

James Madison and the Bill of Rights: A Reluctant Paternity

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JAMES MADISON AND THE BILL
OF RIGHTS: A RELUCTANT
PATERNITY

In May 1789, when the first Congress was just two months old James Madison indicated his intention to introduce a series of amendments to the Constitution. A month later Madison finally found an opening in the agenda to propose his amendments.¹ He faced opposition from all sides.² Former federalist allies, like Fisher Ames and Roger Sherman, dismissed Madison's call for amendments as unnecessary, imprudent, or worse yet, an attempt by Madison to gain popularity.³ In private correspondence they were even more critical of Madison's proposals.⁴

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¹Speeches of Madison, *Annals of Congress*, 1st Cong., 1st Sess., (May 4, 1789 and June 8, 1789) 257; 440–469.

²William E. Nelson argues that the "Federalists acceded to Antifederalist demands for the protection of personal rights as the price of ratification," Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787–1801*, 44 *Wm. & Mary Q.* 477 (3rd ser., 1987). This seems correct only for the ratification conventions, where federalists in Massachusetts, Virginia, and New York voted for recommended amendments after the conventions ratified the Constitution. However, by 1789 many federalists in Congress were no longer willing to support amendments. Only Madison's maneuvering, tenacity, and arguments led them to support the Bill of Rights.

³Brant, *James Madison: Father of the Constitution, 1787–1800* 267–68 (1950).

⁴Bowling, "A Tub to the Whale": The Founding Fathers and the Adoption of the Federal Bill of Rights, 8 *J. of the Early Republic* 223, 237 (1988).

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Many antifederalists were equally unsupportive. Elbridge Gerry, who had refused to sign the Constitution in part because it lacked a bill of rights, was unwilling to support Madison at this time.⁵ Aedanus Burke, on the other hand, wanted amendments but not the kind Madison proposed. He thought Madison's were "frothy and full of wind, formed only to please the palate; or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage."⁶

Despite this resistance, Madison persisted. Ultimately Congress accepted most of the substance of what Madison suggested.⁷ Within five months Congress agreed to twelve amendments, ten of which were ratified by 1791.

For his persistence in the summer of 1789, Madison well deserves his reputation as the father of the Bill of Rights. This may indeed have been "some of his noblest work,"⁸ and modern civil libertarians have good reason to claim Madison as one of their own. As Leonard W. Levy has persuasively argued, Madison's "accomplishment in the face of opposition and apathy entitles him to be remembered as 'father of the Bill of Rights' even more than as 'father of the Constitution.'"⁹ This article does not challenge the conventional wisdom on this point; rather, it explores the route that Madison took to his well-earned place in the history of liberty.

Despite his eventual support for a bill of rights, Madison had no well thought-out intentions on this subject. Rather, he had well thought-out reservations about a bill of rights. While 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

⁵In nine recorded votes on the Bill of Rights, Gerry voted against Madison seven times. They voted together, in the majority only on two minor procedural questions which were overwhelmingly defeated. These votes are compiled in Schwartz, 5 *The Roots of the Bill of Rights* 1116, 1124–25, 1127, 1132, 1137, 1161, 1163 (1971).

⁶Speech of Burke, *Annals of Congress*, 1st Cong., 1st Sess. (Debate of August 15, 1789) 774. On this issue, see generally Bowling, note 4 *supra*, at 223–51. George Mason thought Madison's proposals were "Milk & Water propositions," while Senator Richard Henry Lee dismissed them as "not similar" to the amendments proposed by the Virginia ratifying conventions. *Id.* at 233.

⁷Madison proposed that "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury trials in criminal cases." This provision passed the House of Representatives but was eventually struck out by the Senate. Schwartz, note 5 *supra*, at 1027, 1156.

⁸Burns, *James Madison: Philosopher of the Constitution* 15 (1973).

⁹Levy, *The Bill of Rights*, in 1 *Encyclopedia of the American Constitution* 115 (Levy, Karst & Mahoney, eds., 1986).

of what he derisively called “parchment barriers.”¹⁰ 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.

Madison’s primary purpose in supporting amendments was twofold: to fulfill promises made to his constituents during his campaign for Congress and to undermine opposition to the Constitution. On this latter point Madison argued that the amendments “would have stifled the voice of complaint, and made friends of many who doubted the merits of the constitution.”¹¹

I. MADISON AND THE AUTHORSHIP OF THE BILL OF RIGHTS

The amendments Madison introduced in the House of Representatives were rewritten by a committee, amended on the floor, and then altered again by the Senate. The Congress wisely rejected the very structure of Madison’s amendments. Madison proposed that the amendments be imbedded into various sections of the Constitution because “He feared that the placement [of the amendments at the end of the Constitution] would lead to ambiguities about how far the original Constitution had been superseded by the amendments.”¹² Had Madison’s idea been accepted the “Bill of Rights” would not exist as such, although the rights themselves would still be found in the Constitution. Fortunately, Congress accepted Roger Sherman’s suggestion that the amendments be added in a series at the end of the Constitution. It is quite likely that the impact of the Bill of Rights on our society would have been seriously diminished if it had not been one coherent body of rights found in one place in the Constitution.

The Senate categorically rejected Madison’s favorite proposal—an amendment declaring that “No state shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.” This amendment would have limited the power of the states to undermine religious liberty, freedom of expression, and due process of law.¹³ Such an amendment

¹⁰James Madison to Thomas Jefferson, October 17, 1788, 11 *The Papers of James Madison* 295–300, quoted at 297 (Rutland ed. 1977) (cited below as *Papers of Madison*).

¹¹Speech of Madison, *Annals of Congress*, 1st Cong., 1st Sess. (June 8, 1789), 444.

¹²Bowling, note 4 *supra*, at 242.

¹³4 *Documentary History of the First Federal Congress of the United States of America: Legislative Histories* 39 (Bickford & Veit, eds., 1986). At the Constitutional Convention

would have radically altered the federal structure of the new government.

Though other members were active in the House and Senate debates, Madison was without question the key player in the adoption of the Bill of Rights. Perhaps “the Bill of Rights would be in place whether Madison had been present or not.”¹⁴ It would, however, be a different bill of rights and it certainly would not have been ratified by 1791. Madison was, as Jack Rakove has persuasively argued, “almost alone” in the First Congress “in believing that prompt action on amendments was a political necessity.”¹⁵ It may be true that “there was too much pressure from George Mason, Thomas Jefferson, Richard Henry Lee and others for the matter simply to have dropped.”¹⁶ But many antifederalists were exerting pressure for amendments that most probably would not have been ratified; they were also exerting pressure for a second Convention, which might have undone the work of the 1787 gathering. Without Madison’s boundless energy in supporting amendments, despite his ambivalence about their value, strong anti-federalist pressure might have undermined the new government under the Constitution, leading to unforeseen developments. If there was a “framer” and a “father” of the Bill of Rights, it was Madison.

II. THE BILL OF RIGHTS AND THE CONSTITUTIONAL CONVENTION

The Constitutional Convention never seriously considered adopting a bill of rights. Near the end of the Convention the issue was discussed briefly and disposed of summarily. At the same time the delegates defeated various proposals for the protection of specific civil liberties, many of which were eventually incorporated into the Bill of Rights.

On August 20, 1787, Charles Pinckney “submitted sundry propo-

Madison had tried, and also failed, to incorporate greater limitations on the states by giving Congress the power to overrule state legislation. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *Wm. & Mary Q.* 215 (3rd Ser., 1979). See also Banning, *James Madison and the Nationalists, 1780–1783*, 40 *Wm. & Mary Q.* 227 (3rd Ser., 1979), for a discussion of Madison’s early nationalism, and Banning, *The Hamiltonian Madison*, 92 *Va. Mag of Hist. & Biog.* 7 (1984), for Madison’s fear, “As late as 1789” that “the necessary powers of the central government would prove vulnerable to the encroachments by the states.”

¹⁴Rutland, *The Trivialization of the Bill of Rights*, 31 *Wm. & Mary L. Rev.* 287 (1990).

¹⁵Rakove, *The Madisonian Theory of Rights*, 31 *Wm. & Mary L. Rev.* 245, 246 (1990).

¹⁶Rutland, note 14 *supra*, at 287.

sitions” to the Convention. While some of Pinckney’s propositions ultimately were included in the body of the Constitution, the Committee on Detail ignored his proposals to insure freedom of the press and to prohibit the quartering of troops in private homes. On September 12 the Convention rejected a proposal by Elbridge Gerry that the right to a jury in civil cases be guaranteed by the Constitution.¹⁷

George Mason, Madison’s Virginia colleague, then suggested that the entire Constitution be “prefaced with a Bill of Rights.” He thought that “with the aid of the State declarations, a bill might be prepared in a few hours.” Roger Sherman argued that this was unnecessary because the Constitution did not repeal the state bills of rights. Mason replied that federal laws would be “paramount to State Bills of Rights.” This argument, however correct, had little effect on the Convention, which defeated Mason’s motion with all states voting no.¹⁸ Within the Virginia delegation Madison opposed this motion.

The next day advocates of a bill of rights made one last attempt to add protections for basic civil liberties. Gerry once again proposed a guarantee of juries for civil trials, and once again the state delegations unanimously rejected this proposal. Pinckney and Gerry then proposed “that the liberty of the Press should be inviolably observed.”¹⁹

Sherman again argued that under a government of limited powers specific protections of liberty were unnecessary because “The power of Congress does not extend to the Press.” Five states were unconvinced, and voted for the proposal.²⁰ It is possible Madison voted for this motion, because we know Mason and Randolph carried at least one other Virginian within their delegation. But a majority of the state delegations sided with Sherman, defeating the motion to protect “the liberty of the Press.”²¹

On Saturday, September 15, 1787, the next-to-the-last day of the Convention, George Mason expressed his reservations about the Constitution. He observed: “There is no Declaration of Rights, and the laws of the general government being paramount to the laws and

¹⁷² The Records of the Federal Convention of 1787 587 (Farrand ed. 1966) (cited below as Farrand).

¹⁸² Farrand 587–88.

¹⁹*Id.* at 5.

²⁰ Madison recorded the vote as 4 in favor and 7 states opposed. Both the official records and McHenry’s notes recorded 5 states in favor and 6 opposed. 2 Farrand 611, 618, 620.

²¹*Id.* at 617–18.

Constitutions of the several States, the Declaration of Rights in the separate States are no security." Mason noted that under this Constitution "the people" were not "secured even the enjoyment of the benefit of the common law."²²

Mason had other objections to the Constitution. He disliked the commerce power, the treaty-making provisions, the continuation of the African slave trade for *at least* twenty more years,²³ and the power of the President to grant pardons, especially to "those whom he had secretly instigated to commit" crimes and "thereby prevent a discovery of his own guilt."²⁴ These complaints about the Constitution were magnified by the lack of a bill of rights. Mason feared that the Senate and the President would combine "to accomplish what usurpations they pleased upon the rights and liberties of the people," while the federal judiciary would "absorb and destroy the judiciaries of the several States." He thought the expansive powers of Congress threatened the "security" of "the people for their rights." Without a bill of rights all this was possible. He complained, "There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace."²⁵ For these reasons, Mason refused to sign the Constitution.

Another Virginian, Edmund Randolph, also refused to sign. He proposed a second convention to consider amendments, including a bill of rights. Elbridge Gerry of Massachusetts agreed with Mason on many substantive issues, including the dangers posed by the aristocratic nature of the Senate and the centralizing tendencies of the commerce power. He would have been able to "get over all these" defects "if the rights of the Citizens were not rendered insecure" by the virtually unlimited power of Congress under the necessary and proper clause and the lack of a guarantee of jury trials in civil cases.²⁶ But, without such guarantees, he too refused to sign the Constitution.

²²*Id.* at 637–38.

²³Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death, in Beyond Confederation: Origins of the Constitution and American National Identity* 218–21 (Beeman, Botwin & Carter, eds., 1987).

²⁴Farrand 637–38.

²⁵*Id.* at 639–40.

²⁶*Id.* at 632–33; Hon. Mr. Gerry's Objections to signing the National Constitution, in 2 *The Complete Anti-Federalist* 6–7 (Storing ed. 1981).

While Mason, Randolph, Gerry, and Pinckney argued for explicit protections of liberty, James Madison remained oddly silent. Madison was one of the most vocal delegates to the Convention. He said something on virtually every issue raised during the summer-long meeting. Why did Madison fail to support his colleagues from Virginia on this major issue? Why, if he was opposed to a bill of rights, did Madison not speak against their proposals?

There is no immediately satisfactory answer to either question. One explanation for Madison's reticence, and indeed for the majority's refusal to add a bill of rights, is a lack of time. The delegates had spent most of the summer discussing the framework of the new government. Only late in their deliberations did some delegates begin to perceive a threat to liberty from the increasingly centralized government. By then it might seem that the delegates had exhausted themselves creating the machinery of government and had neither the time nor the energy to work on a bill of rights.

Certainly by late August, and even more so by mid-September, most of the delegates were "hurrying toward adjournment" and had little patience for further debate.²⁷ But this explanation, though plausible, is ultimately unsatisfactory.

The first proposal for civil liberties protections came before the Convention on August 20, when Charles Pinckney suggested libertarian additions to the Constitution. This was late in the Convention, but certainly not too late for action. The contrast with the Fugitive Slave Clause,²⁸ which was for black Americans the antithesis of a bill of rights, is revealing. Charles Pinckney and Pierce Butler introduced this clause on August 28. The Convention adopted it the next day, after almost no debate, even though Americans had virtually no prior experience with the interstate rendition of fugitive slaves. The delegates, then, were clearly capable of swiftly and decisively expanding the Constitution even at the end of the Convention.²⁹

The lack of time argument is especially unpersuasive in Madison's case. On September 14, three days before final adjournment, Madison proposed giving Congress two new substantive powers: to grant charters of incorporation and to create a national university.

²⁷Ketcham, *The Dilemma of Bills of Rights in Democratic Government*, in *The Legacy of George Mason* 29 (Pacheco ed. 1983).

²⁸U.S. Constitution, Art. IV, §2, cl. 3.

²⁹Finkelman, note 23 *supra*, at 219–24.

That day Madison also supported a change in the wording of Article I to discourage standing armies. Clearly Madison was willing to make changes late in the Convention, but a bill of rights was not on his agenda.

The explanation for Madison's silence may be that on this issue he was uncharacteristically ambivalent. On the one hand, as a firm supporter of individual rights and personal freedom, Madison did not oppose the concept of protecting rights. He was, according to one former editor of the Madison papers, "the only one [among the founding fathers] who could be called a civil libertarian by the rigorous standards of the American Civil Liberties Union."³⁰ As early as 1774 Madison had considered "the possibility that a 'Bill of Rights' might be adopted by Congress and confirmed by the King or Parliament, such that America's liberties would be 'as firmly fixed and defined as those of England were at the revolution.'"³¹ Later he played a role in drafting Virginia's Declaration of Rights.³² As one historian has argued, "No man of his [Madison's] generation had a broader or deeper commitment to the general principles of civil liberty and procedural justice."³³

On the other hand, for a variety of theoretical, practical, and political reasons, he was uncertain if the new American Constitution ought to have a bill of rights. Thus, Madison avoided the bill of rights debate. While not speaking out on the Convention proposals to protect individual liberty, Madison voted against most of them. During the ratification debates, when forced to take a stand, he opposed a bill of rights, although not always with great conviction. Even when arguing for amendments on the floor of the House, Madison was never fully convinced that a bill of rights was necessary or even desirable. In fact, for nearly two years—from the end of the Convention in 1787 until Congress endorsed the amendments in 1789—Madison consistently accepted the validity of the federalist arguments against a bill of rights.

³⁰Hobson, James Madison, the Bill of Rights, and the Problem of the States, 31 *Wm. & Mary L. Rev.* 267, 268 (1990).

³¹Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* 245 (1972).

³²Rutland, *James Madison: The Founding Father* 11 (1987), points out that Madison proposed a key amendment to Mason's draft of the Virginia Declaration of Rights, changing religious "toleration" to "full and free exercise."

³³Meyers, *The Mind of the Founder: James Madison* xxxvii (1973).

III. REASONS FOR FEDERALIST OPPOSITION TO A BILL OF RIGHTS

There are five general reasons why Madison, along with most other federalists, opposed the addition of a bill of rights. These men believed one or more of the following propositions about a bill of rights: that it was 1) unnecessary; 2) redundant; 3) useless; 4) actually dangerous to the liberties of the people; and, 5) violative of the principles of republican government embodied in the Constitution.

1). The lack of necessity argument rested on the twin assumptions that the states were the main guarantors of liberty and that the national government under the Constitution lacked power to interfere with basic rights and liberties.

In the Convention Madison's allies argued that state protections of liberty were adequate. James Wilson asserted that one purpose of the states was "to preserve the rights of individuals." Oliver Ellsworth explained that he looked to the state governments "for the preservation of his rights." Roger Sherman argued that "the State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." He believed that the national legislature might "be safely trusted" not to interfere with the liberties of the people. Madison joined a majority of the delegates in supporting Sherman's position.³⁴

Madison also agreed that as a compact for a government of limited powers, the Constitution did not empower the national government to interfere with liberty. After ratification Madison would assert that "the rights in question are reserved by the manner in which the federal powers are granted."³⁵

2). Somewhat inconsistent with the argument that the national government could not interfere with liberty was the claim that the Constitution already protected liberty. Although federalists asserted that the Constitution did not need a bill of rights *per se*, they were quick to point out that the document contained many clauses which protected individual liberties and rights.

The Constitution prohibited any "religious test" for office hold-

³⁴1 Farrand 354, 492, and 2 Farrand 588. In the debate over a specific protection for a free press Sherman again argued that "The power of Congress does not extend to the Press" and thus the proposal was unnecessary. *Id.* at 618. Here Sherman carried a narrow majority that probably did not include Madison.

³⁵Madison to Jefferson, October 17, 1788, 11 Papers of Madison 295–300, quoted at 297.

ing; prohibited government officials from simultaneously holding more than one office; and prohibited the suspension of the writ of habeas corpus except in time of actual invasion or rebellion. Article I prohibited both Congress and the states from adopting *ex post facto* laws and bills of attainder or granting titles of nobility. Article III guaranteed jury trials in criminal cases in the district where the alleged crime took place. Article III also eliminated the old English concepts of treason and constructive treason, by requiring two witnesses to an overt act.

These Constitutional provisions protected many basic liberties and rights. One Madison biographer found “twenty-four elements of a Bill of Rights in a Constitution that is said to contain none.”³⁶ Supporters of the Constitution did not make such a careful count, but they extolled the protections of liberty in the document.

3). A third argument of the federalists conflicted with these first two. Federalists argued that a bill of rights would be useless in stopping the government from trampling on the liberties of the people. Many members of the Convention, including Madison, believed that paper guarantees of basic rights meant very little. During a debate over prohibiting *ex post facto* laws, Daniel Carroll of Maryland and James Wilson argued that “these prohibitions in the State Constitutions have no effect” and thus it was “useless to insert them” in the national constitution.³⁷ More than a year after the Convention Madison told Jefferson that “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.” He noted that in Virginia he had “seen the bill of rights violated in every instance where it has been opposed to a popular current.” He warned that “restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.”³⁸

Madison’s views on the inefficacy of “parchment barriers” reflected his fundamental distrust of democratic majorities. In the Vir-

³⁶Brant, *The Bill of Rights: Its Origin and Meaning* 12 (1965).

³⁷2 Farrand 376.

³⁸Madison to Jefferson, October 17, 1788, 11 *Papers of Madison* 297–99. For similar views by federalists see Letter of Cassius, No. 8, reprinted in *Essays on the Constitution of the United States* 28 (Ford ed. 1892), and 2 *The Debates in the State Conventions on the Adoption of the Federal Constitution* 174 (Elliot, ed., 2nd ed., 1836).

ginia legislature Madison had encountered men who “seemed so parochial, so illiberal, so small-minded, and most of them seemed to have only ‘a particular interest to serve.’ They had no regard for public honor or honesty” and were “reluctant to do anything that might appear unpopular.”³⁹ Such “clods,” as historian Gordon Wood has called them,⁴⁰ could not be expected to obey the restrictions of a bill of rights.

4). Federalists, including Madison, also argued that a bill of rights might actually be dangerous. This was based on the legal theory that any rights not enumerated in a bill of rights would have been given up. This argument assumed that a complete enumeration of all rights would be impossible. Thus, in defending the Constitution in the Pennsylvania ratifying convention, James Wilson asked who would “be bold enough to undertake to enumerate all the rights of the people?” He thought no one could, but warned that “if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.” He asserted that members of the Convention considered a bill of rights “not only unnecessary, but improper.”⁴¹ Alexander Hamilton made a similar point in *Federalist* 84, arguing that a bill of rights was:⁴²

not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

Madison agreed with this analysis. He told Jefferson if a bill of rights was added to the Constitution it had to “be so framed as not to imply powers not meant to be included in the enumeration.”⁴³

Madison further worried that a bill of rights might be dangerous because it would not fully secure rights. He believed “that a positive declaration of some of the most essential rights could not be obtained” because he assumed that New Englanders would weaken any attempt to require a separation of church and state. Thus Madison feared that the “rights of Conscience” would be “narrowed much

³⁹Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *Beyond Confederation*, at 74.

⁴⁰*Ibid.*

⁴¹3 Farrand 144, 161–61.

⁴²Hamilton, *Federalist* 84, in 4 *The Papers of Alexander Hamilton* 706 (Syrett ed. 1962).

⁴³Madison to Jefferson, October 17, 1788, 11 *Papers of Madison* 297.

more” by a bill of rights than any government would dare do on its own.⁴⁴ An incomplete or limited protection of conscience was, in Madison’s mind, worse than none at all.

5). Finally, the very notion of a republican government led federalists to argue that a bill of rights was unnecessary. Part of this argument was based on the notion that Congress lacked the power to legislate on the subjects that would be covered by a bill of rights. But this analysis went beyond the concept of a limited government. Oliver Ellsworth, writing as “Landholder,” argued that the theory of the Constitution itself precluded the need for a bill of rights. “Landholder” asserted that a bill of rights was something that the people wrested from the king, thus in America a bill of rights was “insignificant since government is considered as originating from the people, and all the power government now has is a grant *from the people*.” Similarly, James Wilson argued that “it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested.” James Iredell argued that in England a bill of rights was necessary because of the Crown’s “usurpations” of the people’s liberties. But, under the new Constitution the people delegated power to the national government, and thus Iredell argued that such usurpations by the national government were impossible. Iredell asserted that under the Constitution the government could no more “impose a King upon America” than “go one step in any other respect beyond the terms of their institution.”⁴⁵

The more sophisticated and skeptical Madison understood that a republican government might threaten liberty, but that such threats would not be by a minority attacking a majority. Rather, the threats to liberty were most likely to emanate from the legislature which represented the majority of the people. Madison further doubted that in a republic a bill of rights would have any effect against a determined legislative majority. In the Virginia ratification debates he asserted that “If there were a majority of one sect, a bill of rights would be a poor protection for liberty.” Freedom of religion, he argued, was secured by “that multiplicity of sects, which pervades America, and

⁴⁴Madison to Jefferson, October 17, 1788, *id.* at 297.

⁴⁵The Landholder, No. VI, reprinted in 3 Documentary History of the Ratification of the Constitution: Ratification by the States: Delaware, New Jersey, Georgia, Connecticut 489 (Jensen ed. 1978); Substance of an Address by James Wilson and Answer to Mr. Mason’s Objections to the new Constitution, by Marcus [James Iredell], in Pamphlets on the Constitution 161, 335 (Ford ed. 1888).

which is the best and only security for religious liberty in any society."⁴⁶ After Virginia had ratified the Constitution Madison made much the same point to Jefferson:⁴⁷

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Madison simply did not believe that a bill of rights could forestall a determined majority which might want to act in ways which would trample on the rights of a minority.

IV. WORKING FOR RATIFICATION

Madison left the Philadelphia Convention hopeful that the Constitution would be ratified. He initially did not plan to become involved in the ratification struggle, but soon was drawn into it.⁴⁸ Once involved, he became dedicated to two related goals: securing ratification and preventing a second convention to amend the Constitution because he believed such a convention would undermine the Constitution.

Madison was clearly ambivalent about the Constitution. It did not create the strong, consolidated government that he had hoped for. Indeed, "The Constitution Madison expounded and defended as 'Publius' was a pale version of the plan he had carefully worked out before the Philadelphia meeting."⁴⁹ He thought the plan was a vast improvement over the Confederation. But, whether he thought it a sufficient improvement is another matter. In urging his friends at home to support the Constitution Madison argued that the Convention had succeeded in "blending a proper stability & energy in the Government with the essential characters of the republican Form" while retaining "a proper line of demarcation between the national

⁴⁶Madison in the Virginia ratification convention, reprinted in 11 Papers of Madison 130.

⁴⁷Madison to Jefferson, October 17, 1788, *id.* at 298.

⁴⁸Editorial note, 10 Papers of Madison at 259.

⁴⁹Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *Wm. & Mary Q.* 217 (3rd Ser., 1979).

and State authorities.”⁵⁰ But, this seems more like a political posture than an accurate reflection of Madison’s true beliefs.

In more private correspondence he argued that the government created by the Constitution was still too weak. Shortly before the Convention ended he wrote in secret code to Jefferson, who was still in France, that the plan of government “will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst. the state governments.”⁵¹ In late October he still bemoaned the fact that the Convention had rejected his proposal to give Congress a “constitutional negative on the laws of the States.”⁵²

If Madison really believed that the Convention had created a proper but delicate balance between competing interests, as he wrote his friends in Virginia, then he properly feared amendments which would destroy this balance. Similarly, if Madison really viewed the Constitution as creating too weak a government, as he privately expressed to Jefferson, then he certainly did not want any amendments, including a bill of rights, which would have further weakened the national government.

Opposition to the Constitution formed as soon as the document became public. The most common antifederalist complaint was the lack of a bill of rights. Thus, in defending the Constitution Madison was forced to oppose the call for a bill of rights. To do otherwise would have been to admit that the Constitution had a major defect. Madison could not admit this; along with most federalists, he was firmly convinced that ratification of the Constitution was an all-or-nothing proposition, and an admission of the need for a bill of rights would prevent ratification.

Madison’s first test of the issue came in the soon-to-be defunct confederation Congress, which received the work of the Convention. Madison was one of over a dozen signers who were also members of Congress. These “fiery zealots”⁵³ wanted quick action to send the Constitution on to the states without any changes. In accomplishing this, Madison helped defeat a motion by Richard Henry Lee and Melancton Smith to add a bill of rights to the Constitution. The successful arguments in this brief debate were procedural, focusing on

⁵⁰Madison to Edmund Pendleton, Sept. 20, 1787, 10 Papers of Madison 171.

⁵¹Madison to Jefferson, September 6, 1787, *id.* at 163–64.

⁵²Madison to Jefferson, October 24, 1787, *id.* at 212.

⁵³The term is Richard Henry Lee’s, and is quoted in Brant, note 3 *supra*, at 161.

the complications that would arise if Congress added its own proposals to the work of the Convention.⁵⁴ Here Madison was able to oppose the addition of a bill of rights without having to take any position on its merits.

For the next two months Madison continued to avoid the question of a bill of rights. In mid-October he commented to Washington about the unfair nature of George Mason's attacks on the Constitution, but he did not mention Mason's demand for a bill of rights. When he reported to Edmund Randolph the growing opposition to the Constitution over "the omission of the provisions contended for in favor of the Press, & Juries &c.," Madison again failed to comment on the validity of the argument or to propose a strategy for combating it.⁵⁵

On October 24 Madison sent Jefferson a seventeen page letter, analyzing the strengths and weaknesses of the Constitution. This important document reveals that the Madison "who later became an indefatigable publicist in support of the new Constitution was in fact profoundly disappointed with the results of the convention."⁵⁶ Madison's main objection to the final document was the inability of the national government to veto state legislation. Madison feared that majorities within the states would destroy the liberties of minorities. He thought this problem could be prevented by giving the national government the power to overrule the states. In an argument later developed in *Federalist* 10 and 14, Madison declared that "private rights will be more secure under the Guardianship of the General Government than under the State Governments" because the constituency of the national government would be so diverse that no single group would ever control it.⁵⁷

Madison did not think that a majority in the national government might also oppress the people and deny them basic liberties. Thus, he had nothing specific to say about a bill of rights, except to note that George Mason had left Philadelphia "in exceeding ill humour"

⁵⁴Madison to George Washington, September 30, 1787, 10 Papers of Madison 179–81.

⁵⁵Madison to Washington, October 18, 1787, *id.* at 196–97; Madison to Edmund Randolph, October 21, 1787, *id.* at 199–200.

⁵⁶Editorial note, to letter of James Madison to Thomas Jefferson, October 24, 1787, *id.* at 205.

⁵⁷James Madison to Thomas Jefferson, October 24, 1787, *id.* at 212. In 1789, when he drafted what became the Bill of Rights Madison attempted to make certain amendments applicable to the states in one last attempt to secure a federal veto over some state legislation. This provision passed the House but was deleted by the Senate.

and that his chief complaint was that he “considers the want of a Bill of Rights as a fatal objection.”⁵⁸ Madison did not comment on the merits of this position. At this point in his career Madison thought that the national government needed to be strengthened to protect the people from their state governments, but he saw no reason to think that the people needed a bill of rights to be protected from the national government.

V. DEFENDING THE CONSTITUTION, OPPOSING A BILL OF RIGHTS, AND THE FEDERALIST PAPERS

In mid-November 1787 Madison joined Alexander Hamilton in writing *The Federalist*.⁵⁹ This was the beginning of his active involvement in the ratification process. As “Publius” Madison began to articulate more fully—and in public—his opposition to a bill of rights.

In his first contribution to the series, the now-classic *Federalist* 10, Madison argued that the greatest danger to liberty in a Republic came from “the violence of faction” which he defined as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregated interests of the community.”⁶⁰ Madison saw no way to eliminate the causes of faction without destroying political liberty itself. But he argued that political factions might be controlled by increasing the size of an electoral district, thus increasing the number and diversity of the electors, so no single interest could actually obtain a majority. “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”⁶¹

⁵⁸Madison to Jefferson, October 24, 1787, *id.* at 215.

⁵⁹The editors of the Papers of Madison suggest that Madison was not brought into the project “until the middle of November, perhaps as late as the seventeenth.” *Id.* at 261. Ralph Ketcham argues that the collaboration began just after October 10. Ketcham, *James Madison: A Biography* 239 (1971).

⁶⁰*Federalist* 10, in 10 Papers of Madison 264. He had of course developed these arguments earlier, in *The Vices of the Political System*, reprinted in 9 Papers of Madison 350–54.

⁶¹*Federalist* 10, in 10 Papers of Madison, at 269.

Under the theory expressed in *Federalist* 10,⁶² a bill of rights was unnecessary to protect people from oppressive majorities, because the majorities themselves would typically take the form of unstable coalitions of different groups. As such, they would be unable to threaten the people's liberties. The theory of *Federalist* 10 turned on the informal structure of the government under the Constitution. Competing and diverse interests would neutralize each other, making a bill of rights unnecessary.

In *Federalist* 51 Madison elaborated on how the Constitution's system of checks and balances combined with the diversity of the people to provide formal defenses against one faction taking power and depriving the citizens of their liberty. Madison argued that "If men were angels, no government would be necessary," but, given human nature Madison believed some formal controls were necessary. He thought the people themselves would "no doubt [be] the primary control on the government" but that "auxiliary precautions" were also useful, including the Constitution's aim "to divide and arrange several offices in such a manner that each may be a check on the other." This, Madison argued, would prevent any single branch of government from threatening liberty. Furthermore, the division between the states and the federal government would provide a "double security to the rights of the people."⁶³

In *Federalist* 51 Madison again asserted, as he had in *Federalist* 10, that the competing interests caused by diversity of the people was the key to liberty. As long as the ⁶⁴

society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.

As Jack Rakove has succinctly phrased it, Madison's theory rested on the notion that "Diversity begets jealousy, and jealousy begets se-

⁶²This was a theory of government that Madison had been working on in 1786, when he made Notes on Ancient and Modern Confederacies, and then in the Spring of 1787, when he drafted the memorandum On the Vices of the Political System of the United States. During the Federal Convention of 1787, Madison also argued along the lines later developed in *Federalist* 10.

⁶³*Federalist* 51, 10 Papers of Madison 477–78.

⁶⁴*Federalist* 51, *id.* at 478–79.

curity.”⁶⁵ While not explicitly rejecting the idea of a bill of rights in *Federalist* 51, the implications of his argument are that diversity of interests—not any formal document—would ultimately preserve fundamental rights.

Madison reiterated these points in *Federalist* 57, arguing that the “vigilant and manly spirit which actuates the people of America” would prevent the legislature from usurping its power.⁶⁶ Furthermore, ever attuned to turning private interest to the public good, Madison argued that members of the House of Representatives would never betray the liberties of the people because if they did, they would not be reelected. In essence Madison argued in *Federalist* 10, 51, and 57 that the political process, the governmental structures, and the social and demographic diversity of the nation would protect liberty.

In *Federalist* 38 he casually dismissed calls for a bill of rights because the antifederalists could not all agree on what protections of liberty they wanted.⁶⁷ Rhetorically asking “Is a bill of rights essential to liberty,” he noted the “confederation has no bill of rights.”⁶⁸ Such arguments were inherently weak. That some antifederalists did not want a bill of rights, or others could not completely agree on its contents, did not diminish the need for one. Madison also well knew that the demand for a bill of rights was a result of the strengthening of the national government by the new Constitution. Thus, it was disingenuous for Madison to argue that the Constitution did not need a bill of rights because the Articles of Confederation lacked one.

In *Federalist* 44 Madison pointed out that the Constitution prohibited the states from passing bills of attainder, *ex post facto* laws, or laws impairing the obligations of contracts, even though such laws were also prohibited in the “declarations prefixed to some of the state constitutions.” Here Madison argued that “experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted.”⁶⁹ Madison did not explain why “additional fences” against the federal government were also not useful.

In *Federalist* 46 he argued that the state governments would prevent the national government from usurping powers not granted in the

⁶⁵Rakove, *The Madisonian Theory of Rights*, 31 *Wm. & Mary L. Rev.* 245, 259 (1990).

⁶⁶*Federalist* 57, 10 *Papers of Madison* 523.

⁶⁷*Federalist* 38, *id.* at 367–68.

⁶⁸*Federalist* 38, *id.* at 370.

⁶⁹*Federalist* 44, *id.* at 421.

Constitution. This implied that the people did not need to fear that their liberties would be taken from them by the national government, and thus, again by implication, that a bill of rights was unnecessary. In *Federalist* 48 he returned to the theory—again by implication—that bills of rights were useless. Here he noted that in Pennsylvania “the constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the constitution.”⁷⁰ Thus Madison reiterated his belief in the danger and futility of relying on “parchment barriers against the encroaching spirit of power.”⁷¹ The same analysis might effectively have shown the potential danger of usurpation of power by the national government under the proposed constitution. But if Madison saw the double-edged nature of his argument, he did not comment on it.

The most direct statement on the bill of rights in *The Federalist* did not come from Madison, but rather from Hamilton, who argued in *Federalist* 84: “Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”⁷² Madison probably subscribed to this position. After all the essays were published, Madison explained that while “the writers are not mutually answerable for all the ideas of each other” the project was carried out “in concert” between the three authors.⁷³ “In concert” the authors put together a general outline of the project, which probably included some agreement on major issues and strategies. In the absence of evidence to the contrary, it seems reasonable to conclude that Madison did not disagree with Hamilton on this point.

VI. THE PRIVATE MADISON AND THE BILL OF RIGHTS

In his private correspondence during the ratification struggle Madison gave further evidence of his opposition to a bill of rights. This position developed despite pressure from correspondents and friends to recognize the merits of a bill of rights. For George Turber-

⁷⁰*Federalist* 48, *id.* at 459.

⁷¹*Federalist* 48, *id.* at 456. Madison would use the term “parchment barriers” somewhat later in a direct reference to the bill of rights. Madison to Jefferson, October 17, 1788, 11 Papers of Madison 297–99.

⁷²Hamilton, *Federalist* 84, in 4 The Papers of Alexander Hamilton 706.

⁷³Madison to Jefferson, August 11, 1788, 11 Papers of Madison 227.

ville, a minor Virginia politician, he simply laid out his “powerfull reasons that may be urged agt. the adoption of a Bill of Rights.”⁷⁴ But to his closest friends, like Washington, Jefferson, and Edmund Pendleton, Madison revealed both his opposition to a bill of rights and his hostility to opponents of the Constitution who demanded such an addition.

Most federalists, including Madison, held their opponents in contempt and did not take seriously their demands for a bill of rights. General Henry Knox believed that antifederalists were “Demagogues and vicious characters.” In New England federalists described their opponents as “wicked,” “malignant, ignorant, and short-sighted triflers.” A federalist in North Carolina referred to his opponents as “a blind stupid set, that wish Damnation to their Country,” who were “fools and knaves” opposed to “any man of abilities and virtue.” A New Hampshire federalist predicted “that none but *fools, blockheads, and mad men*” opposed the Constitution. In New York the anonymous “Caesar” thought that the demands for a bill of rights were made by “designing croakers” in order “to frighten the people with ideal bugbears.”⁷⁵

Madison also buttressed his opposition to a bill of rights by attacking the integrity and motives of his opponents. He divided Virginia’s supporters of amendments into two categories: men like Edmund Randolph and George Mason, who “do not object to the substance of the Governnt. but contend for a few additional Guards in favor of the Rights of the States and of the people,” and others, led by Patrick Henry, who sought amendments that would “strike at the essence of the System.”⁷⁶ He believed Henry’s group had “disunion assuredly for its object” while disunion was the “real tendency” of all oppo-

⁷⁴George Turberville to Madison, April 16, 1788, in *id.* at 23. Madison’s letter to Turberville, which contained these “powerful reasons,” is now lost, but we can assume that they were a summary of arguments in *The Federalist* and elsewhere.

⁷⁵Rutland, *Ordeal of the Constitution: The Antifederalists and the Ratification Struggle, 1787–1788* 34, 73, 269, 216 (1966). *Letters of Caesar, II*, in *Essays on the Constitution* 289 (Ford ed. 1892). Ford incorrectly identifies the author of this letter as Alexander Hamilton. See 4 *The Papers of Alexander Hamilton* 278–79.

⁷⁶Madison to Jefferson, December 9, 1787, 10 *Papers of Madison* 312. In April Madison modified his analysis, informing Jefferson that Randolph “cannot properly be classed with its [the Constitution’s] enemies,” while Mason was “growing every day more bitter” and had become “outrageous” in his opposition and would “in the end be thrown by the violence of his passions into the politics of Mr. H_____y.” Madison to Jefferson, April 23, 1788, 11 *Papers of Madison* 28–29. When the Virginia convention began Madison happily reported Randolph firmly in the federalist camp, noting that “The Govr. has declared the day of previous amendments past. . . .” Madison to Rufus King, June 4, 1788, *id.* at 76.

nents. Thus Madison felt that there could be “no middle ground” between supporters and opponents of the Constitution.⁷⁷

While Madison conceded that some opposition in Virginia came from “men of intelligence, patriotism, property, and independent circumstances,” he thought their grass-roots support was from people “much accustomed to be guided by their rulers.” In other words, in Virginia a few demagogues, like Patrick Henry, were misleading the people. In most of the rest of the country the educated elite were “zealously attached to the proposed Constitution.” He was particularly pleased that in New England “the men of letters, the principle Off[ic]ers of Govt. the Judges & Lawyers, the Clergy, and men of property” almost universally supported the Constitution.⁷⁸

He described the Massachusetts antifederalists as including “scarce a man of respectability.” They were a combination of supporters of Shays’ Rebellion and “ignorant and jealous men, who had been taught or had fancied that the Convention at Philada. had entered into a conspiracy against the liberties of the people at large, in order to erect an aristocracy for the rich, the *well-born*, and the men of Education.” On the other hand, “all the men of abilities, of property, and of influence” supported the Constitution.⁷⁹

Such observations help explain Madison’s hostility to amendments. He believed the proponents of amendments were either anti-nationalists, like Henry, out to destroy the Constitution, or men who lacked “intelligence, patriotism, property, and independent circumstances.” They were, in other words, not men who Madison thought should govern the republic. Because Madison believed that all who demanded amendments “threaten shipwreck to our liberty,”⁸⁰ he could not admit that any of their points might be valid. No wonder Madison condemned the recommended amendments of the Massachusetts ratifying convention as “a blemish” even though he conceded they were “in the least Offensive form.”⁸¹

⁷⁷Madison to Edmund Pendleton, February 21, 1788, 10 Papers of Madison 532–33.

⁷⁸Madison to Jefferson, December 9, 1787, *id.* at 312–13. Madison was “persuaded” that some of those supporting amendments, especially in Virginia, did so “with the most patriotic & virtuous intentions.” He conceded that “men equally respectable in every point of character” were on both sides of the issue, but nevertheless believed the opposition in his home state would “either dismember the Union” or injure Virginia’s pride and “foresight.” Madison to Archibald Stuart, December 14, 1787, *id.* at 325–26.

⁷⁹Madison to Edmund Pendleton, February 21, 1788, *id.* at 532–33; Madison to Jefferson, February 19, 1788, *id.* at 519.

⁸⁰Madison to George Washington, December 14, 1787, *id.* at 327.

⁸¹Madison to Washington, February 15, 1788, *id.* at 510–11.

Echoing *Federalist* 38, Madison was also contemptuous of the anti-federalists because they could not agree on what they wanted.⁸² He argued that if the antifederalists “were to enter into an explicit & particular communication with each other, they wd find themselves as much at variance in detail as they are agreed in the general plan of amendments.” He believed their only agreement would be on “points of very little substance.”⁸³ Their positions were “as heterogeneous as can be imagined.”⁸⁴

That federalists were also “heterogeneous” on many points did not seem to trouble Madison. By the spring of 1788 Madison wanted the Constitution ratified at all costs, and he would work with anyone toward that end and similarly opposed any idea which might undermine that goal.

VII. THE VIRGINIA RATIFYING CONVENTION

In late February Madison began making plans to return to Virginia to seek election to that state’s ratifying convention. Mounting hostility to the Constitution made his presence imperative. By the time Madison left New York the debate over a bill of rights had been altered. The critical change came in Massachusetts.

When the Massachusetts ratifying convention opened in January 1788, an antifederalist majority seemed certain to defeat the Constitution. The convention elected John Hancock, an apparent anti-federalist, as its president. A key opposition leader was Samuel Adams, the old revolutionary, who was an important and powerful politician in the Commonwealth, and a man who had been committed to bills of rights since the beginning of the Revolution.⁸⁵ Many delegates came to the Boston convention with instructions from their constituents to oppose ratification unless a bill of rights was added to the Constitution.

With opponents of ratification in apparent control, the Massachusetts federalists sought a compromise. They suggested that a series of recommended amendments to the Constitution be sent to Congress along with the convention’s ratification. John Hancock was persuaded to present these amendments to the convention. Samuel

⁸²Note 62 *supra*.

⁸³Madison to Archibald Stuart, December 14, 1787, 10 Papers of Madison 326.

⁸⁴Madison to Edmund Pendleton, February 21, 1788, *id.* at 532–33.

⁸⁵Maier, *The Old Revolutionaries: Political Lives in the Age of Samuel Adams* 25 (1980).

Adams offered a counter-proposal that the convention actually add a bill of rights to the beginning of the Constitution, and then ratify both. Had this motion been successful, Massachusetts's ratification would have been conditional, and only gone into effect if the other states accepted the Massachusetts amendments. The danger of prior amendments, which is what Samuel Adams wanted, was that each state would propose different amendments and the Constitution would never be ratified.

When his motion for prior amendments was defeated, Adams joined Hancock in supporting ratification with recommended amendments. A few other antifederalists joined as well, and the Constitution squeaked through, by a vote of 187 to 168. A change of only ten votes would have defeated the Constitution in Massachusetts.

The importance of the Massachusetts compromise—ratification with recommended amendments—was not immediately apparent to Madison and his friends. Edmund Randolph thought the Massachusetts amendments were a “paltry snare” which were either “inadmissible,” aimed against the Southern states, or “milk & water.”⁸⁶ Madison thought the ratification in Massachusetts had “almost extinguished” the hopes of the New York antifederalists. He did not think the proposed amendments mattered one way or the other, although he believed they were a “blemish.” Madison's attentions were already focused on New Hampshire and Virginia.⁸⁷

In early March Madison left New York for Virginia. For the first time in his public career Madison was forced to campaign for office. On March 22 Madison probably met with Rev. John Leland, an influential Baptist minister who at the time was hostile to the Constitution. Leland and other Baptists feared that the Constitution would undermine religious freedom in the nation. Madison's long record of supporting religious liberty, and his sincere empathy for Leland's concerns, convinced the minister to support Madison for the Virginia convention.⁸⁸

Madison reached Montpelier on March 23, the day before the election for delegates to the Virginia ratification convention. On the 24th

⁸⁶Randolph to Madison, February 29, 1788, 10 Papers of Madison 542–43.

⁸⁷Madison to Randolph, Madison to Washington, and Madison to Edmund Pendleton, all on March 3, 1788, *id.* at 554–55; 555–56; 554.

⁸⁸Butterfield, Elder John Leland, *Jeffersonian Itinerant*, 62 Proceedings of the American Antiquarian Society 183–96 (1952).

Madison overcame his natural shyness to give his first public speech before the voters. He tried to dispel the “absurd and groundless prejudices against the foederal Constitution” that had been growing in his absence. This brief campaign was successful, as he beat his nearest anti-federalist rival by a margin of almost four to one.⁸⁹ Madison was pledged to support the Constitution as written. He was not pledged to prior amendments, or any other alterations of the document.

Madison’s meeting with Leland was critical to his election campaign, because Madison believed the support of the Baptists was crucial to his electoral success. Indeed, it seems likely that “Madison owed his presence in the Virginia convention to” Leland and other “dissenters whose trust he had earned in the struggle for religious liberty.”⁹⁰

The meeting with Leland was also critical for Madison’s eventual support for a bill of rights. Until this time Madison dismissed the antifederalist demand for a bill of rights as a smokescreen for defeating the Constitution. In Leland, however, Madison faced a man who wanted to support the Constitution, but sincerely feared that without a bill of rights freedom of religion would be jeopardized under the new government. Madison could not easily dismiss Leland’s arguments as politically motivated because they were not. Thus, for the first time Madison was forced to take seriously the bill of rights argument.

The Virginia voters elected a convention that was almost evenly split between federalists and antifederalists. Almost immediately some of Madison’s friends urged that the Massachusetts model be applied to Virginia. George Nichols argued it was the only basis on which compromise “can safely take place.”⁹¹ Madison agreed. He did not think amendments were a particularly good idea, but he did believe that proposing them as Massachusetts had done, to be considered after ratification, would blunt antifederalist opposition. The Massachusetts plan was “unquestionably the Ultimatum of the foederalists” while conditional ratification or a second convention would “be fatal.”⁹²

⁸⁹Madison to Eliza House Trist, March 25, 1788, 11 Papers of Madison 5–6.

⁹⁰Kukla, *A Spectrum of Sentiments: Virginia’s Federalists, Antifederalists, and Federalists Who are For Amendments, 1787–1788*, 96 *Va. Mag. of Hist. & Biog.* 282 (1988).

⁹¹George Nichols to Madison, April 5, 1788, 11 Papers of Madison 8–9.

⁹²Madison to George Nichols, April 8, 1788, *id.* at 11–12.

Madison easily saw the practical value of supporting subsequent amendments as a way of obtaining immediate ratification. He told Edmund Randolph he was ready to support them in Virginia. This was perhaps the bridge that could connect strong federalists, like Madison, with more reluctant supporters of the Constitution, like Randolph. Nevertheless Madison remained skeptical about the effectiveness of this tactic. He believed that in Massachusetts the proposed amendments had been directed at popular sentiment, and had actually done little to sway opponents in the ratification convention.⁹³

As the Virginia convention approached, Madison's views firmed. There was a real danger that the Virginia convention would endorse conditional ratification based on subsequent amendments or, worse yet, a demand for a second convention. If Virginia adopted either "the Constitution, and the Union will be both endangered."⁹⁴ Madison, who had once given lukewarm support to the Constitution, now equated its success with that of the nation itself.

This change was not the result of his changing views of the Constitution. Rather it reflected his realization of the true nature of politics in America. If a second convention came about, Madison feared there would be "little" of the "same spirit of compromise" of the previous summer. Madison expected that at a new convention it would be "easy also for those who have latent views of disunion, to carry them on under the mask of contending for alterations popular in some but inadmissible in other parts of the U. States."⁹⁵ Madison could give no quarter to those who wanted fundamental changes in the Constitution, because they would undermine ratification. At the same time, he had to blunt their demand, growing more popular each day, for a bill of rights. Recommended amendments looked better all the time.

In the Virginia convention Madison gave no immediate indication of his new position. Early in the convention he stressed his argument, previously made in *Federalist* 10, that the greatest threat to liberty came from the "majority trampling on the rights of the minority."⁹⁶ He also reiterated the argument made by Wilson in the

⁹³Madison to Randolph, April 10, 1788, *id.* at 18–19.

⁹⁴Madison to Jefferson, April 23, 1788, *id.* at 28–29.

⁹⁵*Ibid.*

⁹⁶Speech of Madison, June 6, 1788, *id.* at 79.

Pennsylvania convention and by Hamilton in *Federalist* 84 that civil liberties could not be harmed because of the limited nature of the national government. The Congress could create no national religion because “The government has no jurisdiction over it.”⁹⁷

Madison then attacked the impracticality of “obtaining previous amendments” to the Constitution. He noted that any amendments Virginia adopted would also have to be submitted to all the other states, which might then submit amendments of their own.⁹⁸ This would lead to an endless process that would produce nothing. Significantly, Madison still did not suggest recommended amendments, such as Massachusetts had proposed.

On June 12 Madison argued against a bill of rights because paper guarantees were worth little. Madison asked:⁹⁹

Is a bill of rights a security for religion? Would the bill of rights in this state exempt the people from paying for the support of one particular sect, if such sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty.

In answering his own questions Madison reiterated his notion that diversity protected liberty. He found that religious liberty was protected by “that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.”¹⁰⁰ Reminding the Convention that he had always “warmly supported religious freedom,” Madison argued that “a variety of sects,” not a bill of rights, was the key to religious freedom.¹⁰¹

By mid-June Madison privately predicted that opponents of the Constitution would be narrowly defeated in their demand for previous amendments.¹⁰² Confident of ultimate success, for the first time Madison argued against the substance of some rights.

A common antifederalist complaint was that the Constitution did

⁹⁷Speech of Madison, June 6, 1788, *id.* at 84.

⁹⁸*Ibid.*

⁹⁹Speech of Madison, June 12, 1788, *id.* at 130.

¹⁰⁰*Ibid.*

¹⁰¹Speech of Madison, June 12, 1788, *id.* at 131.

¹⁰²Madison to Rufus King, June 18, 22, 1788, *id.* at 152, 167. See also, on Madison’s confidence, Madison to Hamilton, June 20, 1788, and June 22, 1788, Madison to George Washington, June 23, 1788, and Madison to James Madison, Sr., June 20, 1788, *id.* at 157, 166, 168, 157–58.

not guarantee trials in the district where an alleged crime took place. This complaint would eventually be remedied by the Sixth Amendment. At the Virginia convention Madison argued that such a remedy was unnecessary, and might be decidedly dangerous to the welfare of the nation. He claimed that he would have supported a “provision for a jury from a vicinage” but only if it could be “done with safety.” But, Madison argued that in some situations, like a rebellion, a trial “would be impracticable in the county” where the law was violated. Madison noted that even though the jury trial was “sacred” in America, there had nevertheless been numerous “deviations” from it since independence. Madison concluded that the legislature must have “discretion” in setting the rules for trials.¹⁰³

Two days later Madison spoke against ratification with amendments. Now fully expecting to win a vote for ratification, he was also confident the convention would defeat prior amendments. After ratification he was prepared to support “a conciliatory declaration of certain fundamental principles of liberty, in a form not affecting the validity & plentitude of the ratification.”¹⁰⁴

Madison once again argued that previous amendments were impractical and that a bill of rights was unnecessary. The impracticality argument rested on the assumption that a demand for previous amendments by Virginia would lead to similar demands from other states, and require that the ratification process begin again. He then reasserted the long-held federalist position that “every thing not granted” to the federal government by the Constitution “is reserved” to the states or the people. He further argued that “an imperfect enumeration” of rights “is dangerous.”¹⁰⁵

Having dismissed the need for a bill of rights, Madison made one major concession to the opposition. He declared that if Virginia ratified the Constitution, he and other federalists would “freely, fairly and dispassionately consider and investigate your propositions, and endeavour to gratify your wishes.” He promised that those amendments which were “not objectionable, or unsafe” could be “subsequently recommended” after ratification. But, he did not admit such amendments might be necessary. Rather, he argued, they would be considered “because they can produce no possible danger,

¹⁰³Speech of Madison, June 20, 1788, *id.* at 164.

¹⁰⁴Speech of Madison, June 24, 1788, *id.* at 174–75; Madison to Ambrose Madison, June 24, 1788, *id.* at 170–71.

¹⁰⁵Speech of Madison, June 24, 1788, *id.* at 174–75.

and may gratify some gentlemen's wishes."¹⁰⁶ Thus, even as Madison accepted the idea of amendments, he did so as a matter of political expedience and accommodation, rather than as a matter of conviction.

VIII. MADISON, JEFFERSON AND THE BILL OF RIGHTS: RECONSIDERING THE "GREAT COLLABORATION"

While Madison was working for ratification, and fighting against a bill of rights, he was involved in a long-distance correspondence with Thomas Jefferson, who was then America's ambassador in Paris. The two had previously been allied in various political enterprises at the state and national level.¹⁰⁷ Now they disagreed over the importance of a bill of rights.

The conventional historical wisdom is that Jefferson pointed out the importance of a bill of rights "in letters persuading Madison to switch positions."¹⁰⁸ But it is not clear whether Jefferson's letters had any effect on Madison's actions or views. Certainly in the short run they did not, because the distance between the two men, and the long time it took for letters to be exchanged, made it impossible for the letters to have any immediate impact. At first glance, for example, Jefferson's well-known letter of December 20, 1787 seems to be an important criticism of Madison's position.¹⁰⁹ But, Madison did not receive this letter until July, 1788, after Virginia had ratified the Constitution and Madison himself had publicly announced his willingness to support future amendments.

Madison often wrote to Jefferson in code, which allowed him the luxury of great candor in an age when mail delivery was erratic and private letters might fall into the wrong hands. Because of the many months that it took for letters to cross the Atlantic, Madison did not fear that his openness would have adverse political repercussions. Thus, this correspondence tells us what Madison really believed about the bill of rights. The letters confirm that Madison's opposition was not simply tactical, but that he truly opposed the adoption of a bill of rights. This investigation also undermines the view that Jefferson "converted Madison to the cause of adding a Bill of Rights

¹⁰⁶Speech of Madison, June 24, 1788, *id.* at 177.

¹⁰⁷See generally, Koch, Jefferson and Madison: The Great Collaboration 3–32 (1950).

¹⁰⁸Levy, note 9 *supra*, at 114.

¹⁰⁹Jefferson to Madison, December 20, 1787, in 12 Jefferson Papers 438.

to the new federal Constitution.”¹¹⁰ The evidence suggests that Madison was converted to a bill of rights by political necessity rather than logical argument and that the conversion, such as it was, took place before Madison received Jefferson’s letter of December 20, 1787 or his other letters urging the addition of a bill of rights.

A. JEFFERSON’S VIEWS

The day after the Convention ended George Washington sent a copy of the Constitution to Thomas Jefferson. In mid-October Benjamin Franklin sent Jefferson an official copy of the document. Finally, on October 24, 1787, Madison sent Jefferson a seventeen page letter and a copy of the Constitution.¹¹¹

In late December, 1787, Jefferson finally received Madison’s long letter of October 24th. By this time Jefferson had already seen a copy of the Constitution, and already corresponded with his counterpart in London, John Adams, about the lack of a bill of rights.¹¹²

Madison’s October 24, 1787, letter gave Jefferson a short history of the Convention. Madison was guardedly enthusiastic about the Constitution, but thought it did not go far enough in nationalizing power.¹¹³ Jefferson’s thoughtful response, his famous letter of December 20, 1787, reflected quite different concerns about the Constitution. After detailing what he liked about the Constitution, Jefferson turned to “what I do not like.”¹¹⁴

Jefferson’s first complaint was “the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land. . . .” Jefferson disputed James Wilson’s arguments “that a bill of rights was not necessary because all is reserved

¹¹⁰Levy, *Jefferson and Civil Liberties: The Darker Side* 3 (1st ed. 1963).

¹¹¹Koch, note 107 *supra*, at 39, states that these men “rushed copies” of the Constitution to Jefferson. This is true for Washington, but not for Franklin and Madison, who sent their letters on October 14 and October 24. Washington to Jefferson, Sept. 18, 1787; Franklin to Jefferson, October 14, 1787; 1787 in 12 *The Papers of Thomas Jefferson* 149, 236, 270 (Boyd ed. 1955) (cited below as *Jefferson Papers*). Madison to Jefferson, October 24, 1787, 10 *Papers of Madison* 205–20.

¹¹²John Adams to Jefferson, November 10, 1787; Jefferson to Adams, November 13, 1787; Jefferson to Madison, December 20, 1787, all in 12 *Jefferson Papers* 334, 349, 438.

¹¹³See text at notes 35–39 *supra*.

¹¹⁴Jefferson to Madison, December 20, 1787, 12 *Jefferson Papers* 441.

in the case of the general government which is not given. . . .”¹¹⁵ Unbeknownst to Jefferson, Madison had taken more or less the same position as Wilson on this question.¹¹⁶ Jefferson thought Wilson’s argument was “*gratis dictum*” which was “opposed by strong inferences from the body” of the Constitution. Jefferson argued that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”¹¹⁷

This letter, which is useful for an understanding of Jefferson’s views on fundamental rights, had no effect on Madison’s actions during ratification, because Madison did not receive it until July, 1788, which was after Virginia had ratified the Constitution and, for tactical reasons, Madison had agreed to support amendments. When Madison answered Jefferson’s letter of December 20, 1787, he said nothing about a bill of rights, perhaps because Jefferson’s points were already moot.¹¹⁸ Madison had already agreed to support amendments that were “not objectionable, or unsafe,”¹¹⁹ not because he had been convinced of their virtues by Jefferson’s arguments, but rather because he had accepted the political necessity of them.

On July 31, 1788, Jefferson wrote Madison once again, “rejoic[ing] at the acceptance of our new constitution by nine states.”¹²⁰ Jefferson apparently knew about New Hampshire’s ratification on June 21, but not about Virginia’s (the 10th state) on June 25.¹²¹ Nor did Jefferson know that Madison (without the benefit of Jefferson’s letter of December 20, 1787) had supported subsequent amendments. Thus, Jefferson once again urged Madison to support a bill of rights.

The Constitution was “a good canvas, on which some strokes only want retouching.” Jefferson’s brush would paint a bill of rights that would “go to Juries, Habeas corpus, Standing armies, Printing, Religion & Monopolies.” Jefferson argued that “the few cases wherein

¹¹⁵Jefferson to Madison, December 20, 1787, *id.* at 440.

¹¹⁶See text *supra* at III.

¹¹⁷Madison to Jefferson, October 24, 1787, 12 Jefferson Papers 270–86; Jefferson to Madison, Paris, December 20, 1787, *id.* at 438, 440.

¹¹⁸Madison to Jefferson, July 24, 1788, 11 Papers of Madison 196–98.

¹¹⁹Speech of Madison, June 24, 1788, *id.* at 177.

¹²⁰Jefferson to Madison, July 31, 1788, *id.* at 212.

¹²¹Curiously, from the Jefferson Papers it appears that none of Jefferson’s many friends in Virginia bothered to write him after the Virginia convention ratified the Constitution on June 25 or finished its deliberations on the 27th.

these things may do evil, cannot be weighed against the multitude wherein the want of them will do evil." He hoped that "a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances."¹²²

B. MADISON'S VIEWS

In August 1788 Madison sent Jefferson two letters which described the ratification struggles in New York and North Carolina. His focus remained on the adoption of the Constitution, and not on the protection of rights under it. He conceded to Jefferson that the Constitution was not perfect and that "A trial for one year [of the workings of the Constitution] will probably suggest more real amendments than all the antecedent speculations of our most sagacious politicians."¹²³ This indicates that Madison was more concerned with the mechanics of government under the Constitution than a bill of rights, which he viewed as a tactical issue, rather than one of principle.

In mid-October Madison received Jefferson's letter of July 31, in which the latter strenuously argued for a bill of rights. Madison had never responded to Jefferson's arguments set out in his letter of December 20, 1787. Nor had he responded to Jefferson's public letters, which had continued to "criticise . . . the omission of a bill of rights."¹²⁴ Finally, on October 17, 1788, Madison faced the criticism of his friend.

His response showed that after a year of calls for a bill of rights, which included two strong appeals from Jefferson, Madison remained basically unconvinced. Madison claimed that his "own opinion has always been in favor of a bill of rights," but he then repeated the litany of federalist arguments against a bill of rights, including: (1) that it was unnecessary under a government of limited powers; (2) that it could not be complete enough, especially because New Englanders would oppose absolute religious freedom; (3) that the inherent tension between the states and the federal government made a bill

¹²²Jefferson to Madison, July 31, 1788, 11 Papers of Madison 212, 213.

¹²³Madison to Jefferson, August 23, 1788, *id.* at 238–39; see also Madison to Jefferson, August 10, 1788, *id.* at 225. On September 21, and October 8, 1788, Madison again wrote to Jefferson, but did not discuss the substantive questions of a bill of rights. *Id.* at 257–59, 276–77.

¹²⁴Madison to Edmund Randolph, August 2, 1788, *id.* at 215.

of rights unnecessary; (4) that “[r]epeated violations of these parchment barriers” showed that a bill of rights was useless; and (5) that a bill of rights was only needed to protect the people against a monarch, which was not a situation the Americans faced.¹²⁵

Having explained to Jefferson why a bill of rights was unnecessary, Madison offered three reasons why he was now willing to support one. First, he acknowledged that “political truths declared” in a “solemn manner” would “acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.” Second, Madison acknowledged the unlikely event that the government itself might oppress some or even a majority of the people. Although doubtless a depressing scenario for a committed republican, Madison seemed to recognize that even in a republic the elected government might trample on the rights of the people and the people might not immediately resist their own government. Under such circumstances, “a bill of rights will be a good ground for an appeal to the sense of the community.” Finally, he conceded a small point to the opposition, noting that perhaps “a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty,” and a bill of rights would be “prudent” “especially when the precaution can do no injury.” Not ready to concede too much to the antifederalists (even though they were now thoroughly defeated) Madison immediately added that he saw “no tendency in our governments to danger on that side.”¹²⁶

As if he had conceded too much to the opposition, even in this private letter to Jefferson, Madison reiterated his ambivalence about a bill of rights. “Supposing a bill of rights be proper” he wrote, “I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided.”¹²⁷ He warned that¹²⁸

restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm

¹²⁵Madison to Jefferson, October 17, 1788, *id.* at 297–98.

¹²⁶Madison to Jefferson, October 17, 1788, *id.* at 298–99.

¹²⁷Madison to Jefferson, October 17, 1788, *id.* at 299.

¹²⁸*Ibid.*

the people as well as the Government, and a suspension of Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure.

Madison's distrust in democracy led him to believe that no legislature would obey either constitutionally or self-imposed limits. The "clods" (as historian Gordon Wood has called them) in the legislature, whether it be state or federal, would do as they pleased.¹²⁹

Well before he received Madison's letter of October 17, 1788, Jefferson made one more plea for a bill of rights. On November 18, 1788, he urged Madison to support a bill of rights, not on ideological or philosophical grounds, but as a matter of practical politics. Jefferson argued that "the minorities [the antifederalists] are too respectable not to be entitled to some sacrifice of opinion in the majority. Especially when a great proportion of them would be contented with a bill of rights."¹³⁰ By the time Madison received this letter, in March 1789, he had already adopted this position, and in fact been elected to Congress on the basis of it.¹³¹

Meanwhile, Madison's letter of October 17, 1788, was delayed even longer than usual for transatlantic correspondence. It did not reach Jefferson until February 1789, and he did not respond until March 15, 1789. In this response Jefferson showed his respect for some of Madison's positions, but continued to argue strenuously for a bill of rights. This letter, however, had little effect on Madison's subsequent conduct—his paternity of the Bill of Rights—because he did not receive it until the end of May. By then Madison had already put Congress on notice of his intention to propose amendments. In response to Jefferson's letter of March 15, Madison wrote that a bill of rights would be introduced into Congress within a week.¹³²

IX. MADISON MOVES TOWARD HIS PATERNITY

Throughout the ratification struggle Madison's opposition to a bill of rights was both tactical and theoretical. In his letter to Jeffer-

¹²⁹See text at note 38 *supra*. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *Beyond Confederation*, at 74.

¹³⁰Jefferson to Madison, November 18, 1788, 11 *Papers of Madison* 353–54.

¹³¹Madison to Jefferson, March 29, 1789, 12 *Papers of Madison* 38.

¹³²Jefferson to Madison, March 15, 1789; Madison to Jefferson, May 27, 1789, *id.* at 13, 186. Before he received Madison's letter of October 17, Jefferson once more urged his friend to support a bill of rights.

son of October 17, 1788, Madison had detailed his theoretical arguments.¹³³ His tactical position was one which even Jefferson understood. Simply put, Madison wanted the Constitution ratified without a second convention being called. He felt that even an admission that a bill of rights was necessary might jeopardize this goal, while a concession on prior amendments would certainly have endangered ratification.

Despite his claim in his October 17, 1788, letter that he had “always been in favor of a bill of rights,” Madison seems not to have favored one until he introduced his amendments in Congress. Even then, it is not clear that Madison theoretically supported the amendments.

How and why did Madison move to his reluctant paternity? The answers to both questions are tied to the politics of Virginia in 1788–89.

Virginia’s ratification of the Constitution was an embarrassing defeat for Patrick Henry. He correctly saw Madison as the chief cause of this outcome. “To humiliate Madison, Henry managed his rejection by the Assembly for a seat in the Senate, referring to him as one ‘unworthy of the confidence of the people,’ whose election to office ‘would terminate in producing rivulets of blood throughout the land.’” In order to “exclude Madison from the House of Representatives as well, Henry, a master of the ‘gerrymander’ long before that term had been invented, placed Orange County [Madison’s home] in a Congressional district otherwise composed of counties considered heavily antifederal.”¹³⁴ As he had before the ratification convention, Madison was forced to return to Virginia to campaign for office—an activity for which he had little enthusiasm.¹³⁵

Madison arrived home at the end of December, 1788. He faced an uphill election campaign. His opponent was James Monroe, a friend and neighbor, but also a moderate antifederalist who had the support of Patrick Henry and his allies. Henry and his friends had already circulated rumors that Madison opposed any changes in the Constitution, including a bill of rights. Madison was particularly disturbed by allegations that he opposed any amendment protecting religious freedom.

¹³³Madison to Jefferson, October 17, 1788, 11 Papers of Madison 298–99. See text at note 124 *supra*.

¹³⁴Ketcham, note 59 *supra*, at 275.

¹³⁵Rutland, note 32 *supra*, at 48.

On January 2, 1789, Madison wrote to Rev. George Eve, a leading Baptist minister, to explain his position on the Constitution. As he had a year earlier during the campaign for his election to the ratifying convention, Madison found that Baptist fears about religious liberty were sincere, strongly held, and had to be overcome if he was to win election.

Madison's letter was surprisingly frank for a man seeking votes. He freely admitted his disagreement with Eve; he did not see in the Constitution "those serious dangers which have alarmed many respectable Citizens." Thus while the Constitution was unratified Madison had opposed amendments, because he believed they were "calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution." However, with the Constitution ratified he was willing to support "amendments, if pursued with a proper moderation and in a proper mode" because under such circumstances they would "be not only safe, but may well serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty." Madison told Eve that "Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States . . . provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, &c."¹³⁶

Madison's changing position was partially a function of the calls by his opposition, including Monroe, for a second convention to alter the Constitution. Madison thought a second convention would lead to a disastrous rewriting of the Constitution. With this as a likely alternative, Madison now saw amendments as the best hope for keeping the Constitution more or less as it had been written. Thus, he told Rev. Eve that future amendments were "the safest mode" of changing the Constitution because "The Congress, who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it" while a second convention "containing perhaps insidious characters from different parts of America," would "be but too likely to turn every thing into confusion and uncertainty."¹³⁷

¹³⁶Madison to George Eve, January 2, 1789, 11 Papers of Madison 404–05.

¹³⁷*Ibid.*

Madison subsequently wrote similar letters to other Virginians, explaining his position on a bill of rights. Two of his letters, which were published at the time, contained his “unequivocal pledge” to work for amendments if elected to Congress.¹³⁸ This counterattack turned the tide in his favor. At a meeting of Baptist leaders Rev. Eve defended Madison, reminding his co-religionists that Madison had always supported their interests by fighting for full religious freedom in Virginia.¹³⁹ In addition, Madison went to various Baptist meetings, German churches, and numerous courthouses to debate Monroe and explain his new support for amendments. His friends continued to argue his case throughout the district.¹⁴⁰ The campaign paid off with “a resounding federalist victory and remarkable personal tribute to Madison in a district ‘rigged’ against him.”¹⁴¹

X. AN AMBIVALENT ADVOCATE

Shortly after his election Madison headed for New York as a Congressman pledged to propose constitutional amendments to protect individual liberty.¹⁴² Although slated to open on March 4, 1789, Congress did not actually begin until April 6, when both houses finally achieved a quorum. When the session finally began a bill of rights was not high on the agenda. Opposition clustered around four different arguments. Some diehard federalists opposed any changes to a Constitution which they thought was beyond improvement. Some antifederalists still hoped for a second convention or substantial amendments that would restructure the new government. They correctly understood that the adoption of a bill of rights would un-

¹³⁸Madison to Thomas Mann Randolph, January 13, 1789, later published in the Virginia Independent Chronicle, January 28, 1789; Madison to “A Resident of Spotsylvania County,” January 27, 1789, published in Fredericksburg Virginia Herald, January 29, 1789; Benjamin Johnson to Madison, January 19, 1789, 11 Papers of Madison 415–17, 428–29, 423–24. Madison’s letter of Randolph was also published in the Virginia Herald and Fredericksburg Advertiser, January 15, 1789, Ketcham, note 59 *supra* at 276, Rutland, note 32 *supra*, at 48.

¹³⁹Ketcham, note 59 *supra*, at 276. See also Rutland, note 32 *supra*, at 48.

¹⁴⁰Ketcham, note 59 *supra*, at 276–77; see also Rutland, note 32 *supra*, at 48. See also George Nichols to Madison, January 2, 1789, and January 24, 1789; Madison to Washington, January 14, 1789; Henry Lee to Madison, January 14, 1789, 11 Papers of Madison 406–09, 427–28, 417–18, 420–27.

¹⁴¹Ketcham, note 59 *supra*, at 277.

¹⁴²Madison was not willing to support “alterations” to the Constitution that would change the fundamental powers of the government or weaken the power of the national government to control the states. See Bowling, note 4 *supra*, at 225–26.

dermine that goal.¹⁴³ They viewed the amendments as a “Tub to the Whale,” designed to divert antifederalists from making more substantive changes in the Constitution.¹⁴⁴ Some members of Congress agreed that a bill of rights might be important, but thought there were greater priorities, such as establishing various executive departments, raising revenue, and creating a judiciary. Finally, many in Congress doubtless sympathized with the position expressed by Georgia’s James Jackson, who declared that the Constitution was “like a vessel just launched, and lying at the wharf; she is untried, you can hardly discover any one of her properties.” Therefore, he argued that amendments should be delayed until this ship of state could be launched and Congress “guided by the experiment.”¹⁴⁵

Madison now believed that amendments ought to be added to the Constitution. He did not think them necessary to preserve liberty—on that point he had not wavered. But he felt a personal obligation to fulfill his campaign promise of supporting amendments. He also hoped that such amendments would remove the fears of many Americans who had opposed the Constitution. Moreover, he believed that Congressional action on a bill of rights would defeat the call for a second convention. Such a convention, he was convinced, would destroy the new Constitution.¹⁴⁶ As he later told Congress, Madison was “unwilling to see a door opened for a reconsideration of the whole structure of the Constitution—for a re-consideration 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.”¹⁴⁷

For Madison, then, the bill of rights was now a question of tactics: how could he get the amendments adopted? His “strategy was to seize the initiative for amendments, to use the Federalist majority in the First Congress to finish the unavoidable business of amendments

¹⁴³In North Carolina, which had not yet ratified the constitution, Hugh Williamson believed that some antifederalists also held this position. Williamson to Madison, May 24, 1789, 12 Papers of Madison 184.

¹⁴⁴The phrase comes from Jonathan Swift, “Tale of a Tub” (1704): “Seamen have a custom, when they meet a whale, to fling him out an empty tub by way of amusement, to divert him from laying violent hands upon the ship.” Quoted in Bowling, note 4 *supra*, at 223.

¹⁴⁵1 Annals of Congress, 1st Cong., 1st Sess., 442.

¹⁴⁶See, for example, Madison to George Eve, January 2, 1789, 11 Papers of Madison 404–05.

¹⁴⁷Speech of Madison, 1 Annals of Congress, 1st Cong., 1st Sess. (debate of June 8, 1789), 450.

in such a way as to remove from the national agenda the major Anti-federalist objections. . . ."¹⁴⁸

Even before the session began he sought the advice of sympathetic fellow federalists.¹⁴⁹ After Congress convened Madison's first strategic step was to involve President Washington in the campaign for a bill of rights. At this time Madison was Washington's closest advisor and part time speechwriter. In drafting Washington's first address to the Congress, which also served as Washington's inaugural address, Madison inserted a clause reminding Congress of its duty to consider proposing constitutional amendments in response to the "objections which have been urged against the System, or by the degree of inquietude which has given birth to them." Here Washington declined to make any specific recommendation, but placed his "entire confidence" in the Congress's "discernment and pursuit of the public good." The speech did urge that Congress show "a reverence for the characteristic rights of freemen, and a regard for the public harmony. . . ."¹⁵⁰

On May 1 Madison proposed that the House send a formal response to the President "assuring him of their disposition to concur in giving effect to every measure which may tend to secure the liberties, promote the harmony, and advance the happiness and prosperity of their country." The House then appointed a committee, chaired by Madison, to draft this reply.¹⁵¹ On May 5 Madison brought the resolution, which he wrote, to the floor. This resolution included the following paragraph: "The question arising out of the fifth article of the Constitution, [the amendment process] will receive all the attention demanded by its importance; and will, we trust be decided, under the influence of all the considerations to which you allude."¹⁵²

This episode was certainly a coup for Madison. He was able to put into Washington's mouth his own views on the need for a bill of

¹⁴⁸Storing, *The Constitution and the Bill of Rights*, in Rossum & McDowell (eds.), *The American Founding: Politics, Statesmanship, and the Constitution* (1981) 32.

¹⁴⁹Tench Coxe to Madison, March 18 and 24, 1789, Edmund Randolph to Madison, March 26, 1789, 12 *Papers of Madison* 21, 27, 31.

¹⁵⁰Address of the President to Congress, April 30, 1789, and Editorial Note, 12 *id.* at 123 & 120. See also 1 *Messages and Paper of the Presidents* 43–49 (Richardson ed. 1897).

¹⁵¹1 *Annals of Congress*, 1st cong., 1st Sess., 242 (May 1, 1789); 12 *Papers of Madison* 134n.

¹⁵²1 *Annals of Congress*, 1st Cong., 1st Sess., 258 (May 5, 1789); 12 *Papers of Madison* 132–34. Washington also asked Madison to help him draft a short, formal reply to the House resolution. Washington to Madison, May 5, 1789, reprinted in 30 *Writings of George Washington* 310, and 310 (Fitzpatrick ed. 1939).

rights. Historian Robert Rutland has suggested that Washington was acting “cautiously”¹⁵³ in calling for Congress to act in its own “discernment of the public good.” However, it seems more likely that by having Washington ask Congress to act Madison was shrewdly getting the President to endorse amendments without appearing too heavy handed. By writing a speech in which Washington deferred to Congress to work out the details, Madison was not taking any great risk because Madison was already the most effective member of the Congress and was emerging as the “first man” of the House.¹⁵⁴

Madison then followed this by becoming the prime draftsman of a resolution supporting the speech that he had written for Washington. Through Madison’s adroit pen both the President and the House were on record supporting amendments to protect liberty.¹⁵⁵ All Madison had to do now was introduce these amendments and shepherd them through Congress. This, however, was no easy task.

On May 4 Madison told the Congress of his intention to propose amendments later in the month, but on the 25th Madison moved for a postponement. As he explained to Jefferson: “more urgent business” had caused a slight delay, but within a few weeks a “Bill of rights . . . will be proposed.”¹⁵⁶

On June 8 Madison finally had the opportunity to present his amendments. He told the House he was “bound in honor and in duty” to bring the amendments forward. His plan was to “advocate them until they shall be finally adopted or rejected by a constitutional majority of this House.”¹⁵⁷ Others in the House wanted a delay, some because they opposed all amendments, some because they thought the Congress had more important work ahead of it. Madison noted that he had already postponed his motion once. In arguing

¹⁵³Rutland, *The Birth of the Bill of Rights, 1767–1791* 198 (1955).

¹⁵⁴Editorial Note on Madison at the First Session of the First Federal Congress, 12 *Papers of Madison* 52–53.

¹⁵⁵Later in the debates Madison produced a letter from Washington in which the President declared he saw “nothing exceptionable in the proposed amendments” and some were “importantly necessary” while others, while not essential were “necessary to quiet the fears of some respectable characters and well meaning Men.” Thus, Washington declared his hope they would receive “a favorable reception in both houses” of Congress. Washington to Madison [ca. 31 May 1789], 12 *Papers of Madison* 191.

¹⁵⁶*I Annals of Congress*, 1st Cong., 1st Sess., 257; 4 *Documentary History of the First Federal Congress of the United States of America: Legislative Histories: Amendments to the Constitution Through Foreign Officers Bill 3* (Bickford & Veit, eds., 1986); Madison to Jefferson, May 27, 1789, 12 *Papers of Madison* 186.

¹⁵⁷*I Annals of Congress*, 1st Cong., 1st Sess., 440–41 (Debate of June 8, 1789).

against further postponements, Madison asserted one of his major points in favor of amendments: that “if we continue to postpone from time to time, and refuse to let the subject come into view, it may well occasion suspicions, which, though not well founded, may tend to inflame or prejudice the public mind against our decisions.” Madison feared that the “very respectable number of our constituents” who had asked for amendments might conclude that Congress was “not sincere in our desire to incorporate such amendments in the constitution as will secure those rights, which they consider as not sufficiently guarded.”¹⁵⁸ Although about to propose amendments, Madison was still not advocating them for their substance. Rather, he argued he had a moral obligation to present them and that it would be politically expedient for Congress to accept them.

Madison’s initial speech led the staunch federalist Roger Sherman to urge the House to delay action until it was “a proper time.”¹⁵⁹ Madison responded by reiterating the necessity of calming those who feared the new strong central government. He wanted “the opportunity of proving to those who were opposed to” the Constitution that “those who have been friendly to the adoption of this constitution” were also “sincerely devoted to liberty and a Republican Government” and not attempting to “lay the foundation of an aristocracy or despotism.” He reminded the House of those who had “apprehensions” that the new government wished to “deprive them of the liberty for which they valiantly fought and honorably bled.” He believed that many who had opposed the Constitution were now ready “to join their support to the cause of Federalism, if they were satisfied on this one point.” Furthermore, he argued amendments might lure North Carolina and Rhode Island into the union.¹⁶⁰

While proposing amendments, Madison remained ambivalent about a bill of rights. Madison did not propose a bill of rights as such. Rather, he proposed a series of changes in the main body of the Constitution which would have been scattered throughout the document. Madison noted that his proposal “relates to what may be called

¹⁵⁸*Id.* at 440–44.

¹⁵⁹*Id.* at 444.

¹⁶⁰*Id.* at 449. Without knowing that Madison had already introduced amendments, William R. Davie of North Carolina wrote him urging that amendments be adopted before the North Carolina convention, which was scheduled for the following November. Davie to Madison, June 10, 1789, 12 Papers of Madison 210–11. See also George Lee Turberville to Madison, June 16, 1789, *id.* at 222–23, explaining that amendments would “tend very much to satisfy the minds of those who were really fearful of danger to the Liberties of their fellow citizens” while undermining those who opposed the Constitution for selfish and narrow reasons.

a bill of rights”¹⁶¹ but he did not call it that, just as he did not present it as a unified package.

Madison did not argue with passion or even much conviction for his proposal. He admitted that he had “never considered this provision so essential to the federal constitution” that it should have been allowed to impede ratification. But, with the Constitution ratified Madison was willing to concede “that in a certain form and to a certain extent, such a provision was neither improper nor altogether useless.”¹⁶²

Madison followed this tepid endorsement of his amendments with a balanced assessment of the pros and cons of a bill of rights. He conceded the virtues of the opposition, but found reasons to counter all their points. Madison’s most innovative proposal concerned the vexing problem that “by enumerating particular exceptions of 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.” He argued that this problem could be “guarded against.” He had already done so with a provision which became the ninth amendment.¹⁶³

Madison concluded his opening speech on the bill of rights debate by asking that the House appoint a committee to consider the amendments. He argued that “we should obtain the confidence of our fellow citizens, in proportion as we fortify the rights of the people against the encroachments of the government.” To Madison’s disappointment, the House referred the amendments to a committee of the whole, thus delaying the process of adoption.¹⁶⁴

Madison had introduced the amendments because he claimed it “was my duty” to do so.¹⁶⁵ His unstated goal was to convince the nation’s moderate antifederalists to support the Constitution. His subsequent correspondence indicates that he believed his strategy

¹⁶¹I Annals of Congress, 1st Cong., 1st Sess., 453.

¹⁶²*Ibid.*

¹⁶³*Id.* at 456. Madison’s original provision read: “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.”

¹⁶⁴*Id.* at 459.

¹⁶⁵*Ibid.*

was working. He was certain that the amendments, if adopted, would “be satisfactory to a majority of those who have opposed the Constitution.”¹⁶⁶ He was pleased that they were “limited to points which are important in the eyes of many and can be objectionable in those of none.” Proudly he noted that “the structure & stamina of the Govt. are as little touched as possible.”¹⁶⁷

Part of Madison’s strategy was to avoid controversial political issues so that his amendments would pass as quickly as possible. He thought that “nothing of a controvertible nature ought to be hazarded” in order to avoid a defeat of the amendments. He told Edmund Randolph that he had avoided anything of a “controversial nature” because of the “caprice & discord of opinions” in the House and Senate, which had to approve the amendments by a two-thirds vote, and in the state legislatures, three-fourths of which had to approve the amendments. The amendments had a “twofold object of removing the fears of the discontented and of avoiding all such alterations as would either displease the adverse side, or endanger the success of the measure.” In sending them to a North Carolina correspondent he doubtless hoped to push that state toward ratification.¹⁶⁸

Because the amendments were now in the committee of the whole, Madison had to weigh carefully when he ought to try to bring them up again. Madison’s energies, and those of the rest of Congress, were directed at other pending legislation on such matters as the removal power of the President, import duties, western land, and the salaries of congressmen. For the next month most of his correspondence focused on these issues, rather than on the bill of rights. This reflects Madison’s low key and deliberate approach to amendments. He had done his “duty” in introducing a bill of rights, and he would continue to fight for the proposal. But, he was not preoccupied with the question.

Tench Coxe, a Philadelphia federalist, agreed with this analysis and happily noted that “the most ardent & irritable among our friends are well pleased” with the amendments, as were “honest” antifederalists. Edmund Randolph, meanwhile, noted that “*strong*

¹⁶⁶Madison to Jefferson, June 13, 1789, 12 Papers of Madison 218.

¹⁶⁷Madison to Edmund Randolph, June 15, 1789, *id.* at 219.

¹⁶⁸Madison to Edmund Pendleton, June 21, 1789, Madison to Edmund Randolph, June 15, 1789, and Madison to Samuel Johnston, June 21, 1789, *id.* at 253, 219, 250. See also Madison to Tench Coxe, June 24, 1789, Madison to George Nichols, July 5, 1789, *id.* at 257, 282.

foederalists” in Virginia supported the amendments, while among diehard antifederalists “nothing, nay not even the abolishment of direct taxation would satisfy those, who are most clamorous.” Another Virginia friend was pleased the amendments would protect individual liberty “so far as declarations on paper can effect that purpose” while at the same time “leaving unimpaired the great Powers of the government.”¹⁶⁹ Hugh Williamson, a leading North Carolina federalist, liked what he saw, but correctly predicted that his state would not ratify the Constitution until after Congress had approved the amendments.¹⁷⁰

On July 21, during a brief lull in the legislative business, Madison “begged the House to indulge him in the further consideration of amendments.” Madison’s colleagues were in no mood for another debate in the committee of the whole. Some, like Roger Sherman, opposed any amendments and wanted to end the entire process but a majority voted for a select committee of one member from each state to consider the amendments.¹⁷¹

On August 13 the select committee reported back to Congress. For the next eight sessions the House debated the amendments, finally adopting them on August 22. Although active in these debates, Madison did not dominate them.¹⁷² Madison never spoke directly to the merits of a bill of rights but throughout the debates almost always argued for their expediency. Initially he asked if it was “desirable to keep up a division among the people of the United States on a point in which they consider their most essential rights are concerned?” He argued that consideration of the issue would “promote that spirit of urbanity and unanimity which the Government itself stands in need of for its more full support.”¹⁷³ Later he argued for a particular clause because “it be desired by three important States.” Even on the protection of religious liberty—something he fervently supported—Madison would not affirmatively argue for his amendment. He re-

¹⁶⁹Tench Coxe to Madison, June 18, 1789; Edmund Randolph to Madison, June 30, 1789; and Joseph Jones to Madison, June 24, 1789, *id.* at 239, 273, 258–59. See also Edward Stevens to Madison, June 25, 1789, *id.* at 261.

¹⁷⁰Hugh Williamson to Madison, July 2, 1789, *id.* at 274–75. See also Benjamin Hawkins to Madison [July] 3, 1789, *id.* at 275.

¹⁷¹I Annals of Congress, 1st Cong., 1st Sess. 685–92.

¹⁷²Madison spoke twenty-three times during these debates, while Elbridge Gerry spoke twenty-nine times. Nine other men spoke at least ten times each, for a collective total of 130 times. This is based on a count of speeches in *id.* at 730–808.

¹⁷³*Id.* at 731.

fused to say “Whether the words are necessary or not” arguing only that members “of the State Conventions . . . seemed to entertain an opinion that under the [necessary and proper] clause of the constitution” Congress might “infringe the rights of conscience, and establish a national religion.” He consistently “appeal[ed] to the gentlemen who have heard the voice of the country, to those who have attended the debates of the States conventions, whether the amendments now proposed are not those most strenuously required by the opponents to the constitution?”¹⁷⁴

During the debates over the Constitution many of the antifederalists had reflected “the traditional politics of consensus, the old quest for unanimity, not the new majoritarian politics of the constitution’s promoters.”¹⁷⁵ Ironically, in the congressional debates over the bill of rights Madison, who was perhaps America’s first modern politician, reflected this older notion of politics. He sought reconciliation by giving the antifederalists the protections of liberty that they valued so highly.

Only twice in these debates did Madison seem to speak about the amendments with great enthusiasm. Both brief speeches showed that Madison remained more committed to limiting the powers of the states than to limiting the power of the national government. Thus, he passionately supported a proposal that would have prohibited the states from infringing “the equal right of conscience . . . freedom of speech or the press, . . . [and] the right of trial by jury in criminal cases.” Madison thought this was “the most valuable amendment in the whole list.”¹⁷⁶ Although the House approved this clause,¹⁷⁷ the Senate did not and thus these rights did not become applicable to the states until after the adoption of the Fourteenth Amendment and its modern development, starting with *Gitlow v. New York*.¹⁷⁸ Similarly, Madison strongly and successfully opposed adding the word “expressly” to what became the tenth amendment. Madison thought this would give the states too much power.¹⁷⁹

¹⁷⁴*Id.* at 746, 758, 775.

¹⁷⁵P. Maier, note 85 *supra* at 228.

¹⁷⁶I Annals of Congress, at 783–84.

¹⁷⁷See note 7 *supra*.

¹⁷⁸*Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁷⁹I Annals of Congress, 1st Cong., 1st Sess., 790.

XI. A RELUCTANT PATERNITY AND MODERN INTERPRETATION

Madison did not enjoy these debates. He wrote to Richard Peters of the “nauseous project of amendments.”¹⁸⁰ This phrase has been subject to contradictory interpretations.¹⁸¹ Jack Rakove has argued that Madison was “probably allud[ing] to the feelings of his colleagues in Congress rather than his own.”¹⁸² In another article Rakove has argued that the essence of the “nauseous project” statement was the fact that Madison’s support the Bill of Rights was “only for expedient reasons of politics.”¹⁸³ Robert Rutland, on the other hand, suggests this statement is an “offhand remark” and should not be taken “as a statement of fact.” Rutland argues that this statement has been wrongly interpreted to indicate that Madison’s support of the amendments was marred by “a tinge of hypocrisy.”¹⁸⁴ In this context, Rutland takes exception to Rakove’s comments on political expediency.

Rutland is on solid ground in arguing that this statement does not indicate a “tinge of hypocrisy” in Madison’s support for the Bill of Rights. Madison, after all, did not think the substance of the amendments was “nauseous.” Moreover, even as Madison fought for the Bill of Rights, he never appeared enthusiastic about the proposals. Given his cool and reserved support for the amendments, it would be impossible to consider him hypocritical, even if one were to interpret his “nauseous project” remark to refer to the substance of the amendments. Similarly, Rakove is correct in seeing Madison’s support for the Bill of Rights as fundamentally political. Just because it was political does not mean, as Rutland implies, that the support was hypocritical. Here Rutland apparently misread both Madison and Rakove. Madison’s support for the amendments was based on a coherent and rational political analysis of the needs of America under

¹⁸⁰Madison to Richard Peters, August 19, 1789, 12 Papers of Madison 346.

¹⁸¹Kenneth Bowling, in *A Tub to the Whale*, note 4 *supra*, has ignored the phrase altogether, perhaps because it is so distracting, and so easily misunderstood. This analysis is based on Bowling’s public comments on an earlier version of this paper at the Organization of American Historians meeting in 1990.

¹⁸²Rakove, *The Madisonian Theory of Rights*, 31 *Wm. & Mary L. Rev.* 245–46 (1990).

¹⁸³Rakove, *Mr. Meese, Meet Mr. Madison*, *The Atlantic Monthly* (Dec., 1986), 77, quoted at 84, col. 1.

¹⁸⁴Rutland, *The Trivialization of the Bill of Rights*, 31 *William & Mary L. Rev.* 287, 291 (1990).

the Constitution; such a motivation seems hardly an act of hypocrisy.

Rutland is also wrong, I think, in dismissing the statement as is merely an “off hand remark” or a “slip of the pen.”¹⁸⁵ The “nauseous” comment was not an isolated one. Madison also described the debates over the amendments as “extremely difficult and fatiguing”¹⁸⁶ and “exceedingly wearisome.”¹⁸⁷ What Madison found to be “nauseous,” “fatiguing,” and “wearisome” was the process of getting the amendments through Congress. No doubt it was. “Madison was sick and tired of the obstructionism of Roger Sherman, Aedanus Burke, William Loughton Smith, James Jackson, and other congressmen who thought the introduction of a bill of rights was a waste of time.”¹⁸⁸ Madison probably found this obstructionism particularly distasteful because of his own ambivalence about the goal he sought.

While never actually opposed to the idea of rights, in 1787–89 Madison was never convinced a bill of rights was either necessary or completely harmless. To the end Madison was uncertain about the value of a bill of rights. A few days before the House endorsed the amendments, Madison observed that “we are so deep in them now, that right or wrong some thing must be done.” This was hardly the sentiment of an enthusiastic partisan. But, Madison had not become one, even as he supported the addition of a bill of rights. With victory in sight, he could only marshal a series of weak arguments to support his position: a bill of rights was “a thing not improper in itself;” “had no assurances been given” of subsequent amendments the Constitution might not have been ratified; “as an honest man” Madison felt “bound” to support amendments after the Virginia convention; without his promise to support amendments Virginia would have elected antifederalists to Congress; if Madison had not introduced his amendments, opponents of the Constitution would have presented more damaging ones; once the amendments were adopted they “would kill the opposition every where, and by putting an end to the disaffection to the Govt. itself, enable the administration to venture on measures not otherwise safe”; the amendments would head off a second convention; and the amendments were necessary to bring North Carolina into the Union.¹⁸⁹

¹⁸⁵*Ibid.* This is also Rutland’s terminology.

¹⁸⁶Madison to Edmund Pendleton, August 21, 1789 12 Papers of Madison 348.

¹⁸⁷Madison to Edmund Randolph, August 21, 1789, 12 Papers of Madison 348.

¹⁸⁸Rutland, note 184 *supra*, at 292.

¹⁸⁹Madison to Richard Peters, August 19, 1789, 12 Papers of Madison 347.

In sum, Madison argued that the bill of rights should be adopted because it might help the country, and could not hurt it. "We have" he told Congress "something to gain, and, if we proceed with caution, nothing to lose."¹⁹⁰

Despite his ambivalence and misgivings about a bill of rights, Madison fought hard for the amendments. Duty to his constituents, duty to himself as an "honest man," and his keen sense of politics kept him going. But, so too, no doubt, did Madison's libertarian values. Whether opposing amendments during the ratification struggle or giving them lukewarm support in Congress, Madison rarely opposed the idea of protecting basic rights and liberties. He never denied the value of due process, freedom of expression, and religious liberty. If he doubted the value of the amendments, he never doubted the values they stood for. That, in the end, enabled him to support the Bill of Rights, even while uncertain if it was either necessary or prudent. He would, in effect, leave that question up to future generations.

Madison's ambivalence about the Bill of Rights serves to remind the living generation that liberty is ultimately protected, not by parchment barriers, but by the "vigilant . . . spirit which actuates the people of America."¹⁹¹ The Bill of Rights articulates the goals of that spirit.

¹⁹⁰Speech of Madison, in *I Annals of Congress*, 1st Cong., 1st Sess., 450 (June 8, 1789).

¹⁹¹Federalist 57, in *10 Papers of Madison* 523.