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# James Madison and the Framing of the Bill of Rights: Reality and Rhetoric in the New Constitutionalism

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**Abstract** *James Madison's leadership in framing of the Bill of Rights exemplifies the role of democratic statesmanship. Although never waivering in his principled opposition to a bill of rights, Madison understood the political expediency of rights, Madison understood the political expediency of proposing amendments to forestall more radical revisions to the Constitution. His task was to appease public opinion without doing injury to the principled foundation of the Constitution; in this task he only partially succeeded.*

**Keywords:** Bill of Rights, bill of rights, constitutionalism, natural rights, democratic statesmanship.

It has been noted often enough that the principal task of democratic statesmanship is to reconcile the requirements of wisdom and consent. Modern democracies, of course, derive their legitimacy from the consent of the governed. Thus, the requirement of consent necessarily defines the limits of democratic statesmanship; depending on the character and circumstances of the regime, those limits will be more or less restrictive. The goal of the democratic statesman remains essentially constant: to reconcile theory and practice (wisdom and consent) in a manner that will maintain the principles of the democratic regime. This means, above all, that the object of democratic statesmanship is to secure the conditions necessary to the rule of law (i.e., to substitute reason for human will or will to power).

In *The Federalist*, Madison noted that "according to Plutarch" Solon was forced by "his fellow-citizens to take upon him the sole and absolute power of new-modeling the constitution" of the Athenians. Solon, unlike some other ancient law givers ("celebrated reformers") who had to resort to extreme "expedients" in order "to carry their reforms into effect," seems "to have indulged a more temporizing policy." Indeed, he seems even to have "confessed that he had not given to his countrymen the government best suited to their happiness, but most tolerable to their prejudices."[1] Madison, like Solon, seems always to have been mindful that even "the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side."[2] However, Madison seems to have been somewhat more ambitious than Solon, remarking in the Constitutional Convention that "We ought to consider what was right and necessary in itself for the attainment of a proper Governm[en]t. A plan adjusted to this idea will recommend itself."[3] Thus, Madison seems to have regarded public opinion as some-

what more educable than did Solon. But as Madison found both in the deliberations of the convention and in the ratification debates, what is "right and necessary" is not always politically expedient—some "temporizing" it seems always will be necessary.[4] The temporizing that Madison provided in the debate over the Bill of Rights was given impetus because of his concern for the vital role of public opinion in republican government. "Public opinion," Madison wrote in 1791, "sets bounds to every government, and is the real sovereign in every free one."[5] An examination of Madison's role in the framing of the Bill of Rights and his understanding of the place of rhetoric and public opinion sheds considerable insight into the Fathers' conception of the proper place of statesmanship in a democratic polity.

Despite the fact that he perhaps deserves "to be remembered as 'father of the Bill of Rights' even more than as 'father of the Constitution,'"[6] Madison never waivered in his principled opposition to a Bill of Rights.[7] This opposition has occasioned considerable consternation among supporters of the modern administrative state. One facile minded writer—an unabashed apologist for the administrative state—wrote that

> [w]*hile always sympathetic to the goal of preserving liberty,* Madison, even as he introduced the Bill of Rights in the Congress, had little faith in the value of what he derisively called "parchment barriers." Madison's paternity of the Bill of Rights was a reluctant one that he accepted only after political realities forced him to rethink long-held positions.[8]

As the highlighted portions of this quote indicate, Madison's theoretical opposition to the Bill of Rights indicates something less than a whole-hearted devotion to liberty. Yet nothing could be further from the truth. Madison was opposed to a bill of rights precisely because of his devotion to liberty. Madison, along with most of the leading Federalists, believed that the Constitution itself was the greatest guarantor of rights and liberties. As Madison succinctly stated the issue in a famous letter to Jefferson (who did not share Madison's reticence about the Bill of Rights), "rights . . . are reserved by the manner which the federal powers are delegated."[9]

Madison and leading Federalists—most notably James Wilson, Roger Sherman, and Alexander Hamilton (among others)—opposed a bill of rights, not only because they believed it was superfluous in a constitution derived from the consent of the governed, but because it would be dangerous to liberty. The presence of a bill of rights, Madison believed, would transform the sovereignty of the people into the sovereignty of the state and bring with it all of the attendant dangers to liberty occasioned by the supremacy of the state. In a word, Madison anticipated the rise of the modern administrative state and did all in his power to prevent its coming into being. Madison's ultimate failure is seen today when legal scholars speak of rights not as the necessary dictates of the laws of nature, but as merely trumps on governmental power.

As is well known, the Constitutional Convention scarcely gave any attention at all to the question of a bill of rights. On September 12, only five days before the adjournment of the convention, George Mason expressed his wish that "the plan" be "prefaced with a Bill of Rights." This would, he said, "give great quiet to the people." Elbridge Gerry of Massachusetts subsequently introduced a motion, seconded by Mason, to create a committee to study a bill of rights; the motion was unanimously rejected.[10] On September 14, Charles Pinkney and Gerry moved to insert a declaration "that the liberty of the Press should be inviolably observed." Roger Sherman opposed the motion, stating that "[i]t is unncessary—The power of Congress does not extend to the Press." The motion

was defeated 7–4.[11] On the final day of the convention's deliberations, Edmund Randolph of Virginia proposed a motion to allow the states to submit amendments and to call a new convention to consider the revisions. This motion similarly was rejected and all the state delegations adopted the Constitution.[12] On September 17, the day the delegates signed the Constitution, only Randolph, Gerry, and Mason refused to sign the document, each citing the lack of a bill of rights as a principal concern.

The question of a bill of rights became a significant issue in the ratification debates and revealed that the opposing sides held fundamentally differing views on the principles of republican government. Alexander Hamilton gave the most extensive argument in support of the convention's decision not to adopt a bill of rights in the 84th number of *The Federalist*. Hamilton explained that the delegates did not think it necessary to rely on a bill of rights to protect rights and liberties simply because the Constitution rested on the solid foundation of the sovereignty of the people—"that pure, original fountain of all legitimate authority."[13] Resorting to a bill of rights was necessary only where the people were not sovereign: "[I]t has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince." Magna Carta was "obtained by barons, sword in hand, from King John." No different in theory were the Petition of Right and the English Bill of Rights. Hamilton concluded that "[i]t is evident, therefore, that, according to their primitive signification, they have no application to constitutions, executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations."[14]

Madison gave a more sophisticated version of this argument in his letter to Jefferson of October 17, 1788, in which he attempted to parry Jefferson's imprecations that he support the movement for a bill of rights. Madison compared "the efficacy of a bill of rights in controuling abuses of power" in republican and monarchical governments, concluding that a bill of rights was directly applicable to the latter form, whereas in the former, a bill of rights played at best only a marginal role, as declarations of the "fundamental maxims of free Government," and as providing "a good ground for an appeal to the sense of the community."[15] However, in a monarchy the effect is more dramatic:

> [I]n a monarchy the latent force of the nation is superior to that of the sovereign, and a solemn charter of popular rights must have a great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community; whereas in a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community.[16]

In a republic, a bill of rights provides, in effect, an appeal from the community to the community. Under these circumstances, a bill of rights tends to become a mere "parchment barrier." As Madison noted, "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current."[17] Thus, the danger of majority faction is not obviated by a bill of rights, but by a form of government that will produce constitutional majorities as op-

posed to merely numerical majorities. It is the Constitution—its theoretical ground having been explicated in *The Federalist* numbers 10 and 51—that renders the part (the majority) capable of ruling in the interest of the whole.[18] Reliance on a bill of rights to perform this essential constitutional role is a fatal deception.

A closely related argument also was adumbrated by Madison: "Supposing a bill of rights to be proper," Madison wrote, there will undoubtedly be much dissention concerning its particular composition. Absolute restrictions, however, "ought to be avoided," because in cases where "emergencies may overrule them" they will be ignored.

> Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab[eus] Corp[us] be dictated by the alarm, no written prohibitions on earth would prevent the measure. Should an army in time of peace be gradually established in our neighbourhood by Brit[ai]n: or Spain, declarations on paper would have as little effect in preventing a standing force for the public safety.[19]

Because it is impossible to foresee all the exigencies that confront the peace and tranquility of a nation, restrictions on the polity's power to act in its own defense should be minimized. As Hamilton wrote in *The Federalist*, "the circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[20] A constitution that must be violated in the exercise of the natural right of preservation is unrealistic and will not survive the necessities of *real politick*.

Both Hamilton and Madison appreciated the difficulties of attempting to restrain the operations of government by specific restrictions or exceptions to power. It was much more realistic (and safer) to structure and channel power to the performance of enumerated ends. Republican government was limited properly by the enumeration of the objects entrusted to its care, not by restrictions on its power. With respect to the accomplishment of the objects delegated to it (most notably national defense), its powers "ought to exist without limitation."[21] It could be contended that this argument is simply the recognition of the natural right of nations. As Hamilton rightly noted,

> Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[22]

The assumption that inevitably accompanies a bill of rights is that sovereignty rests with government and the people's liberties exist only to the extent that exceptions to that sovereignty can be exacted—in one form or another—from the government. Thus, the people's liberties reside merely within the interstices of excepted power.[23] This was the foundation of the "rights of Englishmen," but in America rights existed on the foundation of "the laws of nature and Nature's God." The great (and radical) innovation of the American Revolution was to substitute nature for history or convention as the ground of rights. The anti-Federalist opponents of the Constitution, no less than its Federalist supporters, recognized that the principles of the Declaration of Independence were the

foundation of legitimate government.[24] Above all, this meant that government must rest on the consent of the governed and must be instituted for the protection of the natural rights of those who consent to be governed. Natural rights were those preexisting rights that government did not create, but was designed to protect.

The Anti-Federalists never seemed to understand that the protection of natural rights (as opposed to the conventional or "historical" rights of Englishmen) required a new conception of constitutional government. The Anti-Federalists were never able to reconcile themselves to the idea that energetic government was the most effective vehicle for the protection of rights and liberties. They never changed their view that liberty could exist only where the power of government was diminished. Energy and liberty were for them simply irreconcilable. But energetic government was a crucial ingredient of Federalist constitutionalism. Energy and liberty were compatible because, in the Federalists' view, sovereignty no longer resided in the government, but in the people. The Anti-Federalists always thought in terms of limiting monarchy; and it was this preoccupation, above all, that blinded them to an understanding of republican principles based on a new kind of constitutionalism.[25]

The Anti-Federalist Agrippa, for example, remarked that when constitutions are established by the people, "they delegate all the powers of government not expressly reserved. Hence it appears, that a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government bear to each other, but does not in any degree imply security to the rights of individuals." Agrippa continued by remarking that "[i]t is therefore impertinent to ask by what right government exercises powers not expressly delegated," because this has been the "uniform practice" of all governments.[26]

But the leading Federalists, among them James Wilson, Alexander Hamilton, Oliver Elsworth, and James Madison, believed that the proposed Constitution would not only depart from the "uniform practice" of previous governments, but would provide greater security for individual rights and liberties. Leonard Levy made the remarkable argument that the Federalists' opposition to a bill of rights was "unhistorical." "Over a period of a century and a half," Levy contended,

> America had become accustomed to the idea that government existed by consent of the governed, that people created government, that they did it by written compact, that the compact constituted fundamental law, that the government must be subject to such limitations are necessary for the security of the rights of the people, and usually, that the reserved rights of the people were enumerated in bills of rights.[27]

This is certainly the historical experience of the American colonies. But, in attempting to depart from this history, in what sense were the Framers "unhistorical?" The state constitutions, insofar as they relied on powers delegated by the people *and* contained a bill of rights, were contradictory from the point of view of republican theory. In practice, it led to gross overconfidence in the efficacy of a bill of rights as the primary protection for rights and liberties. Despite the resort to a bill of rights, the states had failed miserably in their attempts to secure rights and liberties, as, one after another, the state legislatures aggrandized all power to themselves as the representatives of majority factions. This legislative tyranny was denounced roundly "for that prevailing and increasing distrust of public engagements and alarm for private rights which are echoed

from one end of the continent to the other."[28] It was precisely in the light of this historical experience that the Federalists pressed for a new constitutionalism.

As Hamilton noted in *The Federalist*, bills of rights "contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"[29] A specific reservation of power implies that if it were not for the exception, government would indeed have the power to act, even in the absence of a specifically delegated power. Therefore, the inclusion of exceptions in a bill of rights has the tendency to transform the idea of limited government into that of unlimited government: government can do everything (i.e., exercise all the attributes of sovereignty) except that which it has been specifically prohibited from doing. A true limited government has all the attributes of sovereignty, but only over a limited range of objects. As Madison noted in *The Federalist*, a limited government is not one whose power had been diminished, but one whose "jurisdiction is limited to certain enumerated objects."[30]

Hamilton used the example of freedom of press to illustrate the point:

> Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.[31]

Thus, the inclusion of exceptions in a bill of rights seems inevitably to transform the idea of limited government into that of unlimited government—to transform the new constitutionalism into the old. A government of delegated powers seems to be structurally incompatible with a bill of rights. Hamilton concluded his argument by noting that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[32]

However, Hamilton did not attempt to answer one substantial charge that was broadcast widely by the Anti-Federalists. The argument that the Constitution was a bill of rights and therefore rendered specific exceptions either superfluous or dangerous was vitiated by the presence in the body of the Constitution of specific exceptions against, *inter alia*, ex post facto laws, bills of attainder, creation of titles of nobility, and religious tests. As Federal Farmer pointedly noted:

> In fact, the 9th and 10th Sections in Art. I. in the proposed constitution, are no more nor less, than a partial bill of rights; they establish certain principles as part of the compact upon which the federal legislators and officers can never infringe. It is here wisely stipulated, that the federal legislature shall never pass a bill of attainder, or *expost facto* law; that no tax shall be laid on articles exported, etc. The establishing of one right implies the necessity of

> establishing another and similar one. On the whole, the position appears to me to be undeniable, that this bill of rights ought to be carried farther, and some other principles established, as a part of this fundamental compact between the people of the United States and their federal rulers.[33]

Agrippa made the same point when he remarked that

> [i]n answer to the favourite remark of the federalists, that what is not given is reserved, it is sufficient to reply, that the framers of the proposed constitution have themselves thought it necessary to make an explicit reservation of the power to grant titles of nobility. Why did they reserve this point, if it would not otherwise have been given up?[34]

Hamilton limited his somewhat rhetorical defense in *Federalist* 84 to claiming that the charge that the constitution did not contain a bill of rights was belied by the fact that there were specific reservations contained in the document, and that these protections were more than many states had in their own constitutions. Hamilton seemingly ignored the fact that this rhetorical defense contradicted his more elaborate argument against a bill of rights. In the 44th *Federalist*, Madison never alluded to the potential tension between his own opposition to a bill of rights and the particular reservations contained in the Constitution. He merely noted that those provisions belonged to "the first principles of the social compact and to every principle of sound legislation,"[35] thereby implying that only those exceptions relating to first principles were the appropriate objects of specific exceptions. The tergerversations of both Hamilton and Madison undoubtedly proceeded from the fact that the insertion of specific prohibitions against the federal government in the Constitution. Although not defensible in theory, these were compromises designed to allay the fears of those members of the convention who were particularly anxious about encroachments on the states' rights. After all, the Federalists had unsuccessfully opposed the inclusion of these specific exceptions in the Constitutional Convention. Incorporated into the text of the Constitution and limited to broad and generally agreed principles, the Federalists apparently believed this to be a workable compromise designed to allay the kinds of fears over the protection of individual liberties that arose in the ratifying conventions.[36]

Hamilton's defense of the convention's refusal to consider a bill of rights excluded an important point that Wilson and Madison both used in their arguments—that any attempt at enumerating rights would remain dangerously incomplete. Wilson argued, in the Pennsylvania ratifying convention in November, 1787, that a bill of rights annexed to "a government possessed of enumerated powers would be not only unnecessary, but preposterous and dangerous." "[I]n a government consisting of enumerated powers, such as is proposed for the United States," Wilson continued,

> a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.[37]

Wilson posed the argument in terms of both rights and powers. A bill of rights as a particular reservation of rights or powers would be imprudent, because of the accepted (and necessary) rule of constitutional construction that *expressio unius est exclusio alterius*—the expression of one is the exclusion of the other. Because it is impossible to know all the particular rights and powers that people will need to develop a decent constitutional order at the founding of a political society, any attempt to enumerate them are dangerous: The enumeration would be construed necessarily as an exhaustive rather than a prospective list of rights and powers. However, the exigencies of future politics might require the articulation of new rights or powers. But this would be foreclosed by the form of the constitutional arrangement and perforce would harbor the potential for the development of despotic government, because every power not explicitly reserved "is presumed to be given" to the government.

Another argument against the enumeration of rights in a bill of rights was expressed by Madison and seems to have been unique to him. Writing to Jefferson slightly more than one year after the adjournment of the convention, Madison stated that

> there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by any assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews, Turks & infidels.[38]

In Madison's view, the protection of rights and liberties should never force the people to define (and therefore limit) reserved rights; rather, it is a matter of strictly confining government to the exercise of its delegated powers.

In today's legal parlance, it is said that rights trump powers. This means that, in our situation, the exercise of government power can be defeated only when (or if) the people can articulate a reserved power or right—thus, today's impulse to begin the systematic articulation of "unenumerated" rights. But in Madison's view, the burden should always rest on government to justify the exercise of its power in terms of some delegated power or some power that is a necessary and proper means to accomplish a delegated power. The people should never articulate or manufacture a right to defeat (or trump) governmental power, because the people, not the government, possess the residual sovereignty of the nation. The Constitution attempted to set up a government of delegated powers, not one of delegated rights.

Any attempt to delineate or articulate a right (even fashioning a trump for the exercise of governmental power) necessarily limits the right, because any definition erects boundaries. In contemporary Ninth Amendment jurisprudence, judicial activists have been considerably embarrassed by the Supreme Court's definition of the right to privacy as the unfettered right of the individual to decide whether or not to procreate. At first, and as a reaction to specific circumstances (bans on contraceptive use and abortion), this definition of privacy seemed adequate. However, before long it proved to be a limitation. Some now regard this definition to be a limitation on the right to privacy in the case of homosexuality.[39] Once defined or articulated, any right is less valuable as a protection against government intrusion—this was Madison's most subtle case against a bill of rights.

However, Madison quickly came to realize that the divisions evidence, by the ratification debates would eventually make it necessary to adopt a bill of rights. In his letter to

Jefferson on October 17, 1788, Madison admitted that it was probable that a bill of rights would be added to the Constitution. However, Madison engaged in some constructive hyperbole in describing his accounts to his mentor:

> My own opinion has always been in favor of a bill of rights provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice.[40]

In January 1789, Madison revealed the reasons that led him to become the principal architect of the bill of rights in the First Congress. During his campaign for a seat in the House of Representatives, Madison wrote that

> I freely own that I have never seen in the Constitution as it now stands those serious dangers which have alarmed many respectable Citizens. Accordingly whilst it remained unratified, and it was necessary to unite the States in some one plan, I opposed all previous alterations as calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution. Circumstances are now changed: The Constitution is established on the ratifications of eleven States and a very great majority of the people of America; and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty.[41]

Madison's overriding goal of statesmanship in the First Congress was to supply the proper moderation and mode in reconciling its opponents to the support of the newly adopted Constitution.

However, Madison was virtually alone in advocating the prompt consideration of amendments. The Federalist majority, flush with electoral victory, was in no mood to accede to the demands of the opposition. By the same token, the Anti-Federalists did not want a prompt consideration of amendments, because they wished to parlay their opposition into a second constitutional convention, where fundamental changes to the structure of the Union itself could be advocated openly. This had been their goal from the very beginning.[42] Thus, Madison was forced to become the demi-urge of the Bill of Rights and succeeded in getting his Federalist colleagues to follow his lead only by his single-minded audacity and tenacity.

On June 8, 1789, Madison advised the House of Representatives that his advocacy of a bill of rights was "inspired by every motive of prudence." He contended that it was necessary to "render [the Constitution] as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."[43] Madison noted that this would be "highly politic for the tranquility of the public, and the stability of the Government."[44]

But the project of reconciling the opponents of the Constitution was a rather delicate task, because it had to be done in a manner that would "not injure the Constitution."[45] As Madison informed the membership of the House on August 13, 1789, "I confess it

has already appeared to me, in point of candor and good faith, as well as policy, to be incumbent on the first Legislature of the United States, at their first session, to make such alterations in the constitution as will give satisfaction, without injuring or destroying any of its vital principles."[46] This called for moderation on both sides of the question, "We have," Madison said, "in this way something to gain, and, if we proceed with caution, nothing to lose."[47]

The admonition to moderation proceeded from the fact that Madison was well aware that "some policy has been made use of, perhaps, by gentlemen on both sides of the question."[48] Madison knew that the objections of the most extreme Anti-Federalists were not directed at the absence of a bill of rights, but the basic structure of the new government, including its power to regulate elections, the supremacy clause, the exclusive power to regulate commerce, the necessary and proper clause, and generally those clauses that trenched upon the powers of the states.[49] Their strategy was to use the absence of a bill of rights as a pretext for calling a new convention in which these issues could be considered *de novo*. But as Madison stated, "I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights" rather than any objection to the general structure and the mass of power allotted to the Federal Government.[50]

Thus, Madison pressed the issue of amending the Constitution in an attempt to forestall challenges to the newly created constitutional regime. As Madison remarked,

> In this case it is necessary to proceed with caution; for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one. I should be unwilling to see a door opened for a reconsideration of the whole structure of the Government—for a reconsideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself.[51]

Madison wished to push through a bill of rights that everyone could agree on, thus taking the offensive against the rhetorical excesses of the more extreme, but influential, Anti-Federalists. Writing to Jefferson on the eve of the First Congress, Madison stated that "[n]otwithstanding this character of the body [viz. that it was overwhelmingly Federalist], I hope and expect that some conciliatory sacrifices will be made, in order to extinguish opposition to the system, or at least break the force of it, by *detaching the deluded opponents from their designing leaders*."[52] As if to signal his serious intentions to his Anti-Federalist opponents, Madison proposed one amendment that struck at the heart of Anti-Federalism: "No *State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[53]

Of course, there was no hope that this amendment imposing federal protections for rights against the states would pass, and eventually it was defeated in the Senate. (However, the amendment did reflect Madison's long-standing conviction that the greatest danger to liberty proceeded from the instability and injustice of the state governments.) However, Madison demonstrated to the Anti-Federalists that he understood politics as well as they did and underscored this demonstration by remarking that he "conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights,

it was equally necessary that they should be secured against the State Governments."[54] As Herbert Storing noted,

> Madison's strategy was to seize the initiative for amendments, to use the Federalist majority in the First Congress to finish the unavoidable business of amendments in such a way as to remove from the national agenda the major Antifederalist objections—and incidentally to secure some limited but significant improvements in the Constitution, especially in securing individual rights.[55]

It is not entirely hyperbole to conclude, as Storing did, that "[t]he crucial fact is that none of the amendments regarded by the opponents to the Constitution as fundamental was included."[56] Both Federalists and Anti-Federalists alike ridiculed the amendments as nothing more than "trifling things," "frothy garnish," and "Milk & Water Propositions."[57]

Still, whatever the form of the amendments, they would pose some danger to the principled structure of the Constitution. However, Madison demonstrated that he was ready for the theoretical challenge:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].[58]

The fourth resolution, as originally introduced by Madison, addressed both powers and rights:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[59]

The two aspects of rights and powers are necessary counterparts. As Madison wrote to George Washington in December, 1789: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended."[60] Madison's original version of the Ninth Amendment, of course, emerged from committee as two amendments: the Ninth as a reservation of rights and the Tenth as a reservation of powers. A reservation of rights would be ineffective without the clear recognition that a reservation of rights cannot be construed as a grant of powers. Thus, both amendments are declaratory of relations already established in the Constitution. Raoul Berger rightly noted that "[t]he two [amendments] are complementary, the ninth

deals with *rights* 'retained by the people,' the tenth with *powers* 'reserved' to the states or the people. As Madison perceived, they are two sides of the same coin."[61]

The reservation of rights in the Ninth Amendment must be read as an affirmation that the federal government is a government of limited powers and can legitimately exercise only those powers delegated to it or those that are a necessary and proper inference from the delegated powers. The Ninth Amendment is necessary because the very fact of enumerating rights implies a grant of power to the federal government. In Madison's view, it is thus never necessary to specify the unenumerated rights protected by the Ninth Amendment, because the burden of justifying the exercise of governmental power rests with those who are exercising the power to justify that exercise in terms of some delegated power. It is in this sense that the Ninth Amendment provides a rule of construction. It provides the rule for construing the Bill of Rights in a manner that is not inconsistent with the principles of the Constitution. It is precisely when the Ninth Amendment has fallen into seeming desuetude that it is operating most effectively. The exercise of governmental power should always be a question of the proper exercise of delegated powers, rather than the articulation of rights.

Although the First Congress enumerated rights as a matter of political expediency, Madison's purpose in the Ninth Amendment was to preclude the possibility of ever having to repeat or add to the enumeration. It was as if Madison was saying: "Although we have set out a bill of particulars, it is inconsistent with republican principles to do so and our actions should never be repeated." Why? Because a continual articulation of new rights to "trump" the exercise of governmental power would, by a natural and inexorable train of events, eventually transform the government from one of limited powers to one of unlimited powers. A republican bill of rights would be transformed into something more like Magna Carta and the English Bill of Rights—a misplaced attempt on the part of the people to restrict the sovereignty of government, when in fact sovereignty was an exclusive attribute of the people itself. Add to this the fact that any definition of a right is a limitation on that right and it is clear that Ninth Amendment rights were not to be articulated; rather, their security depended precisely on the fact that it would never be necessary to assert or articulate those rights. As a rule of construction, the Ninth Amendment was never intended to become the focal point of a systematic articulation of rights.

Madison may have had this in mind when, in the course of his famous speech of June 8, he argued that if a bill of rights is

> incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights *expressly* stipulated for the in the constitution by the declaration of rights.[62]

During the course of the debate in the First Congress, Madison urged his colleagues to confine the bill of rights "to an enumeration of simple, acknowledged principles."[63] The state bills of rights, Madison noted, gave little guidance for the construction of a national bill of rights. Some of the state constitutions contained statements that were "not absolutely necessary," such as the assertion of the "perfect equality of mankind" in the possession of rights. Although "an absolute truth," it seems that those preexisting rights of nature do not need to be asserted, because this would give them the appearance

of being merely a positive—rather than a natural—right. Other provisions specified "positive rights, which may seem to result from the nature of the compact." One such positive right is the right to a trial by jury, which, although it "cannot be considered a natural right . . . is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[64] In other cases, state constitutions contained simple maxims of government, such as the inviolability of the separation of powers. Madison perfunctorily noted that these maxims, although expressing the simple truisms of republican government, are rarely effective in practice.

However, Madison noted that all the state bills of rights seemed to have one thing in common: "to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act in particular circumstances."[65] This said, however, Madison nevertheless admitted that the greatest danger to rights did not emanate from government, but "in the abuse of the community." "The prescriptions in favor of liberty," Madison continued,

> ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.[66]

Madison knew that the rights and liberties of individuals as well as minorities were daily violated, despite the elaborate constitutional guarantees contained in state bills of rights. Bills of rights had the tendency to become merely "paper barriers" unless supported and fortified by public opinion. In Madison's view, the educative function of a bill of rights was important, although he was painfully aware that it was not a self-executing enterprise. Bills of rights, he said, "have a *tendency* to impress *some degree* of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community." Therefore, a bill of rights, as a vehicle for shaping and moderating public opinion, "may be one means to control the majority from those acts to which they might be otherwise inclined."[67] In 1791, Madison wrote that "[i]n proportion as government is influenced by opinion, it must be so, by whatever influences opinion. This decides the question concerning a *Constitutional Declaration of Rights*, which acquires an influence on government, by becoming a part of the public opinion."[68] Thus, whatever defects the addition of a bill of rights might have had for Madison from the point of view of republican constitutional theory was ameliorated to a certain degree by the prospect that it might play a supportive role in the formation of public opinion and the "consciousness of unjust and dishonorable purposes" that must animate constitutional majorities in any decent republican regime.[69] Madison's advocacy of the bill of rights was thus intended to serve a dual purpose in this regard: it was both a balm to public opinion and a means for the education of public opinion.

Madison's last attempt to guard the Constitution from any structural or principled injury that might proceed from the addition of a bill of rights was to attempt to have the various provisions of the bill of rights incorporated into the body of the Constitution, rather than placed at the end as a kind of addendum. As he remarked to the House on August 13, 1789:

> Form, sir, is always of less importance than the substance; but on this occasion, I admit that form is of some consequence, and it will be well for the

> House to pursue that which, upon reflection, shall appear to be the most eligible.[70]

Madison argued that it would be "more simple" ("uniform and entire") if "the amendments [were] interwoven into those parts to which they naturally belong, than it [would] if they consist of separate and distinct parts."[71] Whatever value simplicity and uniformity may have had for Madison, he had a more serious purpose in mind. If the amendments are incorporated into the body of the Constitution, Madison stated, "[w]e shall then be able to determine without references or comparison; whereas, if they are supplementary, its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment" since it is inevitable that "they will create unfavorable comparisons."[72] Madison's fear was that the Constitution and a separate bill of rights eventually would be at odds with one another; the Bill of Rights inevitably would be regarded as the palladium of liberty *against* the Constitution. In other words, the Bill of Rights would, in effect, supplant the Constitution.

Madison failed to have the specific prohibitions and reservations placed in the body of the Constitution. But his prediction that there would be comparisons to the detriment of the Constitution has certainly come to pass. A few years ago, Justice William Brennan remarked that "[t]he original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government." But as Brennan duly noted, "[w]e recognize the Bill of Rights as the primary source of express information as to what is meant by constitutional liberty."[73] Although it is plausible to argue that the Constitution is, for all rational purposes, a bill of rights, it is impossible to argue that the Bill of Rights is a constitution.

It would be bold to question whether it would have been better if there had never been a Bill of Rights. Yet it is interesting (and perhaps useful) for those who are somewhat timid to speculate about what this country's situation might be today had there been no Bill of Rights. One thing is fairly certain: we would have a less intrusive government than we do today; the foundations of the administrative state would have been much more difficult to discover or rationalize; government would have been more strictly limited to the exercise of enumerated powers; and the necessary and proper clause, in all probability, would not have become an independent source of government power.

We also would not refer to our rights as trumps against governmental power. Our contemporary mode of expressing rights simply means that we now believe that government possesses all the attributes of sovereignty, and that we, the people, have rights and liberties only to the extent that we can "trump" government power or create exceptions to the mass of sovereign power that we now assume rightfully resides in government instead of the people. The "new constitutionalism" that Madison advocated essentially has been overwhelmed by too great an admixture of the old.

Without the Bill of Rights, we certainly would be a people more introspective about our rights and more deliberative about our public affairs, because every choice of public policy would entail a justification of the constitutional power needed to implement policies. Therefore, every choice would be a debate about rights and liberties. This is rarely the case in the administrative state; or when rights are the subject of debate, they have nothing in common with the genuine rights and liberties that were the concern of the Framers of the Constitution (or of the Bill of Rights, for that matter). Today, rights mean nothing more than special interest pleadings that result in requests for special exemptions or privileges to be parceled out by government. The administrative state has tended to make us forget the real meaning of rights—that rights are inherent as a dictate of human

nature. This was hardly the intention of the Framers of the Bill of Rights. Indeed, they struggled mightily to prevent this result. Perhaps Madison knew that the Ninth Amendment would be effective only as long as the people were capable of thinking their political principles back to their origins. It has become painfully obvious to anyone with eyes to see that we have become incapable of performing that essential task of self-governance.

## Notes

1. Clinton Rossiter, ed., *The Federalist,* (New York: New American Library, 1961), No. 38, pp. 232–233.

2. Ibid., No. 49, p. 315.

3. Max Farrand, ed., *The Records of the Federal Convention of 1787* (1937, reprint ed.; New Haven, CT: Yale University Press, 1966), Vol. 1, p. 215.

4. In the Constitutional Convention, Madison was particularly alarmed that he was not able to secure a negative on state legislation or a Council of Revision that was designed to provide a "revisionary check on the Legislature" through a prior review of legislative proposals. The council would provide, Madison argued, a defensive mechanism for the executive and judicial branches against "Legislative encroachments." (Farrand, *Records of Federal Convention,* No. 2, p. 73). Seized by a momentary paroxysm of despair, Madison wrote to Jefferson shortly before the close of the convention that "I hazard an opinion nevertheless that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excites disgusts ag[ain]st the state governments." "Madison to Jefferson, Sept. 6, 1787," in *The Papers of James Madison* eds. William T. Hutchinson et. al. (Chicago: University of Chicago Press; Charlottesville: University Press of Virginia, 1962), Vol. 10, pp. 163–164. Much to the disgust of the latter-day supporters of the administrative state, the "father of the Bill of Rights" referred to the amendment of the Constitution as late as August 19, 1992, as a "nauseous project." "Madison to Richard Peters, Aug. 19, 1789," in *Papers,* Vol. 12, p. 346.

5. "Public Opinion," Hutchinson et al., *Papers,* Vol. 14, p. 170.

6. Leonard Levy, "Bill of Rights," in *Encyclopedia of the American Constitution,* 4 vols. eds. Leonard Levy, Kenneth L. Karst, and Dennis Mahoney, (New York: Macmillan, 1986), Vol. 1, p. 115.

7. Levy was clearly mistaken when he stated that "No delegate [to the Constitutional Convention] opposed [a bill of rights] in principle." It suffices to mention James Madison, Alexander Hamilton, Roger Sherman, and others. Levy was correct, however, when he stated that "[a]ll the Framers were civil libertarians." Leonard Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1988), p. 148.

8. Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity," in *The Supreme Court Review* eds. Gerhard Casper et. al. (Chicago: University of Chicago Press, 1990), pp. 302–303 (emphasis added).

9. "Madison to Jefferson, 17 Oct 1787," Hutchinson et al. *Papers,* No. 11, p. 297.

10. Farrand, *Records of Federal Convention,* Vol. 2, pp. 587–588.

11. Ibid., pp. 617–618.

12. Ibid., pp. 631–633.

13. Rossiter, *The Federalist,* No. 22, p. 152.

14. Ibid., No. 84, pp. 512–513. James Wilson had made the same argument in the Pennsylvania ratifying convention some months earlier when he remarked that "I confess I feel a kind of pride in considering the striking difference between the foundation on which the liberties of this country are declared to stand in this Constitution, and the footing on which the liberties of England are said to be placed. The Magna Carta of England is an instrument of high value to the people of that country. But . . . from what source does that instrument derive the liberties of the inhabitants of that kingdom? Let it speak for itself. The king says, 'We have *given* and *granted* to all archbish-

ops, bishops, abbots, priors, earls, barons, and to all the freemen of this our realm, these liberties following, to be kept in our kingdom of England forever.' When this was assumed as the leading principle of that government, it was no wonder that the people were anxious to obtain bills of rights, and to take every opportunity of enlarging and securing their liberties. But here, sir, the fee-simple remains in the people at large, and by this Constitution they do not part with it." Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Federal Constitution,* 5 vols. (Philadelphia: J.B. Lippincott, 1836, rev. ed. 1937), Vol. 2, p. 435. See, also, Madison's speech of June 8, 1789, in 1 *Annals of Congress* (Gales and Seaton, eds., 1834), pp. 453–454 and Roger Sherman's speech of August 13, 1789, in Ibid., p. 743. See, also, Edward Erler, "The Great Fence to Liberty: The Right to Property in the American Founding," in *Liberty, Property, and the Foundations of the American Constitution* eds. Ellen Frankel Paul and Howard Dickman (Albany: State University of New York Press, 1989), pp. 49–50.

15. Hutchinson et al. *Papers,* Vol. 11, pp. 298–299.

16. Ibid., p. 298.

17. Ibid., pp. 297–298.

18. See Edward Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991), pp. 21–38.

19. Hutchinson et al., *Papers,* Vol. 11, p. 299.

20. Rossiter, *The Federalist,* Vol. 23, p. 153.

21. Ibid.

22. Ibid., Vol. 25, p. 167.

23. Erler, "The Great Fence to Liberty," pp. 47–50.

24. John P. Kaminski, "Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment," in *The Bill of Rights,* ed. Jon Kukla (Richmond: Virginia State Library and Archives, 1987), p. 141.

25. Rossiter, *The Federalist,* Vol. 48, p. 309; Erler, *The American Polity,* pp. 42–47.

26. "Agrippa," in *The Complete Anti-Federalist,* 7 vols, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), 4.6.69.

27. Levy, *Original Intent and the Framers' Constitution,* p. 156.

28. Rossiter, *The Federalist,* No. 10, pp. 77–78; Farrand, *Records of Federal Convention,* Vol. 2, pp. 35, 73–74.

29. Ibid., No. 84, p. 513.

30. Ibid., No. 14, p. 102.

31. Ibid., No. 84, p. 514.

32. Ibid., No. 84, p. 515.

33. *The Complete Anti-Federalist,* 2.8.51–2; see Ibid., 2.8.198.

34. Ibid., 4.6.66. See, also, Letters of Brutus in Ibid., 2.9.30–1.

35. Rossiter, *The Federalist,* No. 44, p. 282. The most extensive defense of Convention's actions is, ironically, Edmund Randolph, who had refused to sign the Constitution but became a staunch advocate for ratification in the Virginia ratifying convention. See Elliot, *Debates,* vol. 3, pp. 463ff.

36. Farrand, *Records of Federal Convention,* Vol. 2, p. 376. Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990), p. 61.

37. Elliot, *Debates,* Vol. 2, p. 436.

38. "Letter to Thomas Jefferson, October 17, 1788," Hutchinson et al., *Papers,* Vol. 11, p. 297.

39. *Bowers v. Hardwick,* 478 U.S. 186, 106 S. Ct. 2841, 2844. See Erler, "The Ninth Amendment and Contemporary Jurisprudence," in *The Bill of Rights: Original Meaning and Current Understanding,* ed. E. Hickok (Charlottesville: University Press of Virginia, 1991), pp. 446–448.

40. "Letter to Thomas Jefferson, October 17, 1788," Hutchinson et al., *Papers,* Vol. 11, p. 297.

41. "Letter to George Eve, January 2, 1789," Hutchinson et al., *Papers,* Vol. 11, p. 404.

42. See Levy, *Original Intent,* p. 148: "from the start of the ratification controversy, the

omission of a bill of rights became an Anti-Federalist mace with which to smash the Constitution. Its opponents sought to prevent ratification and exaggerated the bill of rights issue because it was one with which they could enlist public support. Their prime loyalty belonged to states' rights, not civil rights." See, also, Kenneth R. Bowling, " 'A Tub to the Whale': The Founding Fathers and the Adoption of the Bill of Rights," *Journal of the Early Republic,* vol. 8 (1988), pp. 227–228.

43. *Annals of Congress,* vol. 1, pp. 448–449.
44. Ibid., p. 458.
45. Ibid., p. 449.
46. Ibid., p. 733–734.
47. Ibid., p. 450.
48. Ibid., p. 453.
49. A good example can be seen in the Letters of Agrippa, *The Complete Anti-Federalist,* 4.6.75–76. See, also, "Elbridge Gerry to Patrick Henry, September 14, 1789," in *The Bill of Rights: The Documentary Record From the First Federal Congress,* eds. H. Veit, K. Bowling, and C. Bickford (Baltimore: Johns Hopkins University Press, 1991), p. 295; "Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Delegates, September 28, 1789," pp. 299–300, especially note 1, p. 300. A useful compilation of the amendments proposed by five states can be found on pp. 14–28.
50. *Annals of Congress,* vol. 1, p. 450.
51. Ibid.
52. "Madison to Thomas Jefferson, March 29, 1789," Hutchinson et al., *Papers* Vol. 12, p. 38 (emphasis added).
53. *Annals of Congress,* vol. 1, p. 452 (emphasis added).
54. Ibid., p. 784.
55. Herbert Storing, "The Constitution and the Bill of Rights," in *How Does the Constitution Secure Rights,* eds. R. Goldwin and W. Schambra (Washington, DC: American Enterprise Institute, 1985), p. 19.
56. Ibid.
57. Veit et al., *The Bill of Rights,* pp. 225, 233.
58. *Annals of Congress,* vol. 1, p. 456. Madison had made this same point in the Virginia ratifying convention: "If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government? Has not the honorable gentleman himself admitted that an imperfect enumeration is dangerous?" *Debates in the Several States* vol. 3, p. 620.
59. Ibid., p. 452.
60. "Madison to George Washington, December 5, 1789," Hutchinson et al., *Papers,* No. 12, p. 459. Eventually both modes of expression found their way into the Bill of Rights. The First Amendment, for example, commands that "Congress shall make no law . . . ," whereas the Fourth Amendment states that "The right of the people to be secure . . . ."
61. R. Berger, "The Ninth Amendment," *Cornell Law Review,* vol. 66 (1980), pp. 2–3.
62. *Annals of Congress,* vol. 1, p. 457. See Levy, *Original Intent and the Framers' Constitution,* pp. 282–283.
63. Ibid., p. 766.
64. Ibid., p. 454.
65. *Annals of Congress,* vol. 1., p. 454.
66. Ibid., pp. 454–455.
67. *Annals of Congress,* vol. 1, p. 455 (emphasis added).
68. "Public Opinion," Hutchinson et al., *Papers,* Vol. 14, p. 170.
69. Rossiter, *The Federalist,* No. 10, p. 83.
70. *Annals of Congress,* vol. 1., p. 735.
71. Ibid.
72. Ibid.
73. William Brennan, "The Constitution of the United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University, October 12, 1985, pp. 8, 11.