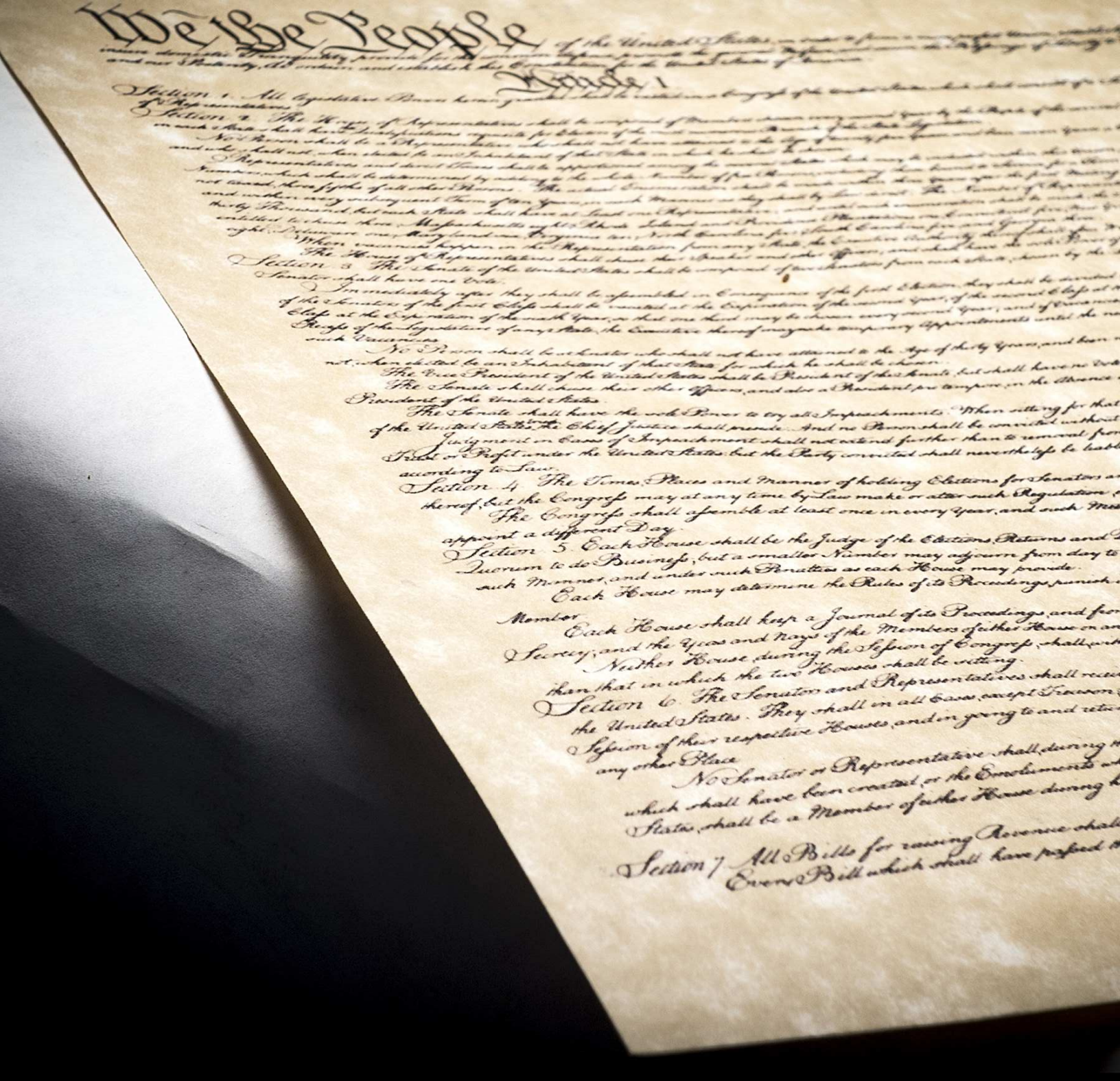

The Virginia Ratifying Convention and the Birth of the 10th Amendment

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The modern debate over the meaning of the Constitution often devolves into dueling opinions between legal experts and judges. But the true meaning of the document and the kind of government it created isn't found in Supreme Court decrees or through interpretation based on opinion.

Much like an author's diary offers the most relevant commentary on the meaning of their book, the best way to learn what the meaning of the Constitution is to find out what those who approved it had to say. For that, we must return to the state ratifying conventions where the Constitution was discussed, debated and clarified before delegates voted to approve it.

While the essays found in the *Federalist Papers* provide an intellectual argument in favor of the Constitution, it was at the conventions where its supporters had to confront the specific concerns of skeptics and opponents.

Of all them all, the Virginia Ratifying Convention - held June 2-27, 1788 - may offer the best insight into what kind of government the Constitution created.

At the convention, many aspects of the Constitution, such as the power of taxation, were thoroughly discussed and fervently debated. However, those who helped craft the Constitution, as well as its supporters, also made it unmistakably clear if approved it would set up a limited government with only certain specific powers delegated to it – powers that could be taken back if desired.

It is this part of the convention we'll be focusing on.

BIG NAMES

To grasp the significance of what was said during the Virginia Ratifying Convention, it is critical to first understand the importance of the people there. Among the delegates were James Madison, Edmund Randolph, John Marshall, Patrick Henry and George Mason. Madison is commonly known as the Father of the Constitution for his role in crafting the document. Randolph was the then-governor of Virginia and the first U.S. attorney general, while Marshall was the fourth chief justice of the U.S. Supreme Court.

Randolph's statements in particular are notable because he was one of the few people who refused to sign the U.S. Constitution in Philadelphia a year earlier, yet he later changed his mind and voted in favor of it at the Virginia Ratifying Convention.

Both Patrick Henry and George Mason were anti-federalists, intense skeptics of the new Constitution. Yet they were also fierce advocates for the adoption of a bill of rights that would ensure the protection of rights recognized by the state constitutions. They also wanted numerous amendments to the U.S. Constitution as a condition of ratification. Mason earned the title "Father of the Bill of Rights" for his efforts to secure much of what later became the first amendments to the Constitution, including the Tenth Amendment.

DELEGATED POWERS

Debate over the powers of the proposed national government dominated the Virginia convention.

Early in the convention, delegates raised concern about giving Congress the authority to alter the time, places and manner of elections for U.S. senators and representatives under Article 1

Section. 4. The worry by some was that they would use this power to inappropriately influence elections.

In response to these concerns, delegate George Nicholas made the following remarks (note: all bold emphasis added)

It is absurd to think that Congress will exert this power, or change the time, place, and manner established by the states, if the states will regulate them properly, or so as not to defeat the purposes of the Union. It is urged that the state legislature ought to be fully and exclusively possessed of this power. Were this the case, it might certainly defeat the government. As the powers vested by this plan in Congress are taken from the state legislatures, they would be prompted to throw every obstacle in the way of the general government. It was then necessary that Congress should have this power.

Another strong argument for the necessity of this power is, that, if it was left solely to the states,

Congress will superintend the great national interests of the Union. Local concerns are left to the state legislatures.

Nicholas' statement reveals several critical facts about the Constitution that would be repeated throughout the convention:

- It was delegating specific powers to the federal government, and no more.
- The powers delegated to the federal government were not general, but specific.
- The new government's powers were limited to handling external issues; internal issues and the powers to deal with them were to be left to the states.

Nicholas later reiterated this point while referring to the House of Representatives:

The state legislatures, also, will be a powerful check on them: every new power given to Congress is taken from the state legislatures; they will be, therefore, very watchful over them; for, should they exercise any power not vested in them, it will be a usurpation of the rights of the different state legislatures, who would sound the alarm to the people. Upon such an appeal from the states to the people, nothing but the propriety of their conduct would insure the Congress any chance of success.

Again, the federal government's powers would come from the states. They would not come out of thin air. Nor was the federal government a sovereign entity. It was a national government using powers delegated to it by the states. If the feds had a power it had to be specifically stated.

Anti-federalist George Mason was not convinced this was how things would actually work out. Because a national government would be more powerful than the state governments "the latter must give way to the former," he said.

He elaborated further:

I hope that a government may be framed which may suit us, by drawing a line between the general and state governments, and prevent that dangerous clashing of interest and power, which must, as it now stands, terminate in the destruction of one or the other. When we come to

the judiciary, we shall be more convinced that this government will terminate in the annihilation of the state governments: the question then will be, whether a consolidated government can preserve the freedom and secure the rights of the people.

In response, James Madison stated "that the general limitation of their (federal) powers, and the general watchfulness of the states, will be a sufficient guard."

The phrase "general watchfulness of the states" implied the states have ultimate authority over the federal government. The powers it exercises are only on loan from the states. Thus, it would be a duty of the "watchful" states to ensure the new government did not go beyond its delegated authority.

This is the concept of nullification neatly summarized a full decade before Madison would pen the Virginia Resolutions of 1798.

However, not all the sections of the Constitution were as clear in language as others. One of the provisions Patrick Henry attacked was the necessary and proper clause, which he saw as giving Congress carte blanche authority and declaring its laws "paramount to the laws and constitutions of the states," he warned on June 5.

"This, sir, is my great objection to the Constitution, that there is no true responsibility, and that the preservation of our liberty depends on the single chance of men being virtuous enough to make laws to punish themselves," he said further.

Except this clause actually didn't give them any unspecified authority, said Madison the following day.

"The powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction," he said.

Another prominent delegate at the Convention was Richard Henry Lee. A signer of the Articles of Confederation, his motion for separation from Great Britain at the Second Continental Congress in 1776 led to the Declaration of Independence.

Lee argued that a simple question could determine Congress' powers.

"It is plain on the side of the governed: Is it enumerated in the Constitution?" he stated on June 9. "If it be, it is legal and just. It is otherwise arbitrary and unconstitutional."

Lee was recorded as arguing further:

Under the state governments, the people reserved to themselves certain enumerated rights, and that the rest were vested in their rulers; that, consequently, the powers reserved to the people were but an inconsiderable exception from what were given to their rulers; but that, in the federal government, the rulers of the people were vested with certain defined powers, and that what were not delegated to those rulers were retained by the people.

The consequence of this, he said, was that the limited powers were only an exception to those which rested in the people, and that they knew what they had given up, and could be in no danger.

BACKWARDS

There would be no hidden powers in the Constitution. It would not be a “living, breathing” document that could be changed by the whims of those in power. But this couldn’t be more false. The document was created as unambiguous and unchanging outside of the amendment process. Any power it had could be determined simply by reading it.

A common misinterpretation of the Constitution and the subsequent amendments is that unless a right is expressly stated it does not exist. Likewise, if the federal government is not expressly prohibited from doing something it has the authority to do so. Or, the power could be “implied” in certain clauses.

It’s an interpretation anti-federalists at the convention feared the federal government would adopt one day. One delegate critical of the Constitution noted the lack of expressed protections for freedom of the press that could be found in state constitutions like Virginia’s. What would prevent Congress from censoring newspapers?

In response, Edmund Randolph explicitly denounced such an interpretation of the Constitution as backwards.

“He (another delegate) says that every power is given to the general government that is not reserved to the states,” Randolph said June 10. “Pardon me if I say the reverse of the proposition is true. I defy anyone to prove the contrary. Every power not given it by this system is left with the states. This being the principle, from what part of the Constitution can the liberty of the press be said to be in danger?”

Randolph then read Article 1 Section 8 listing congressional powers and challenged the delegates to “examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger.”

Once more, this failed to placate George Mason. No matter what reassurances they were given, a bill of rights was still needed, he argued.

RETAINED

George Nicholas warned this flipped the meaning of the Constitution. It was a document listing limited government powers, he said. A document with the limited rights of the people was the European approach.

He said:

In England, in all disputes between the king and people, recurrence is had to the enumerated rights of the people, to determine. Are the rights in dispute secured? Are they included in Magna Charta, Bill of Rights.? If not, they are, generally speaking, within the king’s prerogative.

In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with it. Which is the most safe? The people of America know what they have relinquished for certain purposes. They also know that

they retain everything else, and have a right to resume what they have given up, if it be perverted from its intended object.

"It is a principle universally agreed upon, that all powers not given are retained," he declared.

SOVEREIGN

Contrary to the "one nation, indivisible" phrase in the Pledge of Allegiance, they were not creating a permanent government that could never be abolished. To do so would have been to betray the fundamental principles of the Declaration of Independence. The people were, through their legislatures, delegating powers to a federal government – but if they no longer wished to delegate them they could take them back.

In other words, because the people were sovereign they had a right to abolish a government or withdraw their consent to its rule, just as they had done with Great Britain.

If there is any doubt left in someone's mind as to the authorities of the federal government, James Madison put it as well as anyone could when he said their powers were intended chiefly for times of war, "while those of the state governments will be exercised in time of peace."

"The powers of the general government relate to external objects, and are but few," he said on June 11. "But the powers in the states relate to those great objects which immediately concern the prosperity of the people."

It was a government that was given powers mainly to be utilized at a time of war; and the founders hoped to avoid the kind of wars that had ravaged European. It was a government that had few powers which were to be exercised infrequently.

SUPREMACY CLAUSE

But what about the Supremacy Clause, which declares that all laws made in pursuance of the Constitution supersede state laws? Surely this erased any limitations from the new government, said George Mason.

"Are not those rights with which we were afraid to trust our own citizens annulled and given up to the general government?" he argued on June 11.

Clauses like this made a bill of rights in the U.S. Constitution as necessary as ones for state constitutions, he went on:

Let gentlemen show that they are secured in a plain, direct, unequivocal manner. It is not in their power. Then where is the security? Where is the barrier drawn between the government and the rights of the citizens, as secured in our own state government? These rights are given up in that paper; but I trust that this Convention will never give them up; but will take pains to secure them to the latest posterity."

He then proposed a constitutional amendment evoking the same spirit of the Tenth Amendment.

We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground….We ask such amendments as will point out what powers are reserved to the state governments, and clearly discriminate between them and those which are given to the general government, so as to prevent future disputes and clashing of interests. Grant us amendments

like these, and we will cheerfully, with our hands and hearts, unite with those who advocate it, and we will do everything we can to support and carry it into execution. But in its present form we never can accede to it."

"The liberty or misery of millions yet unborn are deeply concerned in our decision," he added.

DELEGATED AND RESERVED

As the convention progressed, the discussion turned to freedom of religion, a concept which had played a pivotal role in the development of the American colonies and their intense fervor for independence from one another.

Just as the Constitution delegated Congress zero authority to censor the press, it provided for no authority to restrict religion. Federalists insisted this was the case.

Again, for Patrick Henry it wasn't enough to take someone's word for it. Nor could he rely on "constructive, logical reasoning" which allowed well-educated men to reach this conclusion. It had to be painfully obvious to the most uneducated men these rights were secured.

When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger (to religious freedom), is it not sufficient to make us tremble? Is it not sufficient to fill the minds of the ignorant part of men with fear? If gentlemen believe that the apprehensions of men will be quieted, they are mistaken, since our best informed men are in doubt with respect to the security of our rights. [Emphasis added]

James Madison's answer put it plainly and directly as possible:

There is not a shadow of right in the general (federal) government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.

Later in the convention, Madison also explained how Article 1 Section 6 delegated certain powers to the federal government because "it was thought improper to leave it to the state legislatures."

Again, we see the same principle reiterated; all federal powers originated in the states. Federal authority had to be specifically delegated to it or else it didn't have it.

Even then, not all powers delegated the federal government were made exclusive to them, for instance arming militia. George Mason believed giving the feds this power would lead to the "annihilation of the state governments" by calling them up at any time to enforce whatever law they decreed.

On June 14, Madison said the authority to the federal government in this area was "concurrent, and not exclusive." The states were not giving up their authority to call up militia just because they had delegated similar authority to the feds.

Here too John Marshall offered his perspective.

"The state governments did not derive their powers from the general government, but each government derived its powers from the people," he said.

Because of this “the state still had a power “unless there be something in this Constitution that takes it away.”

For Continental purposes Congress may call forth the militia, — as to suppress insurrections and repel invasions. But the power given to the states by the people is not taken away; for the Constitution does not say so. In the Confederation Congress had this power; but the state legislatures had it also.

The truth is, that when power is given to the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the state governments from it. But there are no negative words here. It rests, therefore, with the states. To me it appears, then, unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have done before its adoption. [Emphasis added]

This is the spirit of the Tenth Amendment neatly described. If a power isn’t prohibited to the states by the Constitution, it is reserved to the states or the people – many times, even if the federal government has been delegated the same powers.

NECESSARY AND PROPER

Attacking the necessary and proper clause, Patrick Henry said it would give Congress “a right to pass any law that may facilitate the execution of their acts.”

But the clause was a mere “superfluity” that “gives no supplementary power,” James Madison said. “It only enables them to execute the delegated powers.”

“If the delegation of their powers be safe, no possible inconvenience can arise from this clause,” he added. “It is at most but explanatory.”

Patrick Henry wasn’t swayed. If Congress were vested with this power, the dangers he had described might happen.

“For that Congress would not be confined to the enumerated powers,” he said. With the clause they “could make any laws which they might think necessary to execute the powers of any department or officer of the government.”

Once more, George Mason hammered away the need for a clause “with respect to all powers which are not granted, that they are retained by the states.”

“Otherwise, the power of providing for the general welfare may be perverted to its destruction,” he said. “There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States.”

Without it, the necessary and proper clause will go “to anything our rulers may think proper Unless there be some express declaration that everything not given is retained, it will be carried to any power Congress may please.”

At this point George Nicholas affirmed the right of the people to nullify unconstitutional federal acts.

“If they(the federal government) exceed these powers…the people will have a right to declare it void,” he said.

The discussion continued with Mason insisting that unless explicit restrictions on federal authority were imposed, “many valuable and important rights would be concluded to be given up by implication.”

If it was necessary for Virginia to have a bill of rights with its constitution, why would it be any different with a national constitution, he argued.

The person taking meeting minutes recorded him as saying “Unless there was a bill of rights, implication might swallow up all our rights.”

At that point Patrick Henry pulled no punches, saying “the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before.”

“All nations have adopted this construction; that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers,” he said.

He painted a dark picture of what would happen if they failed to do so.

If you give up these powers, without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw; government that has abandoned all its powers, the powers of direct taxation, the sword, and the purse. You have disposed of them to Congress, without a bill of rights — without check, limitation, or control…A bill of rights may be summed up in a few words. What do they tell us? That our rights are reserved. Why not say so? Is it because it will consume too much paper? [Emphasis added}

While men like George Nicholas believed the clause was unnecessary, delegate William Grayson pointed out that the Articles of Confederation had contained a similar clause upholding the rights of the states not delegated to the confederation. Why include it if it was not necessary, he asked.

However, state governments were different from national governments, said George Nicholas. The people directly delegated their authority to the states, whereas they indirectly delegated authority to the national government through the states. The federal government’s “certain special powers were delegated for certain purposes.”

Besides, a bill of rights was “but a paper check” that has been violated in the past, he added. Better to have a government “with special powers, without any express exceptions, is better than a government with general powers and special exceptions.”

This debate carried on into June 17, where Madison repeated his assertion that the necessary and proper clause “only extended to the enumerated powers” and “should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause.”

As stated before, none of the text implied any powers. All powers had to be specifically laid out.

EVERYTHING NOT GRANTED

Interestingly enough, the issue of slavery was brought up during the debate over the limits of the federal government at the Virginia Ratifying Convention. Several anti-federalists, including

George Mason, cited Article 1 Section 9 of the United States Constitution, which forbade a ban on the slave trade until 1808, as proof that the proposed government's powers weren't limited. If it was necessary to specifically include a restriction on federal powers concerning the slave trade, he argued, how could it not apply to the rest of federal authority.

Madison explained that "it was a restraint on the exercise of a power expressly delegated to Congress; namely, that of regulating commerce with foreign nations."

But then Patrick Henry inquired why the Constitution included specific guarantees of rights such as *habeas corpus*. If the federal government had limited powers why did the constitution need to specifically include these rights while others were left out?

"The few restrictions in that section are your only safeguards," he said. "They may control your actions, and your very words, without being repugnant to that paper….I trust that gentlemen, on this occasion, will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right, secured, before they agree to that paper. These most important human rights are not protected by that section, which is the only safeguard in the Constitution. My mind will not be quieted till I see something substantial come forth in the shape of a bill of rights."

Edmund Randolph defended the Constitution by saying, as stated repeatedly before, that the general government was only delegated specific powers.

Let me say that, in my opinion, the adversaries of the Constitution wander equally from the true meaning. If it would not fatigue the house too far, I would go back to the question of reserved rights. The gentleman (Patrick Henry) supposes that complete and unlimited legislation is vested in the Congress of the United States. This supposition is founded on false reasoning. What is the present situation of this state? She has possession of all rights of sovereignty, except those given to the Confederation. She must delegate powers to the confederate government.

Now, is there not a demonstrable difference between the principle of the state government and of the general government? There is not a word said, in the state government, of the powers given to it, because they are general. But in the general Constitution, its powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it? – for if its powers were to be general, an enumeration would be needless. [Emphasis added]

He went on to say that the inclusion of these rights pertains to enumerated powers given to the federal government.

I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested…. He (Patrick Henry) asks, Where is the power to which the prohibition of suspending the habeas corpus is an exception? I contend that, by virtue of the power given to Congress to regulate courts, they could suspend the writ of habeas corpus. This is therefore an exception to that power.

But the rhetoric of the gentleman has highly colored the dangers of giving the general government an indefinite power of providing for the general welfare. I contend that no such power is given.

Returning to the issue of religious protections, he said “no part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion.”

The disagreement over the meaning of the Constitution would persist for the duration of the convention. Finally George Mason and Patrick Henry’s insistence won over Edmund Randolph, who admitted there was no reason to exclude a bill of rights.

If, in the ratification, we put words to this purpose, “and that all authority not given is retained by the people, and may be resumed when perverted to their oppression; and that no right can be cancelled, abridged, or restrained, by the Congress, or any officer of the United States,” — I say, if we do this, I conceive that, as this style of ratification would manifest the principles on which Virginia adopted it, we should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein. I see no objection to this.

It is demonstrably clear to me that rights not given are retained, and that liberty of religion, and other rights, are secure.

Still, debates persisted over other parts of the Constitution. Anti-federalists pointed to Article 1 Section 8 charging Congress to provide for the “general welfare.”

This charge could only be carried out by enumerated powers, said Edmund Randolph.

“No man who reads it can say it is general,” he said. “You must violate every rule of construction and common sense, if you sever it from the power of raising money, and annex it to anything else, in order to make it that formidable power which it is represented to be.”

As the convention progressed a motion was made approving a resolution that the powers granted by the proposed Constitution are the gift of the people, and may be resumed by them when perverted to their oppression, and every power not granted thereby remains with the people, and at their will.

James Madison felt such a resolution was not needed because “there cannot be a more positive and unequivocal declaration of the principle of the adoption — that everything not granted is reserved.”

“This is obviously and self-evidently the case, without the declaration,” he added. “Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government?”

Finally, a vote came for ratification. While men like Madison, Randolph, and Marshall voted to ratify the Constitution, George Mason and Patrick Henry still opposed it.

The ratification included the following declaration, which left no doubt as to what kind of government they were approving.

We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceeding of the federal Convention, and being prepared, as well as the most mature deliberation hath enabled us, to decide thereon, Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, be resumed by them whensoever the same shah be perverted to their injury or oppression, and that every power, not granted thereby, remains with them, and at their will; that, therefore, no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.

But ultimately, anti-federalists' persistence paid off. While they had hoped to get a bill of rights and subsequent amendments to the Constitution as conditions for adoption, Virginia ratification did included them as recommendations.

The first amendment they recommended read as follows:

That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.

Proposed by Congress in 1789, the Tenth Amendment to the Constitution was ratified with the following text:

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

While proposing the amendment in Congress, James Madison made the following statement:

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated.

In other words, if it was unnecessary it was because it was obvious the federal government only had specific, limited powers. But there was no reason not to include it.

The Virginia Ratifying Convention left no ambiguities about the federal government or its role. It was to be limited, its power explicitly defined and pertaining chiefly to external matters related to war. All the rest of those powers to be reserved to the people in their respective states, where they could decide how much authority to delegate to their local governments.

Sadly, the limited government approved in 1788 bears little resemblance to the one in D.C. today. Instead of leaving most matters for the people and their states to decide, it considers it

good and proper to control every facet of our lives from what we put into our bodies to whom we associate with.

Yet while those who violate the Constitution deserve the shame due, the blame for our dire circumstances cannot be laid solely at their feet. It took years and thousands of willing accomplices to create the monstrosity of a central government we have. Furthermore, it was never the ultimate moral responsibility of the federal government to protect the rights of the people because they are not ultimately in authority over the people. The people are in authority over themselves.

On June 4 at the Virginia Ratifying Convention George Nicholas made a prophetic declaration that serves as an appropriate warning to those who place their hope in government to protect our liberties.

As long as the people remain virtuous and uncorrupted, so long, we may fairly conclude, will their representatives, even at their present number, guard their interests, and discharge their duty with fidelity and zeal: when they become otherwise, no government can possibly secure their freedom.

Governments do not restrain themselves. Governments do not keep people free. The people must restrain their governments. The people must preserve their freedoms.

If they do not, then they doubly suffer the agony of a tyrannical government and the bitter tragedy of never knowing what it is like to be truly free.