning, *Virginia: Sectionalism and the General Good*, in *RATIFYING THE CONSTITUTION* 262, 285, and 234–64 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (hereinafter G&L). At its convention in July 1788, North Carolina voted by a two-to-one margin neither to ratify nor reject the Constitution, thus handing Federalists a serious defeat. Willie Jones, who led the North Carolina convention to this "state of suspended indecision"—in the words of Rutland—was influenced by Anti-Federalists in Virginia. ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTI-FEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788*, at 275 (1983) (1966)

75. Patrick Henry (June 5, 1788), in *DHRC*, *supra* note 45, at 955.

ber as three-fourths of the States will concur, is to suppose that they will possess genius, intelligence and integrity, approaching to miraculous.”⁷⁶ Henry reminded the convention that “four of the smallest States, that do not collectively contain one-tenth part of the population of the United States, may obstruct the most salutary and necessary amendments.”⁷⁷

George Nicholas, who supported the Constitution, tried to reassure Henry and other Anti-Federalists at the ratifying convention, telling them that if Congress refused to approve amendments, a second convention could be called. And he added, “It is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments.” Nicholas seemed overly optimistic when he said that the delegates to the new convention “will have their deliberations confined to a few points;—no local interests to divert their attention;—nothing but the necessary alterations.”⁷⁸

Francis Corbin, another supporter of the Constitution, told opponents at the Virginia convention that if they insisted on ratification contingent upon the approval of amendments, a second constitutional convention would have to be immediately called to propose them.

Admitting this state [Virginia] proposes amendments previous to her adoption [of the Constitution], must there not be another Federal Convention? Must there not be also a Convention in each state? Suppose some of our proposed conditions to be rejected, will not our exclusion out of the Union be the consequence?”⁷⁹

In the final week of the ratifying convention, Madison implored his colleagues not to consider a federal convention to propose amendments. He noted that the “mutual deference and concession” that had marked the Philadelphia convention would be absent from a new one: “It is a most awful thing that depends on our decision—no less than whether the thirteen States shall unite freely, peaceably, and unanimously, for the security of their common happiness and liberty, or whether every thing is to be put in confusion and disorder!”⁸⁰

76. *Id.* at 956.

77. *Id.*

78. George Nicholas (June 6, 1788), in DHRC, *supra* note 45, at 1002.

79. Francis Corbin (June 7, 1788), in DHRC, *supra* note 45, at 1015.

80. James Madison (June 24, 1788), in DHRC, *supra* note 45, at 1500.

Madison recognized that a list of forty amendments had been circulating among Anti-Federalists at the Virginia ratifying convention. Twenty related mostly to a bill of rights, while another twenty provided largely for structural changes in the proposed government. "Will not every State," Madison asked, "think herself equally entitled to propose as many amendments?"⁸¹ Madison warned those opposed to the Constitution that if they insisted on another convention, they might end up with something worse than the plan they oppose: "I would declare it [liberty and happiness of the people] more safe in its present form [the proposed Constitution], than it would be after introducing into it that long train of alterations which they call amendments."⁸²

Shortly before the vote on ratification, Patrick Henry appealed one last time to delegates not to ratify the Constitution without requiring the approval of amendments. He urged the delegates to support amendments in a "manly, firm and resolute manner."⁸³ But in comments that were unexpectedly conciliatory, Henry also said that if he was on the losing side, he would not oppose the new system:

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, and 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.⁸⁴

81. *Id.* See also Madison's comments on June 6, *id.* at 994–95.

82. James Madison (June 24, 1788), in DHRC, *supra* note 45, at 1501.

83. *Id.*

84. *Id.* Madison commented to Alexander Hamilton that Henry "declared previous to the final question that although he should submit as a quiet citizen, he should wait with impatience for the favorable moment of regaining in a constitutional way, the lost liberties of this country." (Emphasis in original). Letter from James Madison to Alexander Hamilton (June 27, 1788), in PJM vol. 11, *supra* note 52, at 182. See also, Letter from James Madison to George Washington (June 27, 1788) *id.* at 182–83. The Philadelphia *Independent Gazetteer* observed on July 2, 1788, that Henry "has been powerful, but now appears to be content," in DHRC, *supra* note 45, at 1698. See also, Letter from William Nelson, Jr., to William Short (July 12, 1788) *id.* at 1701–03. Washington wrote to Tobias Lear about Henry's professed support for implementing the Constitution: "Mr. Henry it seems having declared that, though he can not be reconciled to the Government in its present form, and will give it every constitutional opposition in his power; yet, that he

Henry apparently believed the vote would be close, and he might not prevail. His remarks sounded like the words of a seasoned politician preparing to fight another day. But Madison and his allies could not count on victory even after Virginia ratified the proposed plan. Henry's emphasis on continuing his battle in a "constitutional way" meant to Madison that opponents would use "every peaceable effort to disgrace & destroy" the Constitution and would immediately ask state legislatures to petition Congress under Article V to call a second constitutional convention. As Madison told Hamilton just after the convention ended, "My conjecture is that exertions will be made to engage 2/3ds of the Legislatures in the task of regularly undermining the government."⁸⁵ He wrote to Washington the same day to warn that Henry's plan would be to organize a second convention through the petition process or to "get a Congress appointed in the first instance that will commit suicide on their own Authority."⁸⁶

A few months after the ratifying convention, the Virginia General Assembly met in its fall 1788 session to establish procedures for the selection of presidential electors, to choose U.S. senators, to enact a law providing for election of members of the House, and to consider whether to formally petition Congress to call a second convention. Those demanding such a gathering may not have thought through what would be required to organize a convention and to consider any amendments proposed by it.

Anti-Federalists in the Virginia General Assembly argued that it would take longer for Congress to propose amendments than a convention. They also expected that Congress would not propose radical enough amendments, something they considered worse than mere delay. Included in the second convention resolution eventually approved by the legislature was this statement:

The anxiety with which our Countrymen press for the accomplishment of this important end [securing amendments], will ill admit of delay. The slow forms of Congressional discussion and recommendation, if indeed they should ever agree to any change, would we fear be less certain of success. Happily for their wishes, the Constitution hath presented an alternative, by admitting the submission to a Convention of the States. To this therefore we resort, as the source from whence they are

will submit to it peaceably: as every good citizen he thinks ought." Letter from George Washington to Tobias Lear (June 29, 1788) *id.* at 1715-16.

85. Letter from James Madison to Alexander Hamilton (June 27, 1788), in *PJM* vol. 11, *supra* note 52, at 182.

86. Letter from James Madison to George Washington (June 27, 1788) *id.* at 183.

to derive relief from their present apprehensions.⁸⁷

Anti-Federalists clearly believed that a convention, to which state legislatures would likely send carefully instructed delegates, would propose amendments to limit the power of the new federal government that Congress would not offer.

As the House met as a committee of the whole, Henry introduced a resolution to appoint a committee to draft a request to Congress for a convention. He also wanted his colleagues to answer a "Circular Letter" that had been approved by the New York ratifying convention in July.⁸⁸ The letter, which sought the cooperation of other states to help organize a federal convention, was a compromise between supporters and opponents at the convention, who were closely divided.⁸⁹ New York Anti-Federalists eventually corresponded with opponents of the Constitution in South Carolina, North Carolina, Virginia, Maryland, Pennsylvania and New Hampshire.⁹⁰

New York's efforts revived an interest in a second convention that had receded since February 1788, when Massachusetts had agreed to ratify the Constitution with recommended amendments. The so-called "Massachusetts compromise" gave Anti-Federalists the opportunity to formally request the First Congress to consider amendments without having to go through the long and complicated second convention process. Once the New York ratifying convention called for a convention and distributed the Circular Letter, interest in a new convention resumed. Eventually, New York followed Massachusetts and included recommended amendments.⁹¹

Federalists in the Virginia General Assembly resisted efforts to coordinate plans with New York. On October 30, 1788, they offered a substitute motion where no convention would be called, but Congress would be encouraged to propose amendments to "conform to the true spirit" of the Virginia Declaration

87. 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS: 1788-1790, at 275-76 (Gordon DenBoer ed., 1984) (hereinafter, DHFFE); DHRC, *supra* note 45, at 1765-66.

88. Linda Grant De Pauw, *The Anticlimax of Antifederalism: The Abortive Second Convention Movement, 1788-1789*, in PROLOGUE: THE JOURNAL OF THE NATIONAL ARCHIVES (Fall 1970), 103; Banning, *supra* note 74, at 329; and STEVEN R. BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* 131-35 (1979).

89. PAUL J. WEBER & BARBARA A. PERRY, *UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION* 40-45 (1989).

90. Cornell, *supra* note 1, at 137.

91. *Id.* at 136.

of Rights and other amendments approved by the Virginia ratifying convention.⁹² This motion was defeated 85 to 39. Supporters of the Constitution also did not want the Virginia legislature to send a letter to other states asking them to petition Congress for a convention, as recommended by opponents, so they offered a substitute letter that would call on states to pressure Congress to propose amendments, but that motion was defeated 72 to 50, demonstrating the solid control of the House of Delegates by the Anti-Federalists. Patrick Henry's resolution, petitioning Congress for a convention, was then approved by a voice vote. As George Lee Turberville described Henry's efforts, "the Cloven hoof begins to appear. . . intrigue antifederalism and artifice go hand in hand."⁹³

Supporters of the Constitution again tried to stop the General Assembly from requesting a convention when the report of the committee of the whole was presented to the full house. They argued that the Richmond convention had preferred amendments offered by Congress, and that the "Assembly ought not to divert the course of their pursuit."⁹⁴ The House rejected the pleas of the Federalists and adopted the committee's resolution and letters to the other states.⁹⁵ After the Senate made minor changes to which the House agreed, the resolution was completed and sent to the governor so he could forward it "to the new Congress, as soon as they shall assemble" and the letters to the other states sent "without delay."⁹⁶

Henry had very little opposition to his efforts in the House. Richard Bland Lee, a supporter of the Constitution, told Madison at the end of October that Federalists in the legislature "being all young & inexperienced—form but a feeble band against

92. DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS (Charlene Bangs Bickford et al., eds., 1992) (hereinafter DHFFC), in DHFFE, *supra* note 87, at 74, 276–79; and in DHRC *supra* note 45, at 1764–65.

93. Letter from George Lee Turberville to James Madison (Oct. 27, 1788), in PJM vol. 11, *supra* note 52, at 319.

94. Letter from Edward Carrington to James Madison (Nov. 15, 1788), in PJM vol. 11, *supra* note 52, at 345; and in DHFFE, *supra* note 87, at 276–77. See also, Letter from Francis Corbin to James Madison (Nov. 12, 1788), in PJM vol. 11, *supra* note 52, at 341–43; and Letter from George Lee Turberville to James Madison (Nov. 16, 1788) *id.* at 346–47. Carrington wrote that the "palpable untruths contained in the [Anti-Federalist] drafts ought to fix the condemnation of the people upon them." Letter from Edward Carrington to James Madison (Nov. 18, 1788) *id.* at 352.

95. DHFFE, *supra* note 87, at 274–79.

96. The petition was formally presented to the House on May 5, 1789. Both New York's and Virginia's call for a convention were entered in the House Journal and ordered to be filed. DHRC, *supra* note 45, at 1763.

him."⁹⁷ Lee had hoped to modify Henry's motion. "so as to divest it of its inflammatory dress—or to postpone its operation to such a distant period as to give the people of America a fair experiment of the government."⁹⁸ But the supporters failed, as George Lee Turberville told Madison: "The triumph of Antifederalism is compleat."⁹⁹

The Virginia General Assembly, on November 20, 1788, approved a resolution by a margin of 85 to 39 to be "presented to Congress. . .requesting that Honorable Body, to call a Convention of deputies from the several States" to consider the amendments they recommended and to "report such amendments, as they shall find best calculated to answer the purpose."¹⁰⁰

Madison was appalled that the legislature of his state had formally requested a second constitutional convention. He probably did not expect that enough other states would follow Virginia's and New York's lead to force a new convention right away, but he thought it highly irresponsible for legislators to take any chance that the Constitution would be altered by potentially dozens of amendments offered through such a gathering. As he explained to Henry Lee,

The measures pursued at Richmond are as impolitic as they are otherwise exceptionable—if alterations of a reasonable sort are really in view, they are much more attainable from Congress than from attempts to bring about another Convention. It is already decided that the latter mode is a hopeless pursuit.¹⁰¹

Madison was also concerned that supporters of the Constitution seemed willing to consider a second convention to propose amendments. George Lee Turberville, who represented Richmond County in the Virginia House of Delegates from 1785-1789, told Madison that a convention is "talked of even by the staunchest friends to the new Constitution, to close With N York & propose another convention to amend."¹⁰² Four days

97. Letter from Richard Bland Lee to James Madison (Oct. 29, 1788), in *PJM* vol. 11, *supra* note 52, at 323.

98. *Id.*

99. Letter from George Lee Turberville to James Madison (Nov. 10, 1788) *id.* at 340.

100. DHRC, *supra* note 45, at 1767.

101. Letter from James Madison to Henry Lee (Nov. 30, 1788), in *PJM* vol. 11, *supra* note 52, at 372.

102. Letter from George Lee Turberville to James Madison (Oct. 20, 1788) *id.* at 309.

later, Turberville wrote again to tell Madison that there was "Much talk of closing with New York in her proposal for a new convention. *Prima facie*—I see no impropriety in it."¹⁰³

In a detailed letter responding to Turberville, Madison set out his objections to a second convention. He acknowledged that the Constitution was "not a faultless work," and he told Turberville he wished amendments had been included before the Constitution was completed in Philadelphia.¹⁰⁴ Some changes, Madison noted, could be added with little controversy, but those that have "both advocates and opponents" should "receive the light of actual experiment, before it would be prudent to admit them into the Constitution."¹⁰⁵

Madison gave four reasons why a second federal convention should not be called: First, delegates at such a convention would disagree about the merits of the proposals and the proper method for obtaining them; thus there would be "unquestionably a number of States who will be so averse and apprehensive as to the mode, that they will reject the merits rather than agree to the mode." Second, although Article V required Congress to call a convention upon receiving petitions from two-thirds of the states, all states would probably have to participate in such a convention for it to be successful. In Congress, on the other hand, the process for enacting amendments was much simpler and less cumbersome: A single legislator could introduce amendments, and members of Congress, unlike delegates to a convention, could act without instructions from their state legislatures.¹⁰⁶ Third, a convention would not be as restrained as Congress because the legislature is chosen to "administer and support as well as to amend the system." Therefore,

If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress. . .it would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides. . .[and] would no doubt contain individuals of insidious views who under the mask of seeking alterations popular in some parts. . .might have a dangerous opportunity of sapping the very foundations of the

103. Letter from George Lee Turberville to James Madison (Oct. 24, 1788) *id.* at 316.

104. Letter from James Madison to George Lee Turberville (Nov. 2, 1788) *id.* at 330.

105. *Id.*

106. *Id.* at 331.

fabric.¹⁰⁷

Madison knew from experience how difficult it was to reach consensus at a constitutional convention: "Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance. I should tremble for the result of a Second, meeting in the present temper in America."¹⁰⁸

Finally, Madison worried that European nations would consider a second convention to be a "dark and threatening Cloud hanging over the Constitution just established, and perhaps over the Union itself."¹⁰⁹ He believed that foreign countries would be reluctant to develop relations with the United States during this period of uncertainty. He cited a loan from Holland that was granted only because it expected the Constitution to be "speedily, quietly, and finally established."¹¹⁰

After the Virginia General Assembly voted to request a convention, Madison reported to Jefferson that two-thirds of the legislators were "enemies to the Government." He wanted Jefferson to know that some friends of the Constitution also supported amendments, but "they wish the revisal to be carried no farther than to supply additional guards for liberty, without abridging the sum of power transferred from the States to the general Government."¹¹¹ The opponents, on the other hand, were "zealous for a second Convention, and for a revisal which may either not be restrained at all, or extend at least as far as alterations have been proposed by any State."¹¹²

Madison also knew that the calling of a convention would require substantially more time than for Congress to approve amendments. Two-thirds of states would have to submit petitions to Congress. Congress would then have to schedule a convention. Delegates to such a convention would have to be selected by either state legislatures or voters. They would have to convene, agree on potentially dozens of amendments and then, as required by Article V, submit those amendments to state legislatures or state conventions for ratification. In some states, where legislatures met infrequently, governors would have to

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 332.

111. Letter from James Madison to Thomas Jefferson (Dec. 8, 1788) *id.* at 382.

112. *Id.* at 382-83.

call a special session to prevent a long delay in considering proposed amendments. If Congress chose state conventions for ratification, it would be delayed while elections were held to choose the delegates to the conventions. Months would pass while the elections were conducted and the conventions organized. This entire process could take several years, during which time there would be great uncertainty about the future of the Constitution and the nation.

A few months later, when Madison was running for election to the U.S. House in a district teeming with Anti-Federalists—that Henry had created to prevent Madison from being elected—he wrote to an influential Baptist minister, George Eve, to further explain his objection to a second convention. He told Rev. Eve that unlike a convention, Congress “will probably be careful not to destroy or endanger” the new government. But a convention, explained Madison, “meeting in the present ferment of parties, and containing perhaps insidious characters from different parts of America, would at least spread a general alarm, and, be but too likely to turn every thing into confusion and uncertainty.”¹¹³

Once in Congress, Madison had to again confront efforts to hold a second convention. Virginia’s petition to Congress, approved in November, had been followed by New York’s request a few months later.¹¹⁴ On May 5, a few weeks before Madison introduced what would become the Bill of Rights, his fellow congressman from Virginia, Theodorick Bland—an ally of Patrick Henry—presented to the House Virginia’s petition calling for a convention to consider “the defects of this Constitution that have been suggested by the state Conventions, and report such amendments thereto, as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.”¹¹⁵

Bland was an energetic Anti-Federalist. A doctor from Prince George County who had served in the Confederation Congress and the Virginia House of Delegates, he had voted against ratification at the Virginia convention. He had often opposed Madison and was apparently so popular in his district that

113. Letter from James Madison to George Eve (Jan. 2, 1789), in *PJM* vol. 11, *supra* note 52, at 405.

114. De Pauw, *supra* note 88, at 107.

115. 10 DHFFC, *supra* note 92, at 451.

Federalists put up only token opposition in his race for Congress.¹¹⁶

The next day John Laurance, a representative from New York City, placed before the House New York's resolution asking for a new convention to propose amendments securing personal rights. He did not explain why a Federalist, who would presumably be opposed to a second convention, introduced the document. Laurance may have been simply carrying out an obligation he believed he owed the state legislature to deliver the resolution.¹¹⁷

The introduction of the two petitions drew Madison into a debate he certainly would have preferred to avoid. His primary purpose in offering the amendments that became the Bill of Rights was to prevent the calling of another constitutional convention. Now he was faced with having to discuss two petitions for just such a convention, one from his home state, and one from the state that was hosting the national government. Madison had to be careful not to dismiss them too quickly by suggesting that the petitions should simply be filed without Congress taking any action on them. On the other hand, if Congress took the petitions too seriously, it could encourage other states to submit their own, with the possibility that enough would do so to reach the two-thirds required by Article V for the calling of a convention.

Bland wanted the Virginia petition and list of amendments proposed by the ratifying convention to be submitted to the committee of the whole House so they could be considered along with Madison's amendments. Rep. Elias Boudinot, an influential Federalist from New Jersey who had once been the president of the Confederation Congress, argued that the petitions and amendments should be available for members to consult, but that Congress should not take formal action until a sufficient number of states had presented them.¹¹⁸

Bland was not satisfied. He argued that whether or not other states "would come forward," if the House had Virginia's petition before it when amendments are considered, "it might have some proper influence in their decision, tho' it were not accompanied by other applications."¹¹⁹

116. DHFFE. *supra* note 87, at 359, 364.

117. 10 DHFFC *supra* note 92, at 472.

118. *Id.* at 444.

119. *Id.* at 445.

Madison said the House should respect the decision of the Virginia General Assembly to request a second convention, but that any formal action should be consistent with the requirements of the Constitution. He noted that "Congress had no deliberative power with respect to a convention." When two-thirds of states requested such a gathering, Congress was "bound to call one." Until enough states did so, the House and Senate have "no power whatever to enter into the subject—The best mode was to let it [the Virginia petition] lie upon the table till a sufficient number of applications appeared."¹²⁰ Considering that Madison had played a significant role in the debate at the Philadelphia convention that led to the final language of Article V, his reasoning no doubt carried weight with many of the members of the House.

This could have been the end of the discussion, but Bland and Boudinot continued to disagree about what should be done with the petitions. Boudinot did not see how it would be "paying any respect to Virginia to commit their application to a body which had no power to deliberate or decide upon it," while Bland said again that if the House accepted the petitions and considered them along with the proposed amendments, there would be no violation of the Constitution.¹²¹ As the argument continued, Rep. Elbridge Gerry of Massachusetts suggested that the debate over the treatment of the petitions should wait until the amendments themselves were discussed.¹²² Finally, with Madison and Bland agreeing, the House decided to enter the petitions into the journal and keep the originals on file in the clerk's office, thus taking no immediate action on them.

Gerry was one of many members of the House who believed Congress had more important business to attend to than amendments but he did not want to see them postponed for too long. He agreed with those who said it was "improper to take up the business [of amendments] at this time, when our attention is occupied by other important objects," but unlike some of his colleagues, he considered the matter to be of great urgency, and he proposed that amendments be the focus of the House's attention on July 1, a few weeks in the future.¹²³ Gerry agreed with Madison that if the First Congress did not seem serious about considering amendments, more state legislatures would join the call of

120. *Id.*

121. *Id.*

122. *Id.* at 446.

123. *Id.* at 830.

New York and Virginia for a second constitutional convention.¹²⁴ Despite his earlier opposition to the Constitution, Gerry had pragmatically concluded that it was as good as the new nation was likely to get: "I am not, sir, one of those blind admirers of this system, who think it all perfection; nor am I so blind as not to see its beauties. The truth is, it partakes of humanity; in it is blended virtue and vice, errors and excellence." If amendments were proposed by a second convention, "we run the risk of losing some of its best properties."¹²⁵

Madison's colleague from Virginia, John Page, argued strenuously that if Congress did not act, the people and their legislatures would think seriously about petitioning for a second convention. And he added, "How dangerous such an expedient would be, I need not mention, but I venture to affirm, that unless you take early notice of this subject, you will not have the power to deliberate. The people will clamor for a new convention, they will not trust the house any longer."¹²⁶

Thomas Sumter, an Anti-Federalist from South Carolina, rallied to Madison's cause. He had opposed the Constitution at his ratifying convention, but now said, "I consider the subject of amendments of such great importance to the Union, that I should be glad to see it undertaken in any manner."¹²⁷ He believed that referring the subject to a select committee—which is what the House eventually did—would be "treating the applications of the state conventions rather slightly," and he preferred the full House consider the subject. Sumter worried about what would happen if amendments were not proposed: "I think it will give fresh cause for jealousy; it will rouse the alarm which is now suspended, and the people will become clamorous for amendments."¹²⁸ And, Sumter added, at that point, people would no longer apply to Congress for amendments; they would "resort to the other alternative [a convention] pointed out in the constitution."¹²⁹

Thomas Tudor Tucker of South Carolina criticized his colleagues for not showing sufficient deference to the amendments proposed by state conventions and legislatures and neglected by the select committee, which had been assigned the task of sort-

124. *Id.* at 831.

125. *Id.*

126. *Id.* at 816.

127. *Id.* at 834.

128. *Id.* at 834–35.

129. *Id.*

ing through the amendments submitted by the states and reporting to the House. He said the states that offered amendments “would feel some degree of chagrin at having misplaced their confidence in the general government” and would be disappointed that important rights to which their citizens were entitled would be left unprotected.¹³⁰ He warned his colleagues that the failure to act could result in a second convention, and that “we may lose many of the valuable principles now established in the present constitution.”¹³¹ He predicted that ratification by three-quarters of the states—which would know that their recommended amendments had not been seriously considered by the House—would be unlikely.¹³² The House rejected, by a margin of 34 to 16, Tucker’s motion to consider the additional amendments.¹³³

The debate over amendments was passionate. Rep. George Leonard of Massachusetts described the tense atmosphere by noting that the “Political Thermometer [is] high Each Day.”¹³⁴ Rep. John Brown of the Kentucky territory of Virginia said he was not surprised that Gerry, Tucker and others were “determined to obstruct & embarrass the Business as much as possible.”¹³⁵ The speaker of the House, Frederick Muhlenberg of Pennsylvania, said he hoped “this disagreeable Business is finished.” He noted that Anti-Federalists such as Gerry and Tucker had “thrown every Obstacle they could” by recommending numerous amendments, although they knew there was no chance they would be approved by two-thirds of the members, yet their plan was to “favour their darling Question for calling a [second federal] Convention.”¹³⁶

The approval of 12 amendments by the First Congress removed the immediate threat of a second constitutional convention.¹³⁷ Many Anti-Federalists, such as Patrick Henry, Richard Henry Lee, and William Grayson, were not satisfied that amendments dealing almost exclusively with personal rights were proposed, rather than structural amendments that would have altered the relative power of the states and federal gov-

130. 11 DHFFC, *supra* note 92, at 1297.

131. *Id.* at 1298.

132. *Id.*

133. HELEN E. VEIT, ET. AL., *CREATING THE BILL OF RIGHTS* 51 (1991).

134. Letter from George Leonard to Sylvanus Bourne (Aug. 16, 1789) *id.* at 279.

135. Letter from John Brown to William Irvine (Aug. 17, 1789) *id.*

136. Letter from Frederick Muhlenberg to Benjamin Rush (Aug. 18, 1789) *id.* at 280–81.

137. *See generally*, Amar, *supra* note 26, at 317–18.

ernment. But Anti-Federalists were badly outnumbered in the First Congress and were unable to persuade their colleagues to offer amendments they hoped would reduce the chances the new government would be unaccountable. They also could not maintain interest in a convention after the Bill of Rights was ratified in December 1791. Once North Carolina and Rhode Island agreed to join the union—after having refused until Congress proposed amendments—there was less incentive to continue the effort to call a convention. The adoption of the Bill of Rights effectively ended the drive for such a convention.¹³⁸

If a second convention had been held during the ratification period—a time of great political uncertainty—Article V’s lack of specificity would have added to the potential chaos that such a convention could have caused. Many steps were involved that would have been taken without much guidance from the Constitution.

To organize a new convention, nine of thirteen states would have had to petition Congress. Because ten of thirteen states would have to ratify amendments proposed by the convention, the bare minimum of nine requesting the convention may not have been enough to see the process through.

Article V is silent on the form and scope of the petitions. The petitions would likely vary, with some states explicitly listing the amendments they were demanding, while others would limit the petition to calling for a convention to consider amendments. Virginia and New York did not list specific amendments in their petitions.¹³⁹ But Virginia’s petition made reference to the forty amendments recommended by the ratifying convention, and New York’s made a more general statement about amendments needed to improve the Constitution.¹⁴⁰ If petitions included amendments, a key issue to be resolved by the convention would be whether delegates could consider only those amendments.

States would then have to choose delegates to attend the convention. State legislatures would most likely reserve for themselves the right to select them. Many of the delegates to the second convention would arrive with specific instructions on what amendments to support or oppose. Some states would deny

138. De Pauw, *supra* note 88, at 105–06.

139. Veit, *supra* note 133, at 235–38.

140. For a discussion of the New York ratifying convention, see Cecil L. Eubanks, “New York: Federalism and the Political Economy of Union,” in G&L, *supra* note 74, at 325–29.

their delegates any discretion to compromise on issues directly affecting them.¹⁴¹

In Virginia, the delegates to the new convention would likely have been energetic opponents of the Constitution. In the fall of 1788, Anti-Federalists dominated the Virginia General Assembly. Patrick Henry—who controlled the House and had substantial influence over the Senate—would likely have chosen himself, Richard Henry Lee, William Grayson, and perhaps James Monroe to represent Virginia. Madison would not have been selected and would almost certainly have declined had he been offered the appointment. George Washington, who presided over the first convention, would not have agreed to return, and after April 1789, as president, he would not think it appropriate for the chief executive to attend a constitutional convention. Other states would have sent a mixture of opponents and supporters of the Constitution.

Unlike the first convention, the second would probably have been open to the public, and a large crowd may have been vocal and animated when expressing its sentiments about the proposals being debated. With the delegates committed to fixed positions and a boisterous gallery, it would have been difficult for the convention to draft amendments of the same quality that would be proposed by the First Congress. They may not have been able to agree on any amendments.

Article V does not say how such a convention would be conducted. There would be disagreement over whether amendments need to be approved by a majority or super-majority at the convention and over other procedural issues. Committees would have to sort through the hundreds of recommendations submitted by the states and delegates and to write the language of specific amendments.

Once the convention decided on amendments, Congress would—if it followed the language of Article V—forward them to the states. The Constitution gives Congress the option of choosing whether the amendments will be ratified by state legislatures or state conventions. If Congress chose conventions, states would decide whether delegates to the conventions would be appointed by the legislature or elected by the people. There would be intense demand from citizens for the right to elect delegates to the convention. The campaigns for election to the

141. See Cornell, *supra* note 1, at 150–51.

conventions would last at least several months. Then the conventions would need to be held and after what would likely be lengthy debates, votes would be taken on whether to ratify the proposed amendments. A frantic effort would be undertaken by delegates at one convention to find out what was transpiring at others. Meanwhile, the nation and foreign governments would not know what drastic changes the Constitution would undergo.

The entire process could take several years. Rather than put the nation through this ordeal, it was possible, as James Madison suggested at the Philadelphia convention, that once a sufficient number of states submitted petitions, Congress itself would propose amendments and spare the nation the ordeal of a convention.¹⁴² But Congress would be under no obligation to do so, and some members of each house may have preferred to see what results would come from a convention rather than do the difficult work of proposing amendments themselves.

It can never be known how close the nation came to a second convention as the Constitution was going into effect. Many Americans in 1787-1788 believed that it had been ratified with the understanding that the new Congress would immediately propose explicit protections for individual rights. If Madison had not been in the U.S. House in the first session, Congress would not likely have proposed such amendments. With demands for a second convention coming not only from opponents but also from some supporters of the Constitution, congressional failure to propose amendments may well have been the catalyst for enough states to petition Congress. At a minimum, such a convention would have added to the instability and uncertainty surrounding the new government. If the convention approved amendments, they almost certainly would have drastically altered the plan devised by the delegates in Philadelphia.

142. Madison's Notes, *supra* note 2, at 649.