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"A TUB TO THE WHALE": THE FOUNDING FATHERS AND ADOPTION OF THE FEDERAL BILL OF RIGHTS

Kenneth R. Bowling

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. Jonathan Swift, *Tale of a Tub* (1704)

Like a barrel thrown to the whale, the people were to be amused with fancied amendments, until the harpoon of power, should secure its prey and render resistance ineffectual. [Samuel Bryan], "Centinel No. 19," (Philadelphia) *Independent Gazetteer*, October 7, 1788

The constitutional role of the federal Bill of Rights has been monumental. This fact would surprise most members of the First Federal Congress, the body which reluctantly proposed to the states the constitutional amendments later called the Bill of Rights.[1] The Federalist

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Mr. Bowling is a member of the First Federal Congress Project at George Washington University, Washington, D.C. This article is based upon a chapter in his "Politics in the First Congress, 1789-1791" (Ph.D. diss., University of Wisconsin 1968). Additional research was conducted under a grant from the National Endowment for the Humanities.

[1] Although much has been written about the Bill of Rights, very little of it relates to the legislative history of its adoption. This is particularly true about the political aspects, most of which are contained in previously unstudied manuscripts. Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791* (Chapel Hill 1955), which focuses on the background of the amendments, aptly summarizes its passage through the First Federal Congress. Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis 1965), contains primarily a brief analysis of some of the rhetoric of the debate. His *James Madison: Father of the Constitution, 1787-1800* (Indianapolis 1950) includes a short legislative history, effectively making the point that Madison was the force behind adoption of a federal Bill of Rights. Leonard W. Levy's thesis is clearly stated in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., *Encyclopedia of the American Constitution* (4 vols., New York 1986), I, 113-116. Levy concludes in his essay on the Bill of Rights that it arose from political necessity

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majority considered amendments an unnecessary political expedient of little constitutional importance, and the time spent on their adoption as wasted. Antifederal members saw them as an impediment to the changes in the structure and power of the new federal government that they sought. Many law clerks and scholars have searched in vain through the congressional debate over the first ten amendments for comment on their constitutional or philosophical implications. Instead of inspiring rhetoric and thoughtful analysis about the rights of man, they find only political fights: the most important, between James Madison of Virginia and his fellow Federalists in the House of Representatives; the most bitter, between the Federalists and the Antifederalists in the House; and, finally, the least divisive, between the House and the Senate.

Leonard Levy aptly states that Madison is even more entitled to be known as the father of the Bill of Rights than of the Constitution. Without Madison's commitment there would have been no federal Bill of Rights in 1791, but even he did not envision a separate bill of rights. Although he had long been convinced of the necessity of bills of rights to protect civil liberties, practical political concerns were his primary motivation. He believed rights-related amendments would satisfy enough Antifederalists to protect the new Constitution from both the structural amendments and the second Federal Convention which Antifederal leaders demanded, and to secure ratification by Rhode Island and particularly North Carolina. In addition he had to consider his political survival in Virginia. Forced upon him more by the political climate of late 1788 than by the arguments of his friend Thomas Jefferson, Madison's proposals, as both Federalists and Antifederalists quickly declared, tossed a tub to the whale.

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and that Madison is even more entitled to be known as the father of the Bill of Rights than of the Constitution. Julius Goebel, Jr., *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (New York 1971), ch. 10, is the most detailed narrative on the adoption of the amendments. One of the author's theses is that while certain proposed amendments protected civil liberty, others (the alterations or structural ones) were merely "political" (414). This statement ignores the fact that the movement for amendments was in itself political and that many Federalists considered the rights-related ones in particular nothing more than a political tactic cynically employed by self-serving Antifederal leaders to whip up opposition to the Constitution among the populace. It is also important to remember that some amendments which do not appear to us to be rights-related were so considered in the eighteenth century. Charles Warren's "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, 37 (Nov. 1923), 49-132, fails to establish as intimate a connection between the Judiciary Act and the first ten amendments as it asserts.

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Noah Webster, although not a member of Congress, expressed the point of view of many of its Federalist members in an anonymous attack on Madison, published while the Virginian was leading the floor fight for amendments. "It seems to be agreed on all hands," he wrote, "that paper declarations of rights are trifling things and no real security to liberty. In general they are a subject of ridicule." The people regret that "Congress should spend their time in throwing out an empty tub to catch people, either factious or uninformed, who might be taken more honorably by reason and equitable laws. They regret particularly that Mr. Madison's talents should be employed to bring forward amendments, which, at best can have little effect upon the merits of the constitution, and may sow the seeds of discord from New-Hampshire to Georgia."[2]

Madison and other leaders in the fight to strengthen the federal government during the 1780s made a critical—almost fatal—error at the Federal Convention by not attaching a bill of rights to the proposed Constitution when Antifederalists George Mason of Virginia and Elbridge Gerry of Massachusetts had called for one. Even in the face of Mason's advice that "it would give great quiet to the people," all the states in attendance voted against adding a bill of rights. Antifederalist Richard Henry Lee of Virginia unsuccessfully attempted to attach several hastily drafted amendments to the Constitution in September 1787 before the Confederation Congress submitted it to the states for ratification. His recommendations, however, were not confined to guarantees of personal liberty; he wanted to change the structure and curtail the power of the new federal government as well.[3] Thus an ambiguity in the meaning of the word "amendment" arose at the start of the ratification debate and remained throughout. Support for amendments could indicate either a desire that personal liberties be protected, or that fundamental changes in the balance of

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[2] William T. Hutchinson *et al.*, eds., *The Papers of James Madison* (15 + vols., Chicago and Charlottesville 1962-), XII, 334-345. I identified Webster as the author based on the fact that "A Free Mechanic" (New York *Journal*, Aug. 20, 1789) in replying to the piece signed "Pacificus" referred to its author as a noted grammarian; in addition, "Pacificus" thoughts on bills of rights are identical to those Webster wrote anonymously in 1787 and 1788 and then copyrighted in 1790 under his own name. See also Julian P. Boyd *et al.*, eds., *The Papers of Thomas Jefferson* (23 + vols., Princeton 1950-), XVIII, 131-135.

[3] Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols., New Haven 1937), II, 587-588; Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*, vol. I, *Constitutional Documents and Records, 1776-1787* (Madison, Wisc. 1976), 322-353.

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power between the state and federal governments and in the structure of the federal government be made, or both. As time passed some participants in the debate over the Constitution sought to clarify the confusion by replacing "amendment" with "bill or declaration of rights" for the former sense and "alteration" for the latter. Each of the last four states to ratify proposed their amendments in two lists to reflect this distinction. In this article I use "amendment" to refer to both types and "alteration" and "bill of rights" or "rights-related amendments" to distinguish between them.

Having failed to attach amendments in the Confederation Congress, Antifederalists demanded them from the ratifying conventions. Party leaders stressed the absence of a bill of rights similar to those which existed in most states. Many Federalists considered the eloquent demands of Antifederal leaders for a bill of rights during the ratification campaign as merely a ruse to cover their opposition to a Constitution which restricted state sovereignty and thereby threatened their political bases. Such a motive cannot be attributed to George Mason, the author of the 1776 Virginia Declaration of Rights. To suggest it for Patrick Henry, the chief opponent of Madison and Jefferson in their ten-year struggle for religious liberty in Virginia, is another matter.

In reply to Antifederal demands for a bill of rights, Federalists asserted that since all powers not delegated to the federal government remained with the states there was no need for a federal bill of rights because Congress had no power to interfere with personal liberties. Further, some argued, a federal bill of rights might endanger liberties not only because it protected only certain specified rights, but also because it implied that the central government had the power to decide which rights to guarantee. Pennsylvanian James Wilson's widely reprinted speech of October 1787 is generally seen as the first statement of this critical Federalist argument, but it had been used earlier by both Roger Sherman of Connecticut in the Federal Convention, and Madison in the Confederation Congress. It was a shrewd argument, but hardly convincing to men who knew history and who found in the "necessary and proper" and "supremacy" clauses of the Constitution a multitude of scenarios for tyranny. In the Federal Convention and in his Objections, Mason countered that since the laws of the United States were paramount to state bills of rights, the state protections provided little security. The two sides repeated their positions ad infinitum during the months that the Constitution was before the states.

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Delaware, New Jersey, Georgia, and Connecticut ratified without the issue of amendments creating much stir. In Pennsylvania Antifederalists unsuccessfully urged the ratification convention to propose fifteen primarily rights-related amendments in conjunction with its adoption. Although published by the minority, the proposals had no legal standing. But in February the Massachusetts Convention became the first to adopt amendments, proposing nine "amendments and alterations" which were basically the latter and did not even include protections for the freedoms of press, speech, assembly, or religion. The idea of conditional ratification, requiring that the amendments be adopted by the necessary number of states prior to Massachusetts' ratification becoming effective, was rejected in favor of amendments merely recommendatory. Like Pennsylvania, Maryland's Convention rejected the efforts of its Antifederalists to adopt amendments and the minority then published them. Although many of the twenty-eight proposals were alterations, they included far more rights-related amendments than either those of Massachusetts or the Pennsylvania minority. The South Carolina Convention recommended four alterations. Its decision to omit rights-related amendments may have arisen from the warning of one member that bills of rights generally began with a statement that all men are born free and equal, a condition not the case in South Carolina. When, at the end of June 1788, New Hampshire became the critical ninth state to ratify, its convention adopted the nine Massachusetts amendments almost verbatim, added three protecting personal liberty, and defeated an attempt to make its ratification conditional on their subsequent adoption.

Four states remained out of the new Union. Each had large Antifederal constituencies, perhaps majorities, and their conventions proposed fundamental alterations. Virginia Federalists had to accept such recommendations as the price of securing ratification without the demand for prior amendments. Virginia proposed twenty alterations and a separate bill of rights consisting of twenty items. Modeled on George Mason's 1776 Virginia Declaration of Rights, the proposed federal bill of rights which Virginia recommended was the first complete and integrated bill. The New York Convention in July called for twenty-two alterations and a bill of rights of twenty-three provisions. In addition, New York Federalists, in order to avert a conditional ratification or an outright rejection, bowed to Antifederal demands for a circular letter to the states calling for a second federal convention to adopt amendments. The movement for a second convention, an Antifederal goal from the beginning, now became

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decidedly more threatening. The North Carolina Convention adopted all of Virginia's amendments, added six of its own, insisted that these amendments be added to the Constitution prior to its ratification, provided for delegates to a second state convention, and adjourned in August. Rhode Island Antifederalists defeated the Constitution in a freeholders' election and prevented the calling of a convention several times prior to 1789.[4]

What was the nature of the alterations which the Federalists so feared and which threatened to overturn the constitutional revolution of 1787? The majorities and minorities of eight of the twelve state ratifying conventions that met prior to the First Federal Congress put forth 210 amendments.[5] While many duplicated each other, some varied significantly in detail, enough so that one Federalist newspaper predicted that if the absurd and contrary proposals ever came to the floor of Congress, they would "immediately like Swift's books, give battle to each other, and soon destroy themselves." About 100 separate proposals can be distinguished. Alterations formed a clear majority of both the 210 and the 100. A precise division is impossible because certain amendments protected political or personal rights while altering the powers of the central government; for example, the prohibition of standing armies in peacetime. The alterations expressed a decentralist, republican political philosophy rooted in English tradition and American experience. First and foremost, they sought to alter the balance of power in the new system in order to make the states more equal with the federal government. One New York amendment succinctly expressed this: all federal officials should be bound by oath not to violate the rights and constitutions of the states. Secondly, the alterations aimed at a pure separation of powers between the judicial, executive, and legislative branches, with the

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[4] The work of John P. Kaminski, Gaspare J. Saladino, and Richard Leffler, eds., *The Documentary History of the Ratification of the Constitution*, vols. XIII-XVII, *Commentaries on the Constitution* (Madison, Wisc. 1981-), has brought together all of the important source material from the unofficial debate over whether the proposed Constitution needed to be amended; they are in the process of publishing all of the official debate as well. See "M.C." (XIII, 502-503) for an early advocate of a bill of rights who argued that it would drive a wedge between the Antifederal leaders and their followers.

[5] (Philadelphia) *Federal Gazette*, Mar. 10, 1789. The most convenient compilation of these amendments is Edward Dumbauld, *The Bill of Rights* (Norman, Okla. 1957), 173-205. Cecelia M. Kenyon, ed., "Introduction," *The Antifederalists* (Indianapolis 1966), provides an excellent analysis of the immediate and long range political and theoretical implications of the proposed amendments.

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latter being dominant. Finally, southern Antifederalists sought to further institutionalize sectionalism in the new system.

The Federal Convention did not make the difficult decisions necessary to flesh out Article III creating the federal judiciary. Instead it left that responsibility to the First Congress. Antifederalists consequently proposed amendments designed to limit the options of Congress and enervate the federal judiciary. Its original jurisdiction would be limited to cases involving the United States as a party, two or more states, foreign nations, and admiralty and maritime law. Admiralty courts were to be the only inferior federal courts of original jurisdiction; state courts would hear others issues, with only certain ones appealable to the federal judiciary. Finally, if a decision of the Supreme Court dissatisfied a litigant, the president, under congressional regulations, could appoint a commission to review the decision.

Antifederalists found the president and the executive branch created by Article II far too powerful. Their proposals sought to limit both its monarchical trappings and the possibility of the president assuming dictatorial powers either on his own or in collusion with the Senate to which he had a connection in violation of the doctrine of separation of powers. The president would serve no more than two terms, have an accountable council to advise him, and have his powers of pardon and command of the army in the field curtailed. New York proposed that he be convicted of impeachment by a simple majority of those present.

Despite their commitment to legislative supremacy, the Antifederalists did not ignore the powers delegated under Article I to a distant and small (relative to its constituency) Congress. Specifically to be denied Congress was the establishment of monopolies, regulation of state militias, ratification of treaties contradictory to state constitutions, granting of titles of nobility, and adoption of direct taxes or excises (except on ardent spirits) unless other sources of revenue proved insufficient and the states failed to meet special requisitions. Congress's control over elections and the federal city would be abridged. Several states proposed a two-thirds or three-fourths majority—usually but not always indicating sectional motives—to maintain a standing army in times of peace, to pass commercial laws, and to ratify commercial treaties or treaties contracting American territorial claims. Six states wanted congressional districts limited to 30,000 constituents until such time as the size of the House reached 200 after which this limitation could be raised. Finally, and most important of all the amendments, six states proposed that all powers not expressly or clearly delegated to Congress be reserved to the states. This had

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been the language of the Articles of Confederation and if attached to the Constitution would have eliminated the doctrine of implied powers.

Ratification by eleven states had legitimized the Federal Convention, but Federalists had little time for celebration since they saw ahead an Antifederal leviathan poised to attack the ship of state. Refusal to accept a Bill of Rights at the Federal Convention had cost Federalists dearly: in Massachusetts, acceptance of the idea of subsequent amendment; in Virginia, recommendations for fundamental alterations; in New York, a circular letter to the states calling for a federal convention; and in North Carolina, prior amendments. In addition, four states, including Virginia, had instructed their delegations to the First Congress to devote every effort to obtaining amendments. August and September 1788 provided new threats. A group of New Yorkers attempted to unite Antifederalists up and down the coast. Congress deadlocked over where the First Congress should meet. And Pennsylvania Antifederalists had called the first statewide political party convention in American history for the purpose of adopting amendments and selecting a slate of candidates to support them in the first House of Representatives. Federalists began to fear that Antifederalists might take control of the First Congress. George Washington lamented to Madison that "to be shipwrecked in sight of the Port would be the severest of all possible aggravations to our misery."[6]

No national issues arose during the first congressional election in the winter of 1788-1789 aside from that of amendments. Having failed to obtain changes before ratification, and being uncertain whether a second convention would be called, Antifederal leaders sought to ensure them by means of electing a Congress that would, in the opinion of Madison, commit suicide. All the Antifederalist candidates promised support for amendments, both alterations and rights-related. In some cases, Federalist candidates pledged themselves to amendments, although usually remaining vague about which ones they might support. Despite Federalist fears, Antifederalists did not fare well in the election. Americans, by virtue of a general willingness to try the new system, an expectation of amendments, and partisan election laws in some states, swept Federalists into the First Congress from all states except Massachusetts, New York, Virginia, and South Carolina. (North Carolina and Rhode Island did not hold

[6] Sept. 23, 1788, *Papers of Madison*, XI, 262.

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their elections until after the first session of the First Congress.) Those four states sent ten Antifederalists to a 59-man House and Virginia sent two Antifederalists to a 22-man Senate.[7]

The major contest—and the one with the most national coverage—occurred in the Virginia Piedmont during January and February 1789. There, James Madison ran against James Monroe, a moderate Antifederalist. The congressional district had been carefully constructed by Patrick Henry to keep the nationally known and respected Federalist out of the House of Representatives. Monroe advocated amendments to a sympathetic constituency which had been led to believe that Madison was "dogmatically attached to the Constitution in every clause, syllable and letter." Such an opinion about Madison had a firm foundation, but it failed to acknowledge a shift that had gradually taken place in his thinking since he had condemned the subsequent amendments of Massachusetts as a blemish and convincingly argued to a Virginia political ally against a federal bill of rights. In the Virginia Convention, Madison had repeated the stock Federalist argument that a bill of rights was unnecessary if not dangerous, but in the end gave tacit support to the convention's amendments even though many were highly objectionable. The New York call for a second convention had frightened Madison much more, but even as late as early August 1788 he still desired a trial period of a few years to demonstrate what amendments the Constitution needed.[8]

North Carolina's refusal to ratify without amendments and the Antifederalist resurgence as the autumn of 1788 approached converted Madison. It had taken him a year to accept the reality of the drastic mistake that had been made at the Federal Convention. At the end of September he informed Jefferson, then American Minister to France, that "safeguards to liberty ag[ain]st which no objections can be raised" should be introduced in Congress. "My own opinion has always been in favor of a bill of rights" he asserted a month later in a comprehensive letter to Jefferson, whose letters during the

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[7] On the first congressional election see Kenneth R. Bowling, "Federalists and Antifederalists After Ratification: The First Congressional Election" (M.A. thesis, University of Wisconsin 1964), and Gordon DenBoer, Lucy Trumbull Brown, Robert A. Becker, and Merrill Jensen, eds., *The Documentary History of the First Federal Elections, 1788-1790* (3 + vols., Madison, Wisc. 1976-).

[8] To Washington, Feb. 15, 1788, Jan. 14, 1789, to Edmund Randolph, Apr. 10, 1788, to Hamilton, June 27, 1788, from George Lee Turberville, Apr. 16, 1788, to Washington, Aug. 24, 1788, to Jefferson, Aug. 10, 1788, *Papers of Madison*, X, 510, XI, 18-19, 23, 181, 226, 240-41, 418.

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preceding year had helped to ease the pain of the turnabout by providing a sophisticated rationale. "At the same time," he continued, "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice."[9] Early in November, as Virginia had prepared to elect its first Senators, candidate Madison, an obvious choice for the Senate, wrote from the Confederation Congress at New York to a friend in the legislature at Richmond announcing that he did not consider the Constitution faultless. Madison managed to discourse at length in this letter without mentioning one specific amendment that he supported. "The universal cry is for amendments, & the Federals are obliged to join in it; but whether to amuse, or conceal other views seems dubious," mused Henry, who led the opposition to Madison's reluctant and unsuccessful senatorial candidacy. Henry contended that anyone who wished for amendments wasted a vote on Madison, and told the legislature his election would produce "rivulets of blood throughout the land."[10]

Finding himself the underdog in the congressional campaign against Monroe, Madison rode painfully home from Philadelphia, where he had sought treatment for hemorrhoids. Joining Monroe in a series of debates, Madison stressed his long struggle for separation of church and state in Virginia. Also, he declared in letters to influential constituents, publicly read around the district and printed in newspapers throughout the United States, that with the Constitution safely ratified, amendments could be considered. Specifically, he favored congressional approval—rather than a second convention—of amendments to safeguard all the "essential rights," to provide for the periodic increase of the House of Representatives, and to protect the people against nuisance appeals by the wealthy to a distant United States Supreme Court. "In a number of other particulars," Madison believed, "alterations are eligible either on their own account, or on

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[9] To Jefferson, Sept. 21, Oct. 17, *ibid.*, XI, 257-58, 297. Adrienne Koch discusses the important differences between Madison and Jefferson on the Constitution and Bill of Rights in *Jefferson and Madison: The Great Collaboration* (New York 1964), ch. 3.

[10] To George Lee Turberbville, Nov. 2, 1788, *Papers of Madison*, XI, 330-332; Henry to Richard Henry Lee, Nov. 15, 1788, in William Wirt Henry, *Patrick Henry: Life, Correspondence and Speeches* (3 vols., New York 1891), II, 429; Henry Lee to Madison, Nov. 19, 1788, *Papers of Madison*, XI, 356-357.

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account of those who wish for them." While clearly refuting the allegation that he opposed any amendments, that statement left vague how many and which alterations he would support. Madison defeated Monroe, 1,308 to 972. The fact that he had given his word during the campaign underlies all the reasons he later gave for supporting amendments.[11]

Virginia Antifederalists continued to question the sincerity of Madison's conversion. George Mason emphasized that Madison would never have been elected without making some promises and had now become "the ostensible Patron of Amendments. Perhaps some Milk & Water Propositions may be made . . . by Way of th[r]owing out a Tub to the Whale; but of important & substantial Amendments, I have not the least Hope." Senator Richard Henry Lee wrote his old ally Henry that Madison's "ideas, and those of our convention, on this subject, are not similiar."[12]

An Antifederal newspaper called on members of the First Congress to adopt amendments as their first order of business. "The interest of this new empire requires a union of sentiment, and Congress can do much that way, if the subject of amendments has that proper attention paid to it, which from its importance it naturally claims." But the Federalist press, having contributed to an election landslide, ridiculed the idea of amendments, especially alterations. "The worship of the ox, the crocodile, and the cat, in ancient time, and the belief in astrology and witchcraft by more modern nations, did not prostrate the human understanding more than the numerous asburdities" proposed as amendments, proclaimed one. An anonymous twenty-eight-part essay analyzing the state proposals concluded that "if we must have amendments, I pray for merely amusing amendments, a little frothy garnish."[13] When Congress achieved a quorum in April, Madison naively expected no great difficulty

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[11] *Documentary History of the First Federal Elections*, II, 317-349, (quotation at 339); Brant, *Madison: Father of the Constitution*, 240-242.

[12] George Mason to John Mason, July 31, 1789, in Robert A. Rutland, ed., *The Papers of George Mason, 1725-1792* (3 vols., Chapel Hill 1970), III, 1164, and Richard Henry Lee to Patrick Henry, May 28, 1789, *Henry Correspondence*, III, 387-388.

[13] (Philadelphia) *Freeman's Journal*, Mar. 4, 1789; (Boston) *Massachusetts Centinel*, Mar. 11, 1789; [Nicholas Collin], "Foreign Spectator," *Federal Gazette*, Oct. 21, 1788-Feb. 16, 1789. The latter series of essays was republished at New York in the midst of the House debate over amendments; see New York *Daily Gazette*, June 3-July 7, 1789.

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in getting the Federalist Congress to adopt amendments. Those which "I am known to have espoused, will as far as I can gather, be attainable from the federalists . . . ." These selected proposals would "extinguish opposition to the system, or at least break the force of it, by detaching the deluded opponents from their designing leaders."[14]

On May 4, a month after the session opened and in order to draw attention from Virginia's application for a second convention which was submitted the next day, Madison gave notice that he would offer amendments in three weeks. He later agreed to two postponements to allow the revenue debate to proceed. Finally, on June 8, informing his colleagues that he felt bound by honor and duty, Madison moved that the House sit as a Committee of the Whole to receive and debate his proposals. But his colleagues let him know quickly that they did not consider the matter as urgent as he. They were not expressing opposition to the protection of civil liberties. On the contrary, almost all—even Madison's most vocal critics—held advanced libertarian ideas for their times. They had other reasons for opposing the debate: amendments meant alterations as well as protections for civil liberty; Congress had more important business; and the debate might produce the first public display of the sectional division within the young republic. Most Federalists, basking in their election sweep, believed amendments unnecessary either as a political stratagem or because personal rights needed protection at the federal level. Forgetting their fears of six months earlier, Federalists called for postponement to allow a trial period for the new system. As Roger Sherman, the House's most vocal opponent of amendments expressed it, if the people had really wanted amendments they would have secured them prior

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[14] To Edmund Randolph, Apr. 12, 1789, to Jefferson, Mar. 29, 1789, *Papers of Madison*, XII, 76, 38. See also to Edmund Pendleton, Apr. 8, 1789, *ibid.*, XII, 51. For lack of interest in devoting Congress's time to amendments, see the comments of the following Federalists, all but the first of whom were members of it: Samuel A. Otis to Nathan Dane, Mar. 28, 1789, Personal Papers Miscellany (Library of Congress [LC], Washington, D.C.); Farewell Celebration for Jonathan Elmer, Mar. 26, 1789 (Glassboro State College Library, Glassboro, N.J.); Abraham Baldwin to Joel Barlow, Mar. 1, 1789, Miscellaneous Manuscript Collection (Yale University [Yale], New Haven, Conn.); Richard Bland Lee to Powell, Mar. 28, 1789, Leven Powell Papers, LC; Paine Wingate to Pickering, Mar. 25, 1789, Timothy Pickering Papers (Massachusetts Historical Society [MHS], Boston, Mass.); Ralph Izard to Jefferson, Apr. 3, 1789, *Papers of Jefferson*, XV, 22; and Thomas Hartley to Stephen Chambers, Mar. 30, 1789, Stauffer Collection (Historical Society of Pennsylvania [HSP], Philadelphia, Penn.)

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to ratification. Antifederalists also wanted postponement because they suspected Madison's proposals would fall far short of the alterations they sought. Madison's only support came from two Virginia Federalists who understood Henry's influence.[15]

In response to this reluctance, Madison delivered a long speech defending his motives and arguing for the expediency of amendments. Every motive of prudence argued for them, he pleaded; large numbers of Antifederalists would thereafter support the Constitution and North Carolina and Rhode Island would rejoin the Union. He claimed his proposals aimed at not only curbing abuses by government against the people but also, most importantly, at protecting minorities against majorities. Publicly abandoning the stock Federalist argument that in a government of delegated powers no civil liberties could be infringed, Madison noted as an example that since Congress had all the power necessary and proper to collect revenue it might issue general search warrants as a means. He argued that no serious objection could be raised about the items he promised to recommend, for they were chosen carefully to secure a two-thirds vote in Congress and ratification by three fourths of the states. Madison refused to support alterations. To be sure, he contended, some respectable individuals had sought such amendments but the mass of the people had been concerned only about encroachments on their liberties. In conclusion, he offered and discussed in detail each of his proposals.[16]

Relying heavily on the Virginia Convention's bill of rights, and therefore on George Mason's 1776 Virginia Declaration of Rights, Madison incorporated into his June 8 proposals most of the rights-related amendments recommended by the states. He did omit free and frequent elections unencumbered by poll taxes, a declaration of civilian control of the military, freedom from the suspension of laws or their unauthorized execution, and freedom to hunt and fish in

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[15] *Papers of Madison*, XII, 125. The legislative history of amendments, and all the relevant documents, can be found in Charlene Bangs Bickford and Helen E. Veit, eds., *Documentary History of the First Federal Congress*, vol. IV, *Legislative Histories* (Baltimore 1986), 1-48. All references in this article to the legislative process are from that source. References and quotations from the debates can be found in Joseph Gales and W.W. Seaton, comps., *The Debates and Proceedings in the Congress of the United States. . . [Annals]* (42 vols., Washington 1834-1856); in this case at I, 424-431. During the debate, ten members participated with frequency. They were Madison, Sedgwick, Vining, Smith of South Carolina, Ames and Sherman from the side which eventually supported amendments, and Gerry, Tucker, Livermore and Burke from the other side.

[16] *Papers of Madison*, XII, 193-209.

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seasonable times. Madison included two rights-related proposals not recommended by any state: no person could be forced to give up private property without just compensation and no state could infringe the equal rights of conscience, freedom of the press, or trial by jury in criminal cases. Of the proposed alterations Madison included only a handful, some of which were rights-related as well: one regulating the apportionment of the House in order to set a limit on its size and to facilitate constituent access, one confirming separation of powers, one regulating the compensation of congressmen to prevent salary grabs, one setting a minimum monetary value on cases which could be appealed to the Supreme Court to prevent vexatious appeals against the poor, and one declaring that all powers not delegated were reserved to the states. The latter proposal significantly lacked the word "expressly" between "not" and "delegated." In sending off copies of his amendments to acquaintances in Virginia and North Carolina, Madison insisted that he designed them to touch "the structure & stamina of the Govt." as little as possible. Yet, they were "important in the eyes of many" and "objectionable in those of none."[17]

Despite Madison's long and comprehensive speech, neither Federalists nor Antifederalists seemed inclined to proceed with the business. Madison had "done his duty," Federalist William L. Smith of South Carolina had smugly told the House earlier, "and if he did not succeed, he was not to blame." Antifederalists again urged a postponement until the new government had been organized and the House could take up all the amendments of the states rather than merely those "few propositions brought forward by an individual gentleman." The respect that many members felt for Madison—who acted as a sort of prime minister during the first session of Congress—rather than the Antifederal threat to bring forward alterations resulted in the House referring Madison's proposals to the Committee of the Whole.[18]

Federalist Representative George Clymer of Philadelphia had reflected in a letter just before the speech on whether Madison meant "merely a tub to the whale, a declaration about the press, liberty of conscience &c. or will suffer himself to be so far frightened with the antifederalism of his own state as to attempt to lop off essentials . . . ." A postscript added after the speech summed up the view

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[17] To Edmund Randolph, June 15, 1789, to Samuel Johnston, June 21, 1789, *ibid.*, XII, 219, 250.

[18] *Annals*, I, 429-449.

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of almost everyone: Madison "has proved a tub" on amendments. Later Clymer described Madison as "a sensible physician" who "has given his malades imaginaires bread pills, powder of paste and neutral mixtures."[19]

Other Federalist representatives characterized the proposals as innocent, nugatory, premature, or unnecessary.[20] Fisher Ames, the most carping critic of bills of rights in general, believed they "may do some good towards quieting men, who attend to sounds only, and may get the mover some popularity, which he wishes." Theodore Sedgwick thought their introduction unwise and of no value politically. On and off the floor of Congress, both of these Massachusetts Federalists questioned Madison's motives, complained about his timidity and lack of nerve when confronted by popular clamors, and declared bills of rights to be of no constitutional importance. At the same time, both men, despite harassing Madison on the floor, let friends know early in the debate that they intended in the end to support a modification of what Sedgwick termed Madison's water gruel amendments.[21]

Madison's proposals had become public throughout the country after they were published in the New York *Daily Advertiser* on June 12. A Boston Antifederalist reported that Federalists there openly expressed disappointment with "the great Man from Virginia. They think he appears too serious in his motion for amendments." Antifederalists at Boston on the other hand complained that Madison had laid "aside the amendments proposed by the several states in order to prevent any thing being done on the subject." The *Gazette of the United States*, a Federalist organ, later criticized the proposals more than once. Nevertheless, a letter to a newspaper predicted that "they will give general satisfaction, and quiet the minds of many well disposed citizens."[22]

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[19] To Peters, June [8], 1789, Richard Peters Papers, HSP; to Coxe, June 28, 1789, Tench Coxe Papers, HSP.

[20] George Gale to [William Tilghman], June 17, 1789, Tilghman Papers, HSP; Thomas FitzSimons to [Benjamin Rush], June 15, 1789, excerpt, *Parke-Bernet Sale Catalog 468* (New York 1943), 34; Benjamin Contee to Gov. John Eagar Howard, June 12, 1789, Executive Papers (Maryland Hall of Records, Annapolis, Md.).

[21] Ames to Thomas Dwight, June 11, 1789, to George R. Minot, July 2, 23, 1789, Seth Ames, ed., *Works of Fisher Ames* (2 vols., Boston, 1854), I, 53 (quotation), 58, 65; Sedgwick to Pamela Sedgwick, Aug. 20, 1789, Ames to Sedgwick, Oct. 6, 1789, Sedgwick Papers, MHS; Sedgwick to Lincoln, July 19, 1789, Benjamin Lincoln Papers, MHS; Sedgwick to Lincoln, Aug. 14, 1789, Fogg Autograph Collection (Maine Historical Society, Portland, Me.).

[22] Peter Muhlenberg to Benjamin Rush, June 25, 1789, Sol Feinstone

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Madison received a great deal of reaction. "I like it as far as it goes; but I should have been for going further," wrote his gently critical mentor, Jefferson. Others suggested Madison include the power for Congress to declare where canals should be cut, a two-thirds majority for commercial laws, and a three-fourths majority for treaties surrendering American territorial claims.[23] "If Chips must be put into the Porridge," wrote Richard Peters, Speaker of the Pennsylvania Assembly, "I would let the bad Cooks put them into the Pot, nor should any throw out Tubs but those who were afraid of the Whale." Madison understood all too well about tubs and whales, but he questioned Peters about the porridge. Madison soon received a fable entitled "The Wise Cooks and Foolish Guests." Eleven cooks carefully prepared an excellent soup. Dissatisfied, some of the guests proposed changes in the recipe to the extent that the soup became unrecognizable. "Had you lived in the Days of these Cooks," Peters pointedly teased, "your Easiness of Temper . . . would have prompted you to indulge the Anti Soupites in some of their Whims of an innocent Nature especially if they had been some of your Neighbours."

Madison, delighting in his correspondence with the witty Peters and seeking to change his disapproving mind, argued the necessity of amendments. "As an honest man" he felt bound by the fact that the Constitution was adopted in Virginia and other states with the tacit understanding of subsequent amendment. Further, he insisted that if the Virginia candidates in the congressional election had not taken a conciliatory stand on the issue, the delegation would have been almost wholly disaffected; that if the Federalist side of the House had not acted, the Antifederal side would have; that if adopted his amendments would destroy the opposition everywhere, enable the administration to venture into measures not otherwise safe, and prevent Antifederal leaders from blowing "the trumpet for a second Convention." Finally, obtaining North Carolina's ratification required some amendments. Peters remained unconvinced, believing Madison's apprehensions too highly wrought and his amendments merely a banner

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Collection (American Philosophical Society, Philadelphia, Penn.); James Sullivan to Gerry, June 28, 1789 (James S. Copley Library, LaJolla, Calif.); (New York) *Gazette of the United States*, Aug. 15, 19, 1789; John Fenno to [Joseph Ward], July 5, 1789, Ward Papers (Chicago Historical Society); New York *Daily Gazette*, Aug. 7, 1789.

[23] From Tench Coxe, June 18, 1789, from John Dawson, June 28, 1789, from Jefferson, Aug. 28, 1789, *Papers of Madison*, XII, 240, 264, 363-364.

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for the Antifederal leaders to raise because the alterations they sought were excluded.[24]

Madison's incoming letters also brought the news he hoped to hear. The "honest" Antifederalists as well as the Federalists at Philadelphia were pleased, reported Tench Coxe, Madison's mouthpiece in the Philadelphia press. The designing and less honest opponents had been stripped of their arguments, Coxe insisted.[25] Virginia Antifederalists and Federalists approved.[26] Although details of Madison's proposals were unknown in North Carolina, news from there particularly encouraged him. That state's Antifederal leadership wanted amendments which confined Congress to *expressly* delegated powers, but Federalist Samuel Johnston, soon to be elected to the first United States Senate, thought "a little Flourish & Dressing without injuring the substantial part or adding much to its intrinsic value, such as a pompous Declaration of Rights" might be enough to obtain a Federalist victory at the state's upcoming second ratification convention.[27]

Six weeks later—July 21—Madison "begged" the House to take up his proposals. It spent the day debating whether to free the Committee of the Whole from its assignment and to appoint a select committee instead. Federalists could see no good purpose in discussing the subject below crowded public galleries so they established a select committee composed of a member from each state, despite the Antifederal call for a public debate.

The committee, whose members were unsympathetic to amendments, reported back to the House a week later. It discussed the missing state proposals, but, as chairman John Vining observed, it "conceived some of them superfluous or dangerous, and found many of them so contradictory that it was impossible to make any thing of them."[28] It retained Madison's plan of incorporating the amendments into the body of the Constitution itself, rather than appending them at the end as committee member Roger Sherman urged. The

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[24] From Richard Peters, July 5, 20, Aug. 24, 1789, to Peters, Aug. 19, 1789, *ibid.*, XII, 283, 301-303, 353-356, 346-347.

[25] From Tench Coxe, June 18, 1789, *ibid.*, XII, 239-240. See Coxe's writings signed "A Pennsylvanian" in the *Federal Gazette*, June 18, 30, 1789.

[26] From Edward Stevens, June 25, 1789, from Edmund Randolph, June 30, 1789, from Archibald Stuart, July 31, 1789, *Papers of Madison*, XII, 261, 273, 319.

[27] From William R. Davie, June 10, 1789, from Hugh Williamson, July 2, 1789, from Benjamin Hawkins, [July] 3, 1789, from Samuel Johnston, July 8, 1789, *ibid.*, XII, 210-211, 274-275, 284-285.

[28] *Annals*, I, 672, 741.

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report also tightened Madison's prose, rearranged his proposals, and narrowed considerably the absolute guarantees of religious freedom and the equal rights of conscience. Most prominently, it gutted Madison's majestic natural law preamble by omitting the right of the people "to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution"; the statement "that all power is originally vested in, and consequently derived from the people"; and the list of benefits that people derive from government: enjoyment of life and liberty, acquiring and using property, pursuing and obtaining happiness and safety.

The report reflected the Federalist viewpoint of 1789, that support of government stability rather than the right of revolution proved uppermost. The principles of 1776, enunciated by Mason in the Virginia Declaration of Rights and Jefferson in the Declaration of Independence, need not be added to the Constitution. Madison, firmly attached to his own ideas if not his own words, showed displeasure with the revision although he admitted some things had perhaps been changed for the better. Sherman, reported to have opposed civilian control of the military in the committee, thought the proposals probably "harmless and satisfactory to those who are fond of Bills of rights." William Loughton Smith found them inoffensive and perhaps of some strategic benefit.[29]

On August 13 two Virginians moved to go into Committee of the Whole on the select committee's report of two weeks earlier. Once again, spokesmen from both parties urged postponement. Even select committee chairman Vining expressed ambivalence, but being "impressed by the anxiety which the honorable gentleman from Virginia had discovered for having the subject" debated, Vining would support its consideration instead of the land office bill which "in point of importance, every candid mind would acknowledge . . . preference." Elbridge Gerry considered the proposals so inadequate that they, and the many others which would be offered on the floor, would require a lengthy debate. Madison insisted that adoption of amendments before the session ended was vital, and that any proposals in addition to his would waste the House's time. Once again the members yielded to

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[29] Madison to Jefferson, Aug. 2, 1788, *Papers of Jefferson*, XV, 324-325; Sherman's Amendments, July 1789, Madison Papers, LC; Sherman to Henry Gibbs, Aug. 4, 1789, Gibbs Family Papers, Yale; Richard Henry Lee to Samuel Adams, Aug. 8, 1789, James C. Ballagh, ed., *The Letters of Richard Henry Lee* (2 vols., New York 1911-14), II, 496; William Loughton Smith to Edward Rutledge, Aug. 9-15, 1789, *South Carolina Historical Magazine*, 69 (Jan. 1968), 14.

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Madison and postponement failed. The first motion set off a long debate as Sherman attempted without success to place any amendments at the end, rather than within the body, of the Constitution.[30]

From August 13 to 18 the Committee of the Whole considered each proposal individually. The high point of the debate took place on August 15, a sweltering Saturday. The debate was between Federalists and Antifederalists except for Sedgwick's complaint that to guarantee the right of assembly descended into minutia and his suggestion that the Constitution might just as well protect a man's freedom to go to bed when he chose. Led by Gerry, the other Antifederal spokesmen were Aedanus Burke, Thomas Tudor Tucker, and Thomas Sumter of South Carolina. Gerry and Sumter accused the select committee of being so attached to its own work that it would not tolerate any change. Burke declared that the proposals before the Committee of the Whole would never satisfy the people—that Madison's amendments 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." Madison responded to the attack. Had not the people been told that they should oppose the Constitution until they secured these very rights? Had not the amendments he proposed been the ones most strenuously advocated by Antifederal leaders? Who, he implied, was deceiving whom? Burke did not argue that point, but instead held up copies of the amendments of several state conventions to show their difference from those on the floor, concluding that all the important amendments had been omitted. Federalist William Smith summarized the day's debate as more ill-humored and rude than any other that had occurred in Congress. Likely, it was during this day's debate that members of both sides challenged opponents to duels.[31]

When the Committee of the Whole reconvened after its Sunday adjournment, Burke proposed that it add to the select committee report a popular item from the Virginia ratifying convention's proposed bill of rights: civilian control of the military and a prohibition against standing armies in time of peace except from necessity. The motion failed. Tucker took offense at Madison's proposal to prevent the states from infringing on certain specified rights of American citizens

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[30] *Annals*, I, 704-717.

[31] *Ibid.*, 729-749; William Smith to Williams, Aug. 17, 1789, Otho Holland Williams Papers (Maryland Historical Society, Baltimore, Md.); William L. Smith to Edward Rutledge, Aug. 9-15, 1789, *South Carolina Historical Magazine*, 69 (Jan. 1968), 24; Elbridge to Samuel R. Gerry, June 30, 1790, S.R. Gerry Papers, MHS.

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and moved without success that it be struck. Gerry moved that all of the amendments of the states not contained in substance in the select committee report be referred to the Committee of the Whole, and that it adopt a report incorporating them with the work of the select committee. Tucker threatened a second convention in support of the motion; nevertheless, it lost 34 to 16. After a heated debate, with frequent calls to order, the Committee of the Whole rose and submitted the select committee's report to the House, having made only minor changes in it. The House began its consideration immediately. Tucker moved to refer seventeen of the alterations recommended by the states to a new Committee of the Whole, but the House easily defeated the motion.[32]

Apparently none of the select committee's amendments had received the two-thirds majority in the Committee of the Whole necessary to gain approval by the full House. Somewhere Madison would have to locate the votes. President Washington, who had urged Congress in his inaugural address to adopt amendments promoting the rights of freemen without altering the system, had given Madison a letter of support. Washington thought some of the proposals unimportant, but "not foreseeing any evil consequences that can result from their adoption, they have my wishes for a favorable reception in both houses."[33] Lukewarm though it was, the note probably influenced House Federalists to unite behind Madison's amendments. In addition, their postponement or defeat at that stage of the process might provide Antifederalists with new ammunition by which to conduct a campaign for a second convention.

Madison paid a price for the Federalist votes he secured in order to assure the necessary two-thirds majority. Federalists voted out the little that remained of Madison's preamble and agreed to Sherman's motion that the amendments be placed at the end of the Constitution. Madison considered the latter change "an unavoidable sacrifice to *a few* who knew their concurrence to be necessary, to the despatch if not the success of the business . . . ." He feared that the placement would lead to ambiguities about how far the original Constitution had been superseded by the amendments. Actually the change set a precedent for isolating amendments, broadened their role in constitutional law, and made it possible to point to a body of amendments known as the federal Bill of Rights.[34]

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[32] *Annals*, I, 749-764.

[33] To Madison, [c. May 31, 1789], *Papers of Maidson*, XII, 191.

[34] Madison to Alexander White, Aug. 24, 1789, *Papers of Madison*, XII, 352-353;

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On August 20 and 21 the House made only minor changes while moving rapidly through the proposals. When what became the Tenth Amendment limiting the central government to only those powers delegated came up for approval, Gerry moved to add the word "expressly" between "powers" and "delegated," thus bringing reservation of powers into conformity with the Articles of Confederation and the amendments proposed by six states and eliminating the doctrine of implied powers. William Smith and another southern Federalist voted with the Antifederal minority because they believed adding the word would go a long way to prevent Congress from interfering with slavery.

Burke proposed without success that Congress be stripped of its power to interfere with state regulation of congressional elections unless a state proved unable, neglected, or refused to hold elections. In the long debate which ensued, Madison expressed opposition not so much to the popular proposal as to the timing of its introduction. Gerry saw no reason for omitting it except to establish an arbitrary government "to which the present system is pointed in no very indirect manner." Burke decried the assertion, often heard in the House, "that this revolution, or adoption of the new Constitution, was agreeable to the public mind, and [that] those who had opposed it at first are now satisifed with it." On the contrary, he claimed, Americans had parted with their liberties out of patriotism, relying on future amendment by Congress to restore them. Having failed to secure the recommendation of such a popular amendment, Antifederalists had little hope left. Irritated, Madison noted privately at the end of the day that the Antifederalists were trying to "defeat by delaying a plan short of their wishes, but likely to satisfy a great part of their companions in opposition." The last eight days, he complained, had been "extremely difficult and fatiguing" and "exceedingly wearisome."

By August 22 both the heat and the ill humor had subsided. Tucker moved the adoption of one more amendment: Congress shall not impose direct taxes except when duties, imports, and excises proved insufficient and then only after a state had refused to pay a congressional requisition. Many Federalists, Madison included, saw the elimination of Congress's power to lay direct taxes as the chief Antifederal goal. Samuel Livermore of New Hampshire, besides William Floyd of New York the only Federalist voting consistently with

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Annals, I, 767. For an analysis of Sherman's role see Christopher Collier, *Roger Sherman's Connecticut: Yankee Politics and the American Revolution* (Middletown, Conn. 1971).

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the Antifederalists, declared it to be the most important amendment to come before the House. "Unless something more effectual was done to improve the Constitution, he knew his constituents would be dissatisfied. As to the amendments already agreed to, they would not value them more than a pinch of snuff; they went to secure rights never in danger." Gerry and Sumter warned that the states would be annihilated if the power of direct taxation remained with Congress, but the motion failed. With the defeat of four more proposals on voice votes, House Antifederalists gave up the fight for alterations.[35] The two Antifederalists who had spoken against Madison's proposals most frequently expressed their dissatisfaction privately. Gerry confirmed Madison's analysis that a real difference existed between Antifederal spokesmen and their followers: the House proposals had no "other purposes than to reconcile those who had no adequate idea of the essential defects of the Constitution." Tucker fumed that they were "calculated merely to amuse, or rather to deceive."[36]

On August 24 the House transmitted seventeen amendments to the Senate. Madison found them little changed from the report of the select committee.[37] The two Philadelphia representatives advised their fellow townsman, Senator Robert Morris, that the Senate "adopt the whole of them by lump as containing neither good or harm, being perfectly innocent." Morris, who held Madison responsible for all the time which the House had wasted on amendments, disagreed. "Poor Madison took one wrong step in Virginia by publishing a letter respecting *amendments*, and you . . . know what a cursed thing it is to write *a Book*," he joshed Richard Peters, concluding at the end of the Senate debate that "they are what Centinel calls them, a 'tub for the whale.'" Senator Pierce Butler of South Carolina agreed that Madison had offered only "*milk-and-water*" propositions; "I suppose . . .

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[35] *Annals*, I, 795-808; William L. Smith to Edward Rutledge, Aug. 9-15, 1789, *South Carolina Historical Magazine*, 69 (Jan. 1968), 20-21; Madison to Edmund Randolph, Madison to Edmund Pendleton, Aug. 21, 1789, *Papers of Madison*, XII, 348-349; William Smith to Williams, Aug. 22, 1789, Otho Holland Williams Papers. On the importance of the direct taxation issue see Madison to Tench Coxe, July 30, 1788, Edmund Randolph to Madison, Aug. 18, 1789, Madison to Washington, Dec. 5, 1789, *Papers of Madison*, XI, 210, XII, 345, 459; and David Stuart to Washington, Sept. 12, 1789, Washington Papers, LC.

[36] Gerry to John Wendell, Sept. 14, 1789, Fogg Autograph Collection; Tucker to St. George Tucker, Oct. 2, 1789, Charles Roberts Autograph Letters Collection (Haverford College, Haverford, Penn.).

[37] To Alexander White, Aug. 24, 1789, *Papers of Madison*, XII, 352-353.

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to keep his promise with his constituents."[38] The Senate met in secret, and the unofficial recorder of the debates, Federalist William Maclay of Pennsylvania, was bedridden for all but the first day's debate. He noted in his diary then that Senators Morris, Ralph Izard of South Carolina, and John Langdon of New Hampshire treated the amendments contemptuously and unsuccessfully urged a postponement until the next session. Senator Richard Henry Lee of Virginia reported a debate over whether liberty of speech and freedom of the press should be struck from the amendments on the grounds that they only tended to encourage licentiousness. He was also probably the source for the asertion that a simple, but not the necessary two-thirds, majority of the Senate opposed the right of the militia to bear arms.[39]

The two Antifederalist senators, Virginia's Lee and William Grayson, faced overwhelming odds. Earlier in the session, when Grayson had proposed laying the Virginia Convention amendments before the Senate, Lee persuaded him to wait until the House acted, and both men closely observed proceedings there. Grayson complained that Madison's proposals "effect personal liberty alone, leaving the great points of the Judiciary, direct taxation, and etc., to stand as they are." The strategy of such a tactic, the Senator reasoned, was merely to break the spirit of the Antifederal party by dividing it. Lee believed that the Federalists, having gained their new government, wished "to neglect the condition upon which probably their success was founded." Lee and Grayson failed to preserve and strengthen the House proposals, and to add one-by-one the Virginia amendments omitted by Madison.[40]

When it completed work on the amendments on September 14, the Senate had made twenty-six changes. Aside from tightening language, the Senate rearranged and compressed the seventeen articles

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[38] To Peters, Aug. 24, Sept. 13, 1789, Peters Papers, HSP; to Hopkinson, Aug. 15, 1789, Francis Hopkinson Papers, HSP; to James Wilson, Aug. 23, 1789, Willing, Morris and Swanwick Papers (Pennsylvania Historical and Museum Commission, Harrisburg, Penn.); Butler to James Iredell, Aug. 11, 1789, Griffith J. McRee, *Life and Correspondence of James Iredell* (2 vols., New York 1857-1858), II, 265.

[39] Kenneth R. Bowling and Helen E. Veit, eds., *Documentary History of the First Federal Congress*, vol. IX, *The Diary of William Maclay and Other Notes on Senate Debates* (Baltimore 1988), 133; Thomas B. Randolph to St. George Tucker, Sept. 12, 1789, Brock Collection (Henry E. Huntington Library, San Marino, Calif.); John Randolph to St. George Tucker, Sept. 11, 1789, Tucker Papers, LC.

[40] Grayson to Patrick Henry, June 12, 1789, *Henry Correspondence*, III, 391; Richard Henry Lee to Charles Lee, Aug. 28, 1789, to Samuel Adams, Apr. 25, 1789, *R. H. Lee Letters*, II, 499, 484.

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into twelve and made significant changes in content. Struck from the House amendments were ones forbidding the states from infringing certain rights of Americans, asserting separation of powers as a principle of the United States government, guaranteeing freedom of conscience, exempting from military service those with religious objections, and the vicinage requirements in criminal trials, the monetary minimum for appeals to the Supreme Court, and the provision for trials of crimes committed in a place in possession of an enemy. The Senate added a minimum of twenty dollars at issue to ensure a jury trial in common law suits, weakened the guarantees of the religious liberty clause, and, significantly, added "or to the people" at the end of the reservation of powers amendment. The Senate also inserted a preamble describing the amendments as a response to the state ratification conventions and as a means of extending public confidence in the government. Senator Lee understandably found the statement ironic. He believed the Senate had "mutilated and enfeebled" the House proposals, and assured Patrick Henry that he and Grayson had made every effort to secure the adoption of the Virginia amendments. "We might as well have attempted to move Mount Atlas upon our shoulders"; in fact, echoing the warning of the "Federal Farmer" two years earlier, he lamented, that not insisting on prior amendment of the Constitution had been little better than committing suicide. "The lower house sent up amendments which held out a safeguard to personal liberty in [a] great many instances, but this disgusted the senate," Grayson reported to Henry; "they are so mutilated and gutted that in fact they are good for nothing, and I believe, as many others do, that they will do more harm than benefit."[41]

Also angered by the Senate changes, Madison claimed they struck at his most salutary proposals. Reports circulated that he had declared the amendments stripped of their sedative virtue and that none wsa better than those agreed to by the Senate. Predictably, Sherman and several other congressmen who had reluctantly supported Madison welcomed the amending hand of the Senate. And, when President Washington forwarded the twelve amendments to the states in early October, most of the Senate changes remained.[42]

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[41] Richard Henry Lee to Patrick Henry, Sept. 14, 1789, William Grayson to Henry, Sept. 29, 1789, *Henry Correspondence*, III, 339, 406; Richard Henry Lee to [Francis Lightfoot Lee?], Sept. 13, 1789, *R. H. Lee Letters*, II, 500.

[42] Madison to Edmund Pendleton, Sept. 14, 23, 1789, *Papers of Madison*, XII, 402, 418-419; Sherman to Gov. Samuel Huntington, Sept. 17, 1789, Lane Memorial

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Little is recorded about the ratification process within the states. The Antifederal leviathan had submerged and no new, unified opposition had replaced it. Other issues such as the assumption of the states' revolutionary war debts by the central government and the location of the federal capital had captured public attention. Although nine states ratified the amendments within ten months, it took more than two years before the necessary tenth state acted. Several states rejected either the first or second of the proposed amendments—on apportionment of the House and on compensation to members of Congress—and so, to Madison's further chagrin, the twelve became ten.[43]

In the four states where Antifederalism had never been a major force, New Jersey and Delaware ratified the amendments just as quickly as they had the Constitution itself, while Connecticut and Georgia waited until the 1939 sesquicentennial of the Bill of Rights. Although important but not always effective Antifederal parties had existed in Maryland, South Carolina, and New Hampshire, all three states ratified the amendments between December 1789 and January 1790.

Pennsylvania had influential Antifederalists, but it ratified the amendments in March 1790 despite Samuel Bryan's revival of "Centinel." Bryan repeated familiar arguments about the kinds of changes that the Constitution really required and described the twelve amendments as an opiate prescribed to subjugate the people. In his view, Madison had rendered Machiavelli piddling by comparison. In Massachusetts the Antifederal leadership unsuccessfully proposed an additional twelve alterations in the legislature, and a last minute disagreement between the two houses prevented adoption of the amendments. Finally convinced that it had never ratified the Bill of Rights, Massachusetts did so in 1939.[44]

Collection, Yale; Abraham Baldwin to Joel Barlow, Sept. 13, 1789, Miscellaneous Manuscripts Collection, Yale; Fisher Ames to Caleb Strong, 15 Sept. 1789, Thompson Autograph Collection (Hartford Seminary Foundation, Hartford, Conn.); Paine Wingate to John Langdon, Sept. 17, 1789, Dreer Collection, HSP.

[43] Douglas Adair, ed., "James Madison's Autobiography," *William and Mary Quarterly*, 2 (Apr. 1945), 204. Delaware and Pennsylvania did not adopt the first amendment (on apportionment) and New York, New Jersey, and New Hampshire did not adopt the second (on congressional compensation).

[44] "Centinel Revived," (Philadelphia) *Independent Gazetteer*, Aug. 27, 29, Sept. 9, 1789; *Report of the Committee of Both Houses Appointed to Consider Further Amendments to the Constitution of the United States* (Boston 1790), Shipton Imprints No. 22655; Henry

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Most of the complaints about the amendments came from the four states with the strongest Antifederal parties. New York Antifederal leaders found them trivial, equivocal, and unimportant since the people and the states lacked the power to enforce them. New York, however, agreed to them in February 1790.[45] In North Carolina the amendments helped bring the state back into the Union as Madison and others had hoped. Nevertheless, the November 1789 convention, which ratified the Constitution a month prior to the legislature's adoption of the amendments, had demanded that its congressmen seek eight additional amendments. These provided further guarantees of personal liberty, but primarily altered the structure and powers of the federal government in order to further protect state interests. North Carolina's representatives attempted without success to bring the proposals before the House in March and May 1790. In November 1790 the North Carolina Senate killed a resolution for a second Federal Convention.[46]

Rhode Island informed the federal government in September 1789 that the amendments "already afforded some relief and satisfaction to the minds of the people of this state," but it did not ratify the Constitution until May 1790. With its ratification, Rhode Island sent a list of twenty-one alterations and eighteen rights-related amendments which the state assumed to be unimpaired by the Federal Constitution. Among the novel alterations it proposed were an end to the importation of slaves as soon as possible and a provision that no amendment to the Constitution could take place after 1793 unless eleven of the original thirteen states agreed to it. Rhode Island adopted all but one of Congress's Amendments two weeks after it ratified the Constitution itself.[47]

Jackson to Knox, Mar. 7, 1790, Henry Knox Papers, MHS; Christopher Gore to Thomas Jefferson, Aug. 18, 1791, *Papers of Jefferson*, XXII, 16n; Leverett Saltonstall to Cordell Hull, Mar. 3, 1789, General Constitutional Records, RG 11 (National Archives [NA], Washington, D.C.).

[45] Staughton Lynd, "Abraham Yates's 'History of the Movement for the United States Constitution,'" *Class Conflict, Slavery, and the United States Constitution* (Indianapolis 1967), 222; DeWitt Clinton to Charles Clinton, Feb. 8, 1790, Miscellaneous Manuscripts (New-York Historical Society, New York, N.Y.).

[46] New York *Packet*, Oct. 8, 15, 1789; *State of North Carolina. In Convention, November 23, 1789*, Shipton Imprints No. 22039; John Steele to Joseph Winston, May 22, July 20, 1790, in H. M. Wagstaff, ed., *The Papers of John Steele* (2 vols., Raleigh, N.C. 1924), I, 61-62, 70-71; Thomas Blount to John Gray Blount, Nov. 27, 1790, Alice B. Keith, ed., *The John Gray Blount Papers* (2 vols., Raleigh, N.C. 1959), II, 147.

[47] John Collins to Washington, [Sept. 19, 1789], Miscellaneous Records,

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Virginia's response to the amendments was crucial both to Madison politically and to the continuance of an Antifederal movement. Opponents of the Constitution, particularly in the heavily Antifederal counties south of the James River, not only became reconciled to the document as a result of the amendments, but also praised Madison as having been their patron. The state's Antifederal leaders remained dissatisfied nevertheless.[48] Henry claimed the Amendments injured rather than served the cause of liberty, and he promised to continue the fight. He insisted they acted only to lull suspicion and cast an impediment in the way of those who wished to "retrench the exorbitancy of power granted away . . . from the people" to the central government.[49] More moderate than Henry, George Mason, who must have recognized much from his Virginia Declaration of Rights in Madison's proposals, gained satisfaction from them as they had stood before the Senate revised them. With a few more alterations he could support the new system. Jefferson, by his own words in 1787 "not a friend to a very energetic government," had not been forced to take sides in the ratification debate because of his absence in France. Although he had claimed to be more of a Federalist than an Antifederalist, his unyielding support for a bill of rights, and his widely circulated suggestion that once nine states had ratified the Constitution the others should withhold their consent until such a bill was added, proved him a moderate Federalist at most. Jefferson agreed with Mason that amendments additional to those sent to the states should be pressed in order to fix the government on a more republican basis.[50]

Department of State Records, RG 59, NA. The Rhode Island amendments can be found in William Staples, *Rhode Island in the Continental Congress* (Providence 1870), 674-680.

[48] Edmund Pendleton to Madison, Sept. 2, 1789, Edward Carrington to Madison, Sept. 9, 1789, Madison to Washington, Nov. 20, 1789, *Papers of Madison*, XII, 368-369, 393, 453.

[49] Patrick Henry to Richard Henry Lee, Aug. 28, 1789, Jan. 29, 1790, Richard Henry Lee to Patrick Henry, Sept. 27, 1789, June 10, 1790, *Henry Correspondence*, III, 397-398, 402-404, 414, 421-422; Henry to Monroe, Jan. 24, 1791, James Monroe Papers, LC.

[50] Washington to James Craik, Sept. 8, 1789, Washington Papers, LC; Henry Lee to Madison, [c. Dec. 20, 1787], Madison to Jefferson, Oct. 24, 1787, *Papers of Madison,* X, 215-216, 339; Mason to Samuel Griffin, Sept. 8, 1789, Mason to Jefferson, Mar. 16, 1790, *Mason Papers*, III, 1172, 1189; Jefferson to Madison, Dec. 20, 1787, Jefferson to Francis Hopkinson, Mar. 13, 1789, Jefferson to Mason, June 13, 1790, *Papers of Madison*, XII, 442, XIV, 649-651, XVI, 493.

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The amendments first came before the Virginia legislature during the closing weeks of 1789. Henry urged postponement; nevertheless, reacting out of anger or the recognition of defeat, he avoided the debate by going home. The resolution for postponement lost overwhelmingly, although an attempt to ask Congress to adopt the remainder of the Virginia Convention amendments failed by only one vote. The two houses disagreed over which of the twelve amendments to reject, and it did not ratify until December 1791. Appropriately, this made Virginia the tenth state to ratify and therefore gave legal effect to the first ten amendments, by then widely referred to as the Bill of Rights.[51]

Senators Grayson and Lee jointly had sent two official letters to the state in September 1789 insisting that they had done all they could to have "radical" amendments adopted. Fearing a loss of civil liberty and a tendency toward national rather than federal government, they expressed "real grief that we now send forward propositions inadequate to the purpose of real and substantial amendments, and so far short of the wishes of" Virginia. Their letters seriously misread the public reaction to Madison's amendments, and the legislature refused to order them printed. Leaked to the press at the end of 1789, the letters appeared in newspapers throughout the United States, where, in light of Madison's effectiveness, they served as the funeral oration for the Antifederalist party. "Some few indeed had gone such lengths in their declarations of hostility that they feel it awkward perhaps to come over," Secretary of State Jefferson informed the Marquis de Lafayette, "but the amendments proposed by Congress, have brought over almost all their followers."[52]

As Madison had predicted the amendments did detach the Antifederalists from their leaders and thereby prevented immediate structural revision of the Constitution.[53] The opposition party which

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[51] Madison to Washington, Nov. 20, 1789, Henry Lee to Madison, Nov. 25, 1788, Hardin Burnley to Madison, Nov. 28, 1789, Edward Carrington to Madison, Dec. 20, 1789, *Papers of Madison*, XII, 453-456, 463-464; Henry Lee to Hamilton, Nov. 16, 1789, in Harold C. Syrett and Jacob E. Cooke, eds., *The Papers of Alexander Hamilton* (26 vols., New York, 1961-1979), V, 517.

[52] Richard Henry Lee and William Grayson to Governor of Virginia, Sept. 28, 1789, *idem* to Speaker of House of Delegates, Sept. 28, 1789, *Federal Gazette*, Dec. 28, 1789; John Fenno to Ward, Jan. 31, 1790, Ward Papers; David Stuart to Washington, Dec. 3, 1789, Washington Papers, LC; Ames to George R. Minot, Jan. 13, 1790, *Ames' Works*, I, 72; Jefferson to Lafayette, Apr. 2, 1790, *Papers of Jefferson*, XVI, 293.

[53] Several amendments designed to alter the federal judiciary were postponed until the Second Congress by the House on March 3, 1791.

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replaced the Antifederalists was led by Madison and Jefferson and not Henry, who preferred to become a Federalist rather than associate with his old political enemies. The new party accepted the Constitution and challenged its interpretation rather than its essence. In one of the first pamphlets to attack the new party, Federalist William Smith argued that it was Madison "who advised that no other amendments to the Constitution should be offered to the people but a few milk and water propositions . . . ." Alexander Hamilton, after a decade of violent party politics, reflected that Madison's amendments met "scarcely any of the important objections which were urged, leaving the structure of the government, and the mass and distribution of its powers where they were, [and] are too insignificant to be with any sensible man a reason for being reconciled to the system if he thought it originally bad."[54]

The constitutional role as well as the consecrated status of the federal Bill of Rights today is due less to the foresight of the Founding Fathers than to the vigilance of a concerned citizenry, and especially to what Jefferson had called to Madison's attention in 1789 as an argument of "great weight" in favor of a bill of rights, "the legal check which it puts into the hands of the judiciary."[55]

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[54] [William L. Smith], *The Politics and Views of a Certain Party, Displayed* (n.p. 1792), Shipton Imprints No. 24801, 22-23; "An Address to the Electors of the State of New-York," [Mar. 21, 1801], *Papers of Hamilton*, XXV, 356.

[55] Jefferson to Madison, Mar. 15, 1789, *Papers of Jefferson*, XIV, 659.

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