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Edmund Randolph and Virginia Constitutionalism

Kevin R. C. Gutzman

Scholars have long been under the impression that the doctrines enunciated in the Virginia and Kentucky Resolutions of 1798 and 1799 and the Virginia Report of 1800 originated with the authors of those documents, James Madison and Thomas Jefferson. Yet this article demonstrates that it was not either of those two future presidents who concocted what Andrew Jackson would dub “the Virginia Doctrine.” That distinction belongs to Governor Edmund Randolph, a non-signer of the Constitution at the Philadelphia Convention who became a leading voice for ratification in the Virginia Ratification Convention of 1788. The trajectory of Randolph’s thinking regarding federalism and the story of his doctrine’s effect in 1788 are recounted here. Ironically, the reading of the Constitution that would underpin various outbreaks of sectionalism in the antebellum period and later originated with a Federalist of 1788, not with an opponent of ratification.

In the winter of 1798, the Virginia General Assembly adopted a set of resolutions sponsored by Delegate John Taylor of Caroline County. Those resolutions, then known as “Taylor’s Resolutions” but since revealed to have been drafted by James Madison and commonly called the Virginia Resolutions of 1798, came to serve as the bedrock of Virginia’s majority political party’s constitutional position until the end of the Civil War.¹ They held, in brief, that the federal government was the creature of the states, and that as the federal government’s creators, the states were responsible for policing the performance of the federal government and ensuring that the federal government did not usurp any of the powers reserved to the states first in the understanding of the federal Constitution’s ratifiers, then—for good measure—by the adoption of the Tenth Amendment.²

The classic account of the Virginia Resolutions of 1798 and of their tandem Kentucky Resolutions (drafted by Thomas Jefferson) of that same year held that they were the product of leading Re-

1. Charles H. Ambler, *Thomas Ritchie: A Study in Virginia Politics* (Richmond: Bell Book Co., 1913), *passim*.

2. K[evin] R. Constantine Gutzman, “The Virginia and Kentucky Resolutions Reconsidered: ‘An Appeal to the *Real Laws* of Our Country,’” *The Journal of Southern History* 66 (2000): 473-96.

publicans' desperation over the state of federal politics in 1798. Far from representing the calm, mature position concerning federalism of the founders of the Republican Party and chief authors of the Declaration of American Independence, U. S. Constitution, and federal Bill of Rights, then, the Virginia and Kentucky Resolutions should be understood merely as part of "An Episode in Jefferson's and Madison's Defense of Civil Liberties."³

This idea has since been exploded in one sense: the Virginia and Kentucky Resolutions' version of state-centered federalism was the deeply held position of Thomas Jefferson, and of the majority of Virginia Republicans who followed him.⁴ The goal of this article is to disprove the other element of the most influential account of the Virginia and Kentucky Resolutions of 1798: that the version of federalism they contained originated with Jefferson and Madison.

Accounts of Federalism, and particularly of Virginia Federalism, in the contest over ratification of the United States Constitution commonly privilege the role and thought of James Madison, the best "brand name" in the business of the Constitution, and with good reason. Madison was the most cogent thinker among the leading Virginia Federalists, and he played the premier part in bringing the Philadelphia Convention of 1787 into being. In addition, *The Federalist*, to which he was a contributor, stands as the most coherent sustained defense of the Constitution penned in the days when it was still under consideration.⁵

Yet, the focus on Madison has served to obscure, when it did not distort, the role played in the ratification contest of 1787-88 by another leading Virginian: Edmund Randolph. Typically, accounts of that struggle (which, outside the context of biographies of the participants, are surprisingly few) mention Madison's efforts to

3. Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly*, 3rd ser., 5 (April 1948): 147-76.

4. Gutzman, "The Virginia and Kentucky Resolutions Reconsidered."

5. One of the most famous explications of the original understanding of American federalism, H. Jefferson Powell, "The Original Understanding of Original Intent," in *Interpreting the Constitution: The Debate Over Original Intent*, ed. Jack N. Rakove (Boston, MA: Northeastern University Press, 1990), pp. 53-115, relies exclusively upon Madison's writings in explaining how Federalists of 1787-88 understood the place of the states in the proposed system. *Ibid.*, p. 63, text at notes 96-102.

convert the governor from a non-signer in the Philadelphia Convention to a Federalist in the Richmond Convention, but only as part of Madison's masterful performance in bringing the current regime into being. Randolph commonly is treated in the way partisans in the Federalist-Republican debates of the 1790s characterized him: as a weathervane.

The truth of the matter, however, is more interesting. His behavior between the close of the Philadelphia Convention and the final vote at Richmond nearly a year later certainly did mark Randolph as a man highly concerned with his image. Yet, it was in part this concern—which one might call “democratic” or “respectful of the people”—that led Randolph to conceive of an explanation of ratification that his fellow delegates could accept. When the Richmond Ratification Convention of 1788 deadlocked between opponents of ratification and Madisonians, it was Governor Randolph who offered a sensible middle course: the step the delegates were being asked to take, he said, was not so momentous as it seemed; rather, ratification of the proposed federal Constitution would simply place the states in a closer federal relationship to one another, with ultimate authority to oversee the federal government's performance still lodged in the individual states. Randolph, who had refused to sign the Philadelphia Convention's handiwork and had since been narrowly converted to Federalism by the prospect of disunion, had arrived at an explanation of the Constitution that barely satisfied him. In the end, it proved satisfactory to a slight majority of the Richmond Convention. Virginia politicians repeatedly relied upon it in protesting federal initiatives in the years before 1798, and they would continue to insist upon it—this time as stewards of the federal government—for many years after 1800.

The understanding of Virginia's place in the federal union that Randolph persuaded his fellow delegates to the Richmond Convention to adopt was not new to him. Instead, Randolph believed that Virginia would remain essentially in the same position vis-à-vis the other states as it had occupied before—as will be made clear below by consideration of some of Randolph's pre-1787 statements concerning federalism.

Like other moderate politicians, Randolph was a target of sniping from extremists on both sides. So, in May 1793, Secretary of State Thomas Jefferson, leader of the self-styled "Republican" faction, lamented what he called Randolph's indecisiveness. When Randolph refused to act as arbiter between Jefferson and Secretary of the Treasury Alexander Hamilton, but instead left it to the president to decide the latest quarrel between his top two cabinet officers, Jefferson judged that Randolph was straddling the fence. Two years later, on the occasion of Randolph's departure from Washington's cabinet, Jefferson wrote that "where the principle of difference is as substantial and as strongly pronounced as between the republicans and Monocrats of our country, I hold it as honorable to take a firm and decided part, and as immoral to pursue a middle line, as between the parties of honest men and rogues, into which every country is divided."⁶ Moderation, so far as Jefferson was concerned, was Randolph's characteristic vice. Refusal to subscribe to the Republicans' Manichaeic view of the world constituted a moral failing.

On the other hand, an admiring biographer of Alexander Hamilton referred to Randolph as a Jeffersonian Republican.⁷ In President Washington's Cabinet, as in the ratification dispute of 1787-88, Edmund Randolph saw it as an obligation to find the mean, to bring people together, rather than jumping to a hasty conclusion and ignoring the potential costs in pursuit of self-righteous ideological purity.⁸ Washington appreciated this evenhandedness, which helped him to exploit the talents of men from both factions, and Randolph served for a while as a *de facto* federal prime minister.⁹ Similarly, in the Richmond Ratification Convention, it was Randolph who ultimately pointed the way

6. Dumas Malone, *Jefferson and His Time*, vol. 4, *Jefferson and the Ordeal of Liberty* (Boston: Little, Brown and Co., 1962), pp. 73, 85, 264.

7. Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W. W. Norton and Co., 1979), p. 285.

8. Randolph's self-conscious moderation was in the tradition of later American figures such as Henry Clay. Cf. Peter B. Knupfer, *The Union as It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill: University of North Carolina Press, 1991); former Senate Majority Leader Howard Baker, Commencement Address, University of Virginia, May 1999.

9. John J. Reardon, *Edmund Randolph: A Biography* (New York: Macmillan Publishing Company, Inc., 1974), pp. 220-83.

to an understanding of ratification with which Virginia's leaders could be satisfied.¹⁰

The point is not that views similar to Randolph's were not expressed in other states. That question is beside the point. Virginia's peculiar version of federalism, which ultimately reached its apotheosis in the Virginia Resolutions of 1798 and Report of 1800, can be traced to Randolph's explication of the Constitution at Richmond in the summer of 1788.

Within months of the new federal Constitution's implementation in 1789, the Virginia General Assembly—a body dominated by former Anti-Federalist Patrick Henry—would see its worst fears concerning the new federal government fulfilled. In response, it would adopt a resolution drafted by Henry and laying out the strictest of states' rights positions concerning the powers the new constitution, rightly understood, lodged in Congress. Henry's language in that resolution was borrowed directly from the assurances that Edmund Randolph had made in the Richmond Ratification Convention. As the decade of the 1790s progressed, Virginia's political leaders would organize opposition to Federalist presidents George Washington and John Adams; ultimately, the Virginia high political command promulgated the famous Virginia and Kentucky Resolutions of 1798-99 and Report of 1800. Those resolutions echoed the reasoning of Henry's 1790 resolution—and thus of Randolph's assurances to the 1788 convention.

The pedigree of the "Principles of '98" can be traced through James Madison and Thomas Jefferson to Patrick Henry and, ultimately, Edmund Randolph. It was he who paved the road to Virginia ratification by assuring his fellow members of the Virginia political elite that the Constitution they were being asked to ratify in the summer of 1788 would have very limited significance, that it was more another league of sovereign states than a consolidated union they would be entering. What have been portrayed as extremist and Anti-Federalist principles, then, were not extremist or Anti-Federalist in their origins at all. They were the products of the most moderate of Federalists.

Edmund Randolph, like other Virginians, had the idea that Virginia was what we would call a British dominion—a country

10. Contrast, e.g., Jack N. Rakove, "The Madisonian Moment," *University of Chicago Law Review* 65 (1988): 473-505, especially p. 504.

with no constitutional link to Britain other than a common fealty to the British king—early on. Echoing Revolutionary Virginia pamphleteers Richard Bland, Thomson Mason, Landon Carter, and Thomas Jefferson, he wrote in his *History of Virginia* that Virginia had been elevated quite early “from the humiliation of proprietary dependence to the dignity of a colony immediately under the crown.”¹¹ Like other Virginians, he saw the Revolution as a revolution in the sense of a restoration of old ways, not in the sense of an epochal transformation. Its chief accomplishment, in Randolph’s account, was to have put Virginians back in control of their domestic polity.

Neither the Revolution nor the adoption of the Articles of Confederation seems to have made much change in Randolph’s understanding of Virginia’s relationship to the other colonies-cum-states. In 1783, Randolph was asked in his capacity as attorney general of Virginia for his opinion concerning a request from the governor of South Carolina. Virginia Governor Benjamin Harrison wanted to know whether he was obliged to comply with an extradition request, and Randolph’s response took the form of a reading of Virginia’s place in international affairs.

After consulting James Madison, Thomas Jefferson, and the writings of leading law of nations author Emmerich de Vattel (among others, one supposes), Randolph counseled against compliance with South Carolina’s plea. Employing lawyers’ most important skill, he distinguished the case at hand from the one contemplated by the relevant article, and he averred that the evidence the Carolinians had adduced did not prove the Virginian object of their request guilty of the crime. Then, taking up the apposite passages of Vattel, Randolph noted that the case from

11. For the colonial Virginia tradition of constitutional disputation, see K[evin] R. Constantine Gutzman, “Jefferson’s Draft Declaration of Independence, Richard Bland, and the Revolutionary Legacy: Giving Credit Where Credit Is Due,” *The Journal of the Historical Society* 1 (2001): 137-54; Glenn Curtis Smith, “Pamphleteers and the American Revolution in Virginia, 1752-1776” (Ph.D. dissertation, University of Virginia, 1937); and K[evin] R. Constantine Gutzman, “Old Dominion, New Republic: Making Virginia Republican, 1776-1840” (Ph.D. dissertation, University of Virginia, 1999), chap. 1; for Randolph’s appreciation of Bland, see Edmund Randolph, *History of Virginia*, ed. Arthur H. Shaffer (Charlottesville: University Press of Virginia, 1970), p. 190. The quotation is at p. 177.

the Netherlands in which the receiving province had extradited on facts almost identical to those facing Virginia was not dispositive: the Netherlands' provinces were much more closely related to each other than were the United States, Randolph said, because the latter were sovereign for all purposes not included in the limited delegation to Congress.¹²

This is not to say that Randolph believed the Articles to be an adequate basis for the conduct of American affairs. As the 1780s proceeded, he increasingly did not, and he eventually supported the idea of a grand convention to arrange for a stronger federal union. This desire was especially powerful in the wake of Randolph's service in the Congress early in the decade. However, by the time of the Philadelphia Convention of 1787, Randolph's former certainty that the state governments were completely devoid of merit had yielded to a more refined desire to see only certain powers entrusted to the federal government, with the residue of power left to the states.

It was in this spirit, and not in the spirit of more extreme Federalists who would have preferred to see the states abolished or the state boundaries extensively redrawn, that Randolph accepted appointment to what became the Mount Vernon conference, then participated in the Annapolis Convention of 1786 and, finally, took part in the Philadelphia Convention. Randolph and Madison also were chiefly responsible for persuading George Washington to lay his scruples aside and attend the Philadelphia conclave.¹³ While serving earlier in the decade as James Madison's congressional colleague, Randolph had been persuaded by the man from Orange County that the federal government must be strengthened. On returning to Virginia,

12. Reardon, *Edmund Randolph*, p. 69; Edmund Randolph to Thomas Jefferson, 30 January 1784, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd *et al.* (Princeton: Princeton University Press, 1950 -), 6:513-15. ("Besides Virginia and So. C. are as distinct from one another as France and G. Britain, except in the instances, provided for by the confederation." [sic]) As John Adams put it, "Congress is not a legislative assembly, nor a representative assembly, but only a diplomatic assembly" (John Adams, *A Defence of the Constitutions of Government of the United States of America* [London, 1787], p. 362).

13. *The Documentary History of the Ratification of the Constitution*, ed. John P. Kaminski and Gaspare J. Saladino (Madison, WI: State Historical Society of Wisconsin, 1988), 8:xxxvi. The editors point out that Randolph's rhetoric, both in trying to persuade Washington to participate and in presenting the Virginia Plan to the Philadelphia Convention, was far more apocalyptic. *Ibid.*, p. 274, n. 1.

however, he gained the impression that the Commonwealth's government was far worthier of its trust than Madison had led him to think. He wanted, then, a moderate reform.¹⁴

At the Philadelphia Convention's opening, the Virginia delegation agreed to present a draft constitution largely conceived by James Madison for the delegates' consideration.¹⁵ The experienced politicians in Virginia's contingent recognized that he who makes the first proposal often dominates the subsequent debate, so they were resolved to offer a plan congenial to their interests and inclinations as the convention opened. Randolph was the obvious person to present the Virginia Plan to the Convention. As the Old Dominion's incumbent governor, a member of its most prominent family, and the outstanding public speaker in the delegation, he was ideally suited to the task.¹⁶ Despite that auspicious start, however, Randolph left Philadelphia as an adversary of the proposed Constitution. When the remaining delegates gathered to sign their draft proposal, Randolph withheld his signature. He gave several reasons for his abstention.

In a speech delivered on Monday, September 10, 1787, one week before the Convention adjourned, Randolph summarized the reasoning that had slowly moved him from an advocate of stronger union to an opponent of the plan of union the delegates were to sign on September 17. Randolph pointed to the plan's provisions for trial of impeachments in the Senate; for a two-thirds, rather than his favored three-fourths, vote to override a presidential veto; for congressional power to legislate in "necessary and proper" instances; and for a presidential pardon even in treason cases. Besides these sins of commission, Randolph espied shortcomings in the Constitutional Convention's omissions to provide a fuller representation (that is, a larger number of members) in the House of Representatives; to limit standing armies; to restrain navigation (which is to say, tariff) acts; to provide a fixed boundary between federal

14. Reardon, *Edmund Randolph*, p. 27.

15. *Documentary History of the Ratification of the Constitution*, 8:xxxvi.

16. Cf. Hugh Blair Grigsby, *The History of the Virginia Federal Convention of 1788, With Some Account of the Eminent Virginians of That Era Who Were Members of the Body*, 2 volumes (Richmond: Virginia Historical Society, 1890), 1:83.

and state legislative powers; and to limit congressional control over congressional pay.¹⁷

On September 15, Randolph complained about the “indefinite and dangerous” power the proposed Constitution would give to the Congress. He suggested that his disquietude might be allayed by allowing the projected state conventions to propose amendments, which might be disposed of by a second federal convention. Randolph told the Convention that he would refuse to sign the Constitution if this proposal were rejected, and he added that this would not necessarily commit him to opposing the Constitution in the debate over ratification. He meant, he said, to leave that question open.¹⁸

In again explaining his refusal to sign the document on September 17, Randolph first noted that his decision should be understood in no wise as a judgment on the delegates who had come to the alternative decision, and he reiterated that he was not committing himself to opposing the proposed Constitution once the public debate over ratification began. Instead, he said, since he expected the Constitution to fall short of ratification by the requisite nine states, he thought refusing to sign would leave him free to play an ongoing role in the controversy. He added that giving the people the choice of either accepting the unamended Constitution or rejecting it must ultimately yield “anarchy & civil convulsions.”¹⁹

Randolph’s verdict in Philadelphia, then, was based both on an appraisal of the proposed Constitution and on an estimation of the likelihood of its ratification. Within two weeks of the convention’s adjournment, Randolph wrote to Madison (who had signed the Constitution) with his plan for a second convention to amend the product of the first.²⁰ A month later, and a week after his reelection as governor, Randolph wrote to Madison again to provide an update on the state of opinion concerning the Con-

17. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, ed. Adrienne Koch (New York: W. W. Norton and Co., 1966), pp. 614-15.

18. *Documentary History of the Ratification of the Constitution*, 8:11.

19. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, pp. 655-56, 657.

20. Edmund Randolph to James Madison, 30 September 1787, *Documentary History of the Ratification of the Constitution*, 8:25-26.

stitution, and there he distinguished between “the party *positively* against the Constitution” and himself and other “*recusants*.”²¹ In other words, he had adopted a posture of staying aloof from the debate until public opinion and the political situation had congealed.

Virginians in his orbit did not respond positively to Randolph’s performance in Philadelphia. On September 26, the *Virginia Independent Chronicle*, a leading newspaper of the time, celebrated an erroneous rumor that the Philadelphia Convention had closed with unanimous agreement to forward the proposed Constitution to the state ratification conventions. It lamented that Governor Randolph’s return to the Old Dominion had been delayed by the indisposition of Mrs. Randolph, but it asked, “What VIRGINIAN’S breast glows not with the Expectation of the Boon, he is bearing towards us, when he considers, that its first Shoot sprung from this State;—that it has been reared to Maturity by Men, who give Dignity to human Nature;—that it is *the Tree of Life*, whose Fruit will enthrone this western Empire high among the Nations, and raise the firmest and fairest Temple to LIBERTY, that has ever yet dignified this Globe.”²² Things were different on October 24, by which time news of Randolph’s refusal to sign seems to have reached Virginia: “We hear from Richmond, Virginia, that a number of gentlemen of that place were prepared to meet Governor Randolph on his return from the Federal Convention, but finding that he had not signed the proposed New Constitution, the complement intended was dropped.”²³

The governor was highly attentive to the vagaries of public opinion concerning the Philadelphia Convention and his role in it. His correspondence with James Madison in the months between September 1787, when the Philadelphia Convention adjourned, and June 1788, when the Richmond Ratification

21. Edmund Randolph to James Madison, 29 October 1787, *ibid.*, p. 133; reelection at note, *ibid.*, p. 260.

22. *Ibid.*, 8:19.

23. *Carlisle* [Pennsylvania] *Gazette*, October 24, 1787, *ibid.*, 8: n. 1 at 19-20. Both Randolph and George Mason, the other Virginian non-signer, became polarizing figures in the wake of the news of their refusal to sign. Nicholas Gilman to John Langdon, October 23, 1788, *ibid.*, 10:1778.

Convention met, seldom omits to inform Madison of the state of opinion (and of Randolph's reputation) as seen from Richmond.²⁴ Madison, on the other hand, expertly stroked the governor's ego, as in telling him in January of 1788 that had he supported the Constitution, the apparently even division among Virginians would instead have been a strong majority in favor of ratification,²⁵ and in noting to the governor, whose dislike of public criticism was one of the central elements of his character, that George Mason seemed even to be criticizing "the *moderate opponents*" of the Constitution.²⁶ A week later, Randolph disclosed that he held the two weighty objections to his proposal for a second (amending) convention to be that some might use it as a vehicle for thwarting any ratification and that "the hope of obtaining them might be frustrated by the assent of too many states" before Virginia's convention met. Madison's gentle suasion had had its effect:²⁷ within two weeks, in early May, Randolph took steps to thwart New York Governor George Clinton's attempts to coordinate an interstate movement for a second convention.²⁸

In December 1787, Randolph authorized public circulation of a pamphlet detailing his objections to the unamended Constitution.²⁹ He would have published his full views earlier, the governor said, but he had thought it unfitting to do so when the question of his reelection lay before the General Assembly; too, the proximity of the coming debate on ratification of the Constitution made it

24. Edmund Randolph to James Madison, September 30, 1787, *ibid.*, 8:25-26; Edmund Randolph to James Madison, c. October 29, 1787, *ibid.*, 8:132-34; Edmund Randolph to James Madison, December 27, 1787, *ibid.*, 8:275-76; Edmund Randolph to James Madison, January 3, 1788, *ibid.*, 8:284. George Washington thought it only natural that all of the non-signers would attempt to justify their behavior before the public by exaggerating the Constitution's faults, but Randolph did not meet his expectations in this regard. George Washington to Henry Knox, October 15, 1787, *ibid.*, pp. 56-57.

25. James Madison to Edmund Randolph, January 10, 1788, *ibid.*, 8:288-91.

26. James Madison to Edmund Randolph, April 10, 1788, *ibid.*, 9:730-31.

27. Edmund Randolph to James Madison, April 17, 1788, *ibid.*, 9:741-42.

28. "The First Attempt at Cooperation between Virginia and New York Antifederalists," May 8—October 15, 1788, Editors' Note, *ibid.*, 9:788-90.

29. Meriwether Smith, Charles M. Thruston, John H. Briggs, and Mann Page, Jr., to Governor Edmund Randolph, December 2, 1787, *ibid.*, 8:194-95. The pamphlet is at "Edmund Randolph's Reasons for Not Signing the Constitution," December 27, 1787, *ibid.*, 8:262-74.

undesirable to “excite a contest unfavorable to that harmony with which I trust the great subject will be discussed.”³⁰

In introducing his objections to the proposed Constitution, Randolph adopted the pose of the disinterested statesman: “I disdain to conceal the reasons for with-holding my subscription,” he said. He then made clear that he held the Articles of Confederation to be woefully inadequate. “The objects proposed by its institution were,” Randolph wrote, “that it should be a shield against foreign hostility, and a firm resort against domestic commotion: that it should cherish trade, and promote the prosperity of the states under its care. But these are not among the attributes of our present union.”³¹ So long as the Confederation existed, Randolph predicted, the Articles’ various shortcomings would remain evident.³²

One of the main objections to the Articles of Confederation impelling those who had advocated the calling of the Philadelphia Convention had been the impotence of the Confederation government, which had to rely on the state governments both for funds and for military manpower. The Congress had no powers of enforcement vis-à-vis the states, and in the event, the states never had complied fully with the Confederation’s monetary requisitions. Rhode Island notoriously had flouted them all. One reform measure popular among nationally minded congressmen, an amendment of the articles to give Congress a tariff power, had failed to secure the states’ adoption. The government must have the means of coercing compliance with its policies, Randolph asserted, else it would never be an effective government. Neither men nor money would be readily available to a government on the basis of mere requests for assistance. Both American war efforts and federal attempts to suppress insurrection must fail if the government were not strengthened; American ships would in the end be excluded from foreign ports if the common government could not retaliate for foreign tariffs.³³

30. Governor Edmund Randolph to Meriwether Smith, Charles M. Thruston, John H. Briggs, and Mann Page, Jr., December 10, 1787, *ibid.*, 8:229.

31. Governor Edmund Randolph, “Edmund Randolph’s Reasons for Not Signing the Constitution,” p. 262.

32. *Ibid.*, p. 263.

33. *Ibid.*, pp. 266-67.

Several border disputes among the states had threatened to break out into full-scale warfare in the 1780s, and the recollection of the recent Shays' Rebellion in Massachusetts still horrified many patriots. Randolph insisted that "the general government" ought to be the supreme arbiter of disputes among the states; that it should stand ready to suppress domestic, as well as external, violence; and that it could not be empowered to do the things it had to do without being remodeled completely. It was on this ground that he had supported the Philadelphia Convention's decision to propose a new constitution. Because the Articles put the legislative and the executive powers in the same body, because the "importance" of the states had no effect on the proportion of their representation in that body; because their responsibility to state legislatures rendered congressmen more apt to consider the states' than the general interest; because a unicameral legislature would often be precipitate in its measures; and because so large a body could not possibly maintain the degree of secrecy that executive affairs required, Randolph wanted to see the Articles replaced.³⁴

On what principle would Randolph reform the government? "A consolidation of the union, as far as circumstances [would] permit."³⁵ He insisted, too, that the union must not be dissolved or broken into smaller confederacies: "without union we must be undone." Evaluating one likely scenario in the event of a dissolution of the union, Randolph opined that even a southern confederacy stretching from Maryland to South Carolina would be vulnerable to foreign coercion. Why, then, had he refused to subscribe to the Constitution? After all, he knew that people would "construe a temperateness in politicks into an enmity to the union." He foresaw, he said, that "a middle line would probably be interpreted into a want of enterprize and decision."³⁶

Randolph answered by noting that "self approbation is the only true reward, which a political career can bestow."³⁷ In Philadelphia, he pointed out, he had moved that the state conventions should be free to propose amendments, which a second convention must consider. When that suggestion met with rejection, he

34. *Ibid.*, pp. 267-68.

35. *Ibid.*, p. 270.

36. *Ibid.*, pp. 269-70.

37. *Ibid.*

refused to sign. He explained this by noting his opinion that giving the states a mere “yea” or “nay” choice in regard to what he took to be an imperfect proposal likely would lead to rejection of the unamended Constitution, and with rejection perhaps would come “a lasting farewell to the union.” He thought this a horrible potential outcome, and so he had refused to be a party to it.³⁸

Randolph noted that he had seen several responses to the insistence that amendments were necessary before ratification. Many held this to be an insubstantial objection in light of the fact that the Constitution provided a process for amendment. In common with other advocates of amending the Constitution prior to ratification, Randolph insisted that it would be easier to amend the Constitution before ratifying it, when a majority might do so, than to ratify an imperfect Constitution and then assemble the votes of three-fourths of the states. In addition, he perceptively said, when a bad feature was introduced into a government, the passage of time made it seem less objectionable, so it was imperative that the Constitution’s improper features be eliminated before it was put into effect. He did not think it desirable, anyway, that the people should become accustomed to altering their constitution with any regularity once it was adopted.³⁹

Coming to his conclusion, Randolph said that he undertook the task of laying out necessary corrections to the Constitution reluctantly: “it is remote from my intentions to catch the prejudices or prepossessions of any man. But as I mean only to manifest, that I have not been actuated by caprice, and now to explain every objection at full length would be an immense labour, I shall content myself with enumerating certain heads, in which the Constitution is most repugnant to my wishes.”⁴⁰

Randolph’s fifth objection to the unamended Constitution merits full quotation: he hoped other states would join Virginia, he said, “in drawing a line between the powers of Congress and individual states; and in defining the former; so as to leave no clashing of jurisdictions nor dangerous disputes: and to prevent the one from being swallowed up by the other, under the cover of general words, and implication.” In other federalism-related ob-

38. *Ibid.*, pp. 271-72.

39. *Ibid.*, p. 272.

40. *Ibid.*, p. 273.

jections, Randolph wanted an abridgment of the Senate's power to make treaties, as the Constitution says, "the supreme law of the land," and he desired more clearly to define, while limiting, the federal judicial power.⁴¹

Randolph closed by insisting once again on the transparency of his politics and the simplicity of his motives: "as I affect neither mystery nor subtilty [sic], in politics, I hesitate not to say, that the most fervent prayer of my soul is the establishment of a firm, energetic government." He said that the worst outcome would be a dissolution of the union (which he compared to "the rock of our salvation") and that the present moment was one that could never be recalled if it were allowed to slip away without the adoption of a new constitution. For that reason, he would accept the Constitution even if his efforts toward amendment failed, "because I would regulate myself by the spirit of America."⁴²

On December 27, Randolph wrote to Madison that he thought "the current sets violently against the new Constitution." "If I know myself," he concluded, "I have no extreme ardor to acquire converts to my opinions. But I verily believe, that the only expedient which can save the foederal [sic] government in any shape in Virginia, will be the adoption of some such plan, as mine." Having established once again that he was no vociferous opponent of ratification (and running the risk of offending his vociferously pro-ratification correspondent), Randolph distinguished himself from "the high-toned friends to the Constitution," who remained "very sanguine."⁴³

Randolph's great fear, besides that he would be upbraided in the press, was that people would see him as a self-serving cipher heedless of the public good, and some observers did read him in precisely that way. Martin Oster, a French agent in Virginia, described Randolph, and the contemporary impression of his behavior, in a letter to the French minister of marine and colonies:

It is not known here, My Lord, what to think of the indecision and the assertions of the Governor, on the new form of Government. His arguments, his principles, are too confused, and have something of

41. *Ibid.*

42. *Ibid.*, p. 274.

43. Edmund Randolph to James Madison, 27 December 1787, *ibid.*, pp. 275-76.

sophistry; but the attentive observer, nevertheless discovers, a duplicity there that no longer allows a doubt as to the active motives of the person. They consist principally of egoism, of the consuming desire to take the lead; and of a jealousy mingled with the most active fear of seeing the functions and prerogatives of the governors reduced to only internal regulations. According to this understanding, one judges of his Pamphlet:

1st. that he tried to become the hero of a new scene, by frightening and stirring feelings.

2nd. that he lacks sound judgment, and that boldness of spirit that make true republicans.

3rd. that he is of a character that bends according to how his interest varies, and in addition that always follows the strongest party.

That, My Lord, is what I think I perceive in the conduct of the current Governor, relative to the new Constitution which all good citizens ardently desire.⁴⁴

This appraisal was also voiced in public. Under the pseudonym “A Plain Dealer,” someone called attention to the governor’s efforts to “devise a middle course, so as to catch the spirit of all his countrymen, and to reconcile himself to all parties.” “A Plain Dealer” allowed that he did not see why “a real patriot” would withhold his estimation of the proposed Constitution on the ground that his reelection as governor (“an office in a great degree nominal” under Virginia’s revolutionary constitution of 1776—as Oster had failed to notice) was a pending issue.⁴⁵

What “A Plain Dealer” found particularly vexing was the conclusion to Randolph’s pamphlet in explanation of his position. There, the governor had written that “if after our best efforts for amendments, they cannot be obtained, he will adopt the Constitution as it is.” This did not easily square, according to the anonymous author, with Randolph’s earlier assertion in a letter to Congressman Richard Henry Lee “that either a monarchy or an aristocracy [would] be generated from the proposed Constitution” if it were ratified unamended. How, “A Plain Dealer” wrote, could Randolph’s support for such a document be reconciled with the sentiments of Virginians and most other Americans, who had looked only to amendments of their “present republican confederation?”⁴⁶ In sum, he wrote, “It is ... certainly not consistent with sound sense to accept a Constitution, knowing it to be imperfect;

44. Martin Oster to Comte de la Luzerne, February 4, 1788, *ibid.*, 8:343-45.

45. “A Plain Dealer,” *Virginia Independent Chronicle*, February 13, 1788, *ibid.*, 8:364.

46. *Ibid.*, pp. 364-65.

and his Excellency acknowledges the proposed one to have radical objections." He closed by noting that "virtue, candor and integrity" were at a premium in that day, and that "the views of ambitious and designing men are continually working to their own aggrandizement [sic] and to the overthrow of liberty," so that "the utmost caution, secrecy, and political sagacity is [sic] requisite to secure to each the important blessings of good government."⁴⁷ But of course, he respected Randolph's "character, and abilities."⁴⁸ Sometime Congressman Joseph Jones, a frequent correspondent of James Madison, saw the manuscript of "A Plain Dealer," and he concluded that it had been written by the rising politician Spencer Roane of Tidewater Virginia's Essex County.⁴⁹ Soon enough, Randolph wrote to Madison to complain about "A Plain Dealer's" "importunities."⁵⁰ Ironically, Roane would play a significant part in instantiating the memory of Randolph's explanation of the new Constitution to the Richmond Convention of 1788 in the Virginia tradition of constitutional interpretation.

In a letter to Randolph dated April 10, 1788, Madison told his friend that, "Recommendatory alterations are the only ground that occurs to me. A conditional ratification or a second convention appears to me utterly irreconcilable in the present state of things with the dictates of prudence and safety."⁵¹ This letter, in conjunction with Madison's similar insistence to others at the time, has helped to obscure the significance of Randolph's role in Richmond. Historians commonly have taken Madison's description of what he was willing to accept as describing what the Richmond Convention actually wrought—without probing the question whether other participants understood matters in the same way. In the end, Randolph engineered the Richmond Ratification Convention's adoption of a third path—neither conditional ratification nor unconditional ratification, but ratification accompanied by what the convention understood to be a binding statement of ratification's import.

In the course of the Richmond Convention of June 2-27, 1788, Randolph held to a middle course. As he put it, "Wisdom shrinks

47. *Ibid.*, p. 366.

48. *Ibid.*

49. Joseph Jones to James Madison, February 17, 1788, *ibid.*, p. 381.

50. Edmund Randolph to James Madison, February 29, 1788, *ibid.*, 8:436-37.

51. James Madison to Edmund Randolph, 10 April 1788, *ibid.*, 9:731.

from extremes, and fixes on a medium as her choice.”⁵² By June 2, however, the middle had shifted. Eight states already had ratified the Constitution, so Randolph calculated that Virginia must choose between the stark alternatives of ratification and disunion. At the convention’s opening, he announced his intention to support ratification: “I come hither regardless of allurements; to continue as I have begun, to repeat my earnest endeavours for a firm energetic government, to enforce my objections to the Constitution, and to concur in any practical scheme of amendments; but I never will assent to any scheme that will operate a dissolution of the Union, or any measure which may lead to it.” He then repeated his objections to the submission of the Constitution to the states for simple “yea” or “nay” votes, and he justified his apparently inconsistent behavior by reference to the change of circumstances since the Philadelphia Convention’s close.⁵³

This struck the Constitution’s opponents as a bad development, and they hectored Randolph over it (to his great discomfiture, eliciting repeated protestations of disinterestedness that sometimes must have been simply painful to witness) for the balance of the convention.⁵⁴ In light of his published objections, with their insistence that disunion would be the worst of outcomes, Randolph’s announcement of his grudging support for ratification cannot really have come as a surprise to anyone who was paying attention.⁵⁵ On one hand, while Republican leaders such as William Grayson and Patrick Henry taught that Virginia could hold out for amendments, and that the union could not survive without the Old Dominion,⁵⁶ Randolph insisted that Virginia accept the necessity of ongoing union, thus of adoption of the new Constitution; since eight states had ratified by the time the Virginians convened (and a ninth

52. Speech of Edmund Randolph, 6 June 1788, *ibid.*, 9:976.

53. Speech of Edmund Randolph, 4 June 1788, *ibid.*, 10:931–36. He would refer to this idea again in, for example, Speech of Edmund Randolph, June 17, 1788, *ibid.*, 10:1354.

54. For example, see Speech of Edmund Randolph, June 6, 1788, *ibid.*, 9:971–989; and the convention-closing Speech of Edmund Randolph, June 25, 1788, *ibid.*, 10:1537.

55. We glean an idea of the number of people who read Randolph’s pamphlet carefully from the fact that George Mason took “calling Randolph “young Arnold” in light of his supposed switch. Robert A. Rutland, *George Mason: Reluctant Statesman* (Baton Rouge: Louisiana State University Press, 1961), p. 103; William Grayson to Nathan Dane, 4 June 1788, *Documentary History of the Ratification of the Constitution*, p. 1573.

56. Cf. Speech of Patrick Henry, 5 June 1788, *ibid.*, p. 951.

would ratify before the Richmond Convention voted), Randolph concluded that Virginia's choice was between union and disunion, and he had never had any doubts on this score.⁵⁷ Randolph repeatedly painted the condition of the Confederation in the bleakest terms, as when he told the convention delegates in his first speech to that body that:

Had the most enlightened Statesman whom America has yet seen, foretold a year ago, the crisis which has now called us together, he would have been confronted by the universal testimony of history: for never was it yet known, that in so short a space, by the peaceable working of events, without a war, or even the menace of the smallest force, a nation has been brought to agitate a question, an error in the issue of which, may blast their happiness.⁵⁸

Randolph devoted much of this, his maiden address to the assembled delegates, to protesting the purity of his motives. He insisted, "Having obeyed the impulse of duty, having satisfied my conscience, and I trust, my God, I shall appeal to no other tribunal; nor do I come a candidate for popularity; My manner of life, has never betrayed such a desire. The highest honors and emoluments of this Commonwealth, are a poor compensation for the surrender of personal independence." In explanation of the beating he had taken in the press and public,⁵⁹ Randolph opined that "to be moderate in politics, forbids an ascent to the summit of political fame." One cannot but wonder whether Spencer Roane ("A Plain Dealer") was in the chamber for this performance, and whether Randolph had him in his sights as he delivered these awkward lines.⁶⁰

In Randolph's mind, his had been the only proper position, in Philadelphia and since. A choice between "yea" and "nay" seemed "too hard an alternative to the citizens of America, whose servants we were, and whose pretensions amply to discuss the means of their happiness, were undeniable." He thought that even a "yea" vote ex-

57. Randolph was hardly alone among the convention's Federalists in making this calculation. Cf. (Convention President) Edmund Pendleton, "The Danger Not Over," *The Letters and Papers of Edmund Pendleton, 1734-1803*, ed. David John Mays (Charlottesville: University Press of Virginia, 1967), 2:697-98.

58. Speech of Edmund Randolph, June 4, 1788, *The Documentary History of the Ratification of the Constitution*, 9:931.

59. James Duncanson to James Maury, June 7, 13, 1788, *ibid.*, 10:1582.

60. *Ibid.*, 9:932.

torted by the threat of “impending anarchy” would leave the new government “without the safest bulwark, the hearts of the people,” and that rejection on the basis of the necessity of amendments would leave the Union “irredeemably lost.”⁶¹ In his mind, he said, the choice always had been between preliminary and subsequent amendments, and the lateness of the hour foreclosed the former option.⁶²

On the other hand, Randolph repeatedly criticized the Constitution, usually on the grounds he had adopted earlier, both in the Philadelphia Convention and in the letter/pamphlet explaining the reasons for his refusal to sign the Constitution at the close of that assemblage.⁶³ As he explained it, because of his qualms about the Constitution, Randolph had “wearied myself in endeavoring to find a possibility of preserving the Union, without our unconditional ratification, but, Sir, in vain; I find no other means.” Other states, having ratified, would not agree to Virginia’s insistence on preliminary amendments and thus “acknowledge themselves in an error.”⁶⁴

One should not read into this that Randolph agreed with the committed opponents of ratification on the question what the Constitution’s shortcomings were. In one particularly illuminating exchange, Randolph characteristically responded to Patrick Henry’s assertion that men should be suspicious of those who held political power by saying that he agreed—in part. Where he parted ways with Henry was in his belief that, as Randolph put it, suspicion “ought not to be extended to a degree which is degrading and humiliating to human nature; to a degree of restlessness, and active inquietude, sufficient to disturb a community, or preclude the possibility of political happiness and contentment.” What Randolph seems to have been saying was that Henry represented a tendency in Virginia politics that contributed to making

61. *Ibid.*

62. *Ibid.*, 9:933. He repeated this last point in, for example, Speech of Edmund Randolph, June 6, 1788, *ibid.*, 9:973.

63. See, for example, his criticisms of Article III in Speech of Edmund Randolph, 21 June 1788, *Documentary History of the Ratification of the Constitution*, 10:1450-56; his disagreement with both sides in Speech of Edmund Randolph, June 16, 1788, *ibid.*, 10:1328; his objection to the vagueness of the Necessary and Proper clause in Speech of Edmund Randolph, June 17, 1788, *ibid.*, 10:1353; and his insistence that he still had severe doubts about the new Constitution’s suitability in Speech of Edmund Randolph, June 9, 1788, *ibid.*, 9:1085.

64. Speech of Edmund Randolph, June 6, 1788, *ibid.*, 9:973.

Virginians ultimately ungovernable. Randolph had decided to reject that way of thinking.⁶⁵ He intended to help ensure that the states entered into a new federal arrangement with adequate power in the center.⁶⁶ What did that mean? “A national, rather than a Federal Government.”⁶⁷

In a long speech of June 9, 1788, Patrick Henry—the dominant speaker in the convention by far—took great pains to rebut all of the arguments Randolph had made to that point. In doing so, he said that he had first learned to be suspicious of the proposed Constitution from Randolph himself: “He taught me, Sir, in despite of [sic] the approbation of that great Federal Convention, to doubt of the propriety of that system.” Calling to mind the evident contradiction between Randolph’s staunch Federalism in June 1788 and his position in September 1787, at the conclusion of the Philadelphia Convention, Henry asked how the two might be reconciled. “What alteration,” Henry wanted to know, “have a few months brought about? The internal difference between right and wrong does not fluctuate.”⁶⁸ (One might have noted here a similarity between Henry’s questions and the essay of “A Plain Dealer”; one might observe, too, that Spencer Roane was Patrick Henry’s son-in-law.) On the question of preliminary versus subsequent amendments, Henry noted, “There have been no instances shewn of a voluntary cession of power, sufficient to induce me to grant the most dangerous powers: A possibility of their future relinquishment will not persuade me to yield such powers.”⁶⁹

This speech was the turning point in the convention, both insofar as Randolph was concerned and insofar as the convention’s historical significance is concerned. In response to Henry’s barbs, Randolph made the speech that ultimately determined the import of Virginia’s ratification of the federal Constitution and laid the ground for later Virginian and Southern constitutional particularism. Begging the convention’s indulgence in light of the fact that he already had spoken twice

65. *Ibid.*, 9:975-76.

66. *Ibid.*, 9:985-86.

67. Speech of Edmund Randolph, June 7, 1788, *ibid.*, 9:1016.

68. Speech of Patrick Henry, June 9, 1788, *ibid.*, 9:1057-58.

69. *Ibid.*, 9:1066.

at length, Randolph claimed the right to defend himself against what he took to be Henry's aspersions. "I find myself attacked," Randolph insisted, "in the most illiberal manner, by the Honorable Gentleman, I disdain his aspersions, and his insinuations ... and if our friendship must fall—*Let it fall like Lucifer, never to rise again.*" "He has accused me of inconsistency in this very respectable assembly. Sir, if I do not stand on the bottom of integrity, and pure love for Virginia, as much as those who can be most clamorous, I wish to resign my existence." He then recapitulated the history of the prelude to the Philadelphia Convention, that convention, and its aftermath, showing what he took to be the goal toward which his behavior had pointed all the while. He read copiously from his pamphlet in support of his claim that his decision to vote for ratification did not conflict with his previous advocacy of preliminary amendments. He also told his audience that if Henry had not interrupted this speech to say that he had meant no offense, he (Randolph) would have offered some information calculated to make men's hair stand on end; Randolph ignored Henry's immediate request to present any incriminating evidence he had against Henry.⁷⁰

In the balance of his speech that day and the following day, Randolph was at pains to "correct" every historical allusion and philosophical point Henry offered. The former governor's every word formed the grist for the mill of the incumbent's censures. Alas, said Randolph, he had no choice but to behave this way when he perceived that "the flowers of rhetoric are perverted in order to make impressions unfavorable and inimical to an impartial [read: Randolph-like] and candid decision."⁷¹

Between that day and the Richmond Convention's close two weeks later, Randolph's new pose as the corrector of Patrick Henry led him to change his stance on a question that emerged as one of the chief bones of contention between the pro- and anti-ratification parties in the convention: the extent of congressional powers or, more precisely, the approach that one should take to the interpretation of the Constitution's grants of power to the Congress. The next day, continuing the same speech,

70. Speech of Edmund Randolph, June 9, 1788, *ibid.*, 9:1081-82. Henry was not alone in thinking that Randolph's behavior had been inconsistent. James Monroe to Thomas Jefferson, July 12, 1788, *ibid.*, 10:1704.

71. *Ibid.*, 10:1085.

Randolph responded to Henry's warnings about the vagueness of the Constitution by saying that "Every power not given it by this system is left with the States." He then read Article I, Section 8, which he classified as an exhaustive list of the grants of power to the Congress, and said that freedom of religion was not endangered by the Constitution because "no power is given *expressly* to Congress over religion." Thus, he concluded, Congress had no such power. This reasoning, he asserted, was unaffected by a proper reading of the General Welfare and Necessary and Proper clauses.⁷² Randolph repeated this reasoning several times in response to Henry's frank call for an amendment restricting Congress to powers expressly delegated on June 17 (and several times thereafter).⁷³ As Randolph admitted in the course of that speech, it was precisely to the Necessary and Proper clause that he had referred in his pamphlet when he had complained that the delegation of powers to the new Congress was too vague; now that Henry and his fellows noted that vagueness, all suddenly seemed clear to Randolph.⁷⁴

As the Richmond Convention wound down, leading men on both sides were uncertain which side would prevail.⁷⁵ Randolph hit upon a position he thought might appeal to fellow "recusants." His explanation is worth recounting at length:

Gentlemen will perhaps ask me, why, if you know the Constitution to be ambiguous, will you vote for it? I answer, that I see a power, which will be probably exercised, to remedy this defect.—*The stile of the ratification will remove this mischief.* [emphasis added] I do not ask for this concession—that human nature is just and absolutely honest. But I am

72. Speech of Edmund Randolph, June 10, 1788, *ibid.*, 9:1099-1100 [emphasis added], 1102, 1103.

73. Speech of Patrick Henry, June 17, 1788, *ibid.*, 10:1341; Speech of Edmund Randolph, June 17, 1788, *ibid.*, 10:1347-48 ("it has no power but what is *expressly* given it" [emphasis added]), at p. 1350 (reference to "the *express* enumeration of its powers" [emphasis added]), at p. 1352 (no danger to various rights mentioned by Henry absent their "*express* infringement" [emphasis added]). Randolph makes an extremely forceful argument that the Necessary and Proper clause should be read narrowly at pp. 1348-49.

74. *Ibid.*, 10:1353.

75. Grayson to Nathan Dane, 18 June 1788, *ibid.*, 10:1636; James Madison to Rufus King, 18 June 1788, *ibid.*, 10:1637.

fair when I say, that the nature of man is capable of virtue, where there is even a temptation, and that the defects in this system will be removed. ... If it be not considered too early, as ratification has not yet been spoken of, I beg leave to speak of it. If I did believe, with the Honorable Gentleman, that all power not expressly retained was given up by the people, I would detest this Government. But I never thought so, nor do I now. If in the ratification we put words to this purpose,—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 stile of ratification would manifest the principles on which Virginia adopted it,⁷⁶ 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.⁷⁷

Within a short time, George Nicholas, who was understood to be a spokesman for James Madison, joined Randolph in explaining the new Constitution this way.⁷⁸ Since Randolph had served as Republican Virginia's first attorney general for ten years, and since Nicholas soon would become the first attorney general of the new state of Kentucky, their considered legal opinions must have been particularly persuasive. The two of them were among the five members (as were Madison and John Marshall) of the committee of Federalists appointed by the Convention to draft an instrument of ratification,⁷⁹ and Randolph and Nicholas told the convention that that document made explicit what Randolph had claimed to be implicit already. (It said, in relevant part, "the powers granted under the Constitution being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression and ... every power not granted thereby remains with them and at their will.") Within days, Randolph wrote that of the ten delegates whose views had previously been completely unknown, five had been swayed to

76. So much for the idea that the ratifiers (other than James Madison) did not think that their understanding of what they were ratifying would guide later interpretations. Jack N. Rakove, "The Madisonian Moment," fn. 73 at p. 503.

77. Speech of Edmund Randolph, 21 June 1788, *ibid.*, 10:1455-56. [emphasis added].

78. Speech of George Nicholas, 24 June 1788, *ibid.*, 10:1507.

79. The Virginia Form of Ratification, 26 June 1788, *ibid.*, 10:1546.

vote for ratification by his gambit.⁸⁰ In the end, Virginia's Federalists secured the Constitution's ratification by precisely five votes.

James Madison described these assurances, in the context of their incorporation into the instrument of ratification, as "some plain & general truths that can not affect the validity of the Act,"⁸¹ but other Virginians understood Randolph's assurances far differently. During the First Congress, Patrick Henry, formerly the leading opponent of ratification in the Richmond Convention, persuaded the all-powerful General Assembly to adopt a resolution decrying the vector of federal policy. Like Nicholas, Henry in his resolution, which was adopted by an enormous majority of the House of Delegates, repeated the language of Randolph's assurance that the federal Congress would have only the power it was "expressly delegated."⁸² From the first Congress on, then, Virginia's position was that Virginia was (as George Nicholas had explicitly said) one of thirteen parties to the federal Constitution. Randolph and Nicholas had done much to undercut Madison's hopes for the new Constitution. While the co-author of *The Federalist* understood this project as an experiment in really re-constituting the American regime,⁸³ Randolph and Nicholas had convinced Virginia's elected representatives to ratify it as simply a kind of league among the states, one it was up to Virginia, in the final analysis, to construe for itself.⁸⁴

80. Samuel Smith to Tench Coxe, 22 June 1788 (citing a Randolph letter of 18 June), *ibid.*, 10:1666; Thomas Willing to William Bingham, 24 June 1788, *ibid.*, 10:1670. Randolph repeated his insistence that the federal government would have only the powers it was "expressly" granted on June 24, as the convention moved toward its final votes. Speech of Edmund Randolph, June 24, 1788, *ibid.*, 10:1483. In the same speech, he again pooh-poohed the idea that the General Welfare clause represented a catch-all grant of unnamed powers. *ibid.*, at p. 1484.

81. James Madison to Alexander Hamilton, 22 June 1788, *ibid.*, 10:1665.

82. *Journal of the House of Delegates*, 3 November 1790; *Senate Journal*, 21 December 1790.

83. Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814* (Madison, WI: Madison House, 1993), p. 139.

84. The descent of the "Principles of '98" from Randolph's, then Nicholas's, assertions in Richmond is traced in Gutzman, "The Virginia and Kentucky Resolutions Reconsidered."

Thus, the “Virginia Doctrine” that supposedly was born in an atmosphere of extremism in 1798 actually had its origin in Edmund Randolph’s characteristic moderation.⁸⁵ Faced with a group of Federalists dedicated to unquestioning ratification of what he took to be a dangerously inadequate document, on one hand, and a group of Anti-Federalists seemingly too blasé about the prospect of disunion, on the other,⁸⁶ Randolph hit upon a temperate solution. He would persuade an adequate number of “recusants” to vote “aye” on ratification by interpreting ratification as a much less portentous act than Madison and others had thought it to be.

Historians commonly have missed the signal importance of Randolph’s role in the Richmond Convention, and the reason is obvious: James Madison is the sun around which the study of the drafting and ratification of the Constitution tends to orbit. As one historian, expressing a typical sentiment, put it, a fascinating way to introduce oneself to the Old Dominion’s politics in these years is by “reading James Madison’s mail for the period.”⁸⁷ This tendency has led to the mistake of assuming that since Madison was the leading Federalist intellect in the Virginia convention and the Federalists carried the day, it must have been Madison’s brand of Federalism that won in Richmond. Thus, many have characterized Randolph’s position, the final position expressed by Federalists in the Virginia convention, the position around which a majority in the convention perhaps was assembled, as “Anti-Federalist.”

For example, in Saul Cornell’s recent *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1828*, one reads that Spencer Roane tried “to reassert the restrictive reading of the Tenth Amendment that Anti-Federalists had demanded and Democratic-Republicans had asserted during the 1790s.” What was that “restrictive reading”? Cornell quotes Roane that, “It has been our happiness to believe, that in the partition of powers between the gen-

85. The locus classicus of this argument is Koch and Ammon, “The Virginia and Kentucky Resolutions.” Contrast Gutzman, “The Virginia and Kentucky Resolutions Reconsidered.”

86. In appraising the alignment of delegates thus, Randolph agreed with Madison. James Madison to Thomas Jefferson, December 9, 1787, *ibid.*, 9:226-28.

87. Alan V. Briceland, “Virginia: The Cement of the Union,” *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution*, ed. Patrick T. Conley and John P. Kaminski (Madison, WI: Madison House, 1988), 223.

eral and state governments, the former possessed only such as were expressly granted.”⁸⁸ As we have seen, the idea that the federal government had only the powers that were “expressly granted” was not simply an Anti-Federalist reading of the Tenth Amendment; it was precisely the exegesis of the *unamended* Constitution offered by Governor Edmund Randolph and his fellow *Federalist* George Nicholas, the two spokesmen for the committee that drafted the instrument of ratification, in the Richmond Convention of 1788. Unsurprisingly, Roane, the son-in-law and political heir of Patrick Henry, maintained the position that Henry had elaborated in 1790 throughout his career. In light of the continuity between Randolph’s earlier statements and the position Thomas Jefferson adopted in his Kentucky Resolutions of 1798 and 1799, Jefferson was justified in referring to that position as “the true sense in which [the Constitution] was adopted by the States, that in which it was advocated by its friends.”⁸⁹

His mischaracterization of the 1788 Virginia Federalist position, which became the standard Virginia position, as “Anti-Federalist” runs through Cornell’s entire book. In fact, mischaracterization of that position is a staple of the literature on Jeffersonian Republicanism and on the disputes between Jeffersonians such as Roane and the Marshall Court, as well as that concerning Jacksonian Democracy, states’ rights,⁹⁰ the Nullification Crisis, the Civil War, and Reconstruction. Even scholars specializing in the contemporary Supreme Court classify thinkers who follow Randolph’s and

88. Saul Cornell, *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999), 282.

89. Thomas Jefferson to Elbridge Gerry, January 26, 1799, *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb (Washington, 1905), 10:76-77. The identification of the Randolph/Nicholas position with the opponents of ratification was powerfully expounded by ultra-Federalist John Marshall. Writing to his colleague Joseph Story, Marshall classified Virginian opposition to the Supreme Court’s decision in *McCulloch v. Maryland* (in which his court had explicitly and frontally rejected the Randolph interpretation) by saying, “The opinion in the Bank case has brought into operation the whole antifederal spirit of Virginia.” However, Marshall was always a more extreme nationalist than Virginia’s leading Federalists of the 1788 convention: Randolph, Nicholas, and James Madison—whose supposed sympathy for Hamiltonianism has recently been exposed as a myth. Lance Banning, “The Hamiltonian Madison: A Reconsideration,” *The Virginia Magazine of History and Biography* 92 (1984): 3-28.

90. Cf. Forrest McDonald, *States’ Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence, KS: University Press of Kansas, 2000), pp. 24-25, where the Randolph position is portrayed as a post-ratification invention of states’-rights supporters’ collective imagination.

Nicholas's (that is, the Virginia Federalists') logic as "Anti-Federalist."⁹¹ Scholarly descriptions of federalism as "originally" understood commonly begin and end with *The Federalist*,⁹² and one scholar recently credited Virginian Jeffersonian Republican John Taylor of Caroline with originating what was actually Randolph's conception of the federal relationship.⁹³ (Taylor's devotion to Randolph's explanation has earned him a reputation as a lifelong "Anti-Federalist," too.)

To accept that Randolph persuaded marginal Federalists to vote for ratification by arguing that an analogue to Article II of the Articles of Confederation was implicit in the unamended Constitution is not the same as finding his arguments to that effect persuasive. The omission of such a provision as Article II, and thus of the phrase "expressly delegated," from the Constitution would seem to suggest that no such reading was intended by the Constitution's drafters in Philadelphia in the summer of 1787. However, when the issues are why the Richmond Convention ratified the Constitution and where the "Principles of '98" originated, the question whether we now find Randolph's arguments persuasive is beside the point. His fellow Virginia Ratification Convention delegates and later Virginia politicians did accept the arguments Randolph made

91. Cf. Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, KS: University Press of Kansas, 1996), pp. 114, 123; Mark E. Brandon, *Free In the World: American Slavery and Constitutional Failure* (Princeton, NJ: Princeton University Press, 1998); H. Jefferson Powell, "The Complete Jeffersonian: Justice Rehnquist and Federalism," *Yale Law Journal* 91 (1982), pp. 1317-70. (Note that Powell is the author of the article cited in note 5, above, as typical of work mistakenly using Madison as representative of all Federalists of 1787-88 on the issue of federalism.) In doing this, they have adopted (or perhaps have been misled by) the disingenuous position of Chief Justice John Marshall, who wrote—despite being one of the five members of the committee to draft an instrument of ratification, along with Randolph and Nicholas—that the Tenth Amendment could not mean what Republicans took it to mean, because it did not include the word "expressly" (*McCulloch v. Maryland*, 17 U.S. 316 [1819]).

92. Cf. Harry N. Scheiber, "Federalism and the Constitution: The Original Understanding," *American Law and the Constitutional Order*, ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, MA: Harvard University Press, 1988), 85-98.

93. Andrew Lenner, "John Taylor and the Origins of American Federalism," *Journal of the Early Republic* 17 (1997), pp. 399-423.

in Richmond in 1788—even if they did not recall who had originally voiced them.⁹⁴

In time, the idea that the states had joined the union of 1788 with a reserved right to police the boundaries of Constitutional construction would come to be associated with the Jeffersonian (Virginia) Republicans, for whom it was a matter of party dogma. However, it was given birth by a politician who, despite his Virginia origins, never held office as a Republican: Edmund Randolph. Cornell noted years ago that recent developments in academic philosophy seemed to open new vistas on the study of Federalists' opponents, and particularly to make possible a new understanding of the variety of their arguments.⁹⁵ What would be more important than that, however, would be a more nuanced understanding of the views and arguments of the people who actually wrote and enacted the Constitution under which we live. Their understandings of that document were various, too. If in New York they were typified by John Jay and Alexander Hamilton, and if James Madison was the most famous of them in the Richmond Convention of 1788, their pivotal representative in that fateful summer meeting was Governor Edmund Randolph.

94. Randolph seems not to have been persuaded by his own argument for long: in his opinion for President George Washington on Hamilton's bank bill, Randolph allowed that a law incorporating a bank would be constitutional if the nature of the federal government implied that Congress could adopt such a law; under this reading, he said, the bank was unconstitutional. He had once again located the mid-point between extremes (the Federalists' broad construction and the Republicans' view that only what was expressly authorized was authorized). John J. Reardon, *Edmund Randolph*, p. 197.

95. Saul Cornell, "Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography," *Law and History Review* 12 (1994): 1-28.