James Madison and Amendments to the Constitution, 1787-1789: "Parchment Barriers"

By Stuart Leibiger

Historians generally interpret the passage of the Bill of Rights as an example of throwing "a tub to the whale." This phrase refers to the practice whereby sailors threw an old tub or barrel to a menacing whale, hoping the dangerous creature would be so amused with its plaything that it would not damage or demolish the ship. Thus, the Federalists threw a tub in the form of the Bill of Rights to the Antifederalists to keep them from pursuing amendments that might have weakened or destroyed the Constitution.[1]

Most scholars apply this thesis to the Father of the Bill of Rights, James Madison. According to their interpretation, Madison secured the adoption of rights-related amendments for three reasons: to forestall the Antifederalists from pursuing alterations that would weaken the powers of the federal government; to win support for the Constitution, especially in North Carolina and Rhode Island, which had yet to ratify the document; and to fulfill a campaign pledge that had saved his political career, because only by promising amendments had he been elected to a seat in the House of Representatives from his strongly Antifederalist district.[2] While historians

[1] See James H. Hutson, "The Birth of the Bill of Rights: The State of Current Scholarship," *Prologue*, XX (Fall 1988), 143-61; and Kenneth R. Bowling, "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic*, VIII (Fall 1988), 223-51. I would like to thank Don Higginbotham, Peter Coclanis, Harry Watson, Deanna L. Pagnini, and the anonymous reviewers for the *Journal of Southern History* for their helpful comments on this essay.

[2] In this paper, the word *amendment* refers to any change in the Constitution, whether to protect personal liberty or to weaken the federal government vis-à-vis the states. "Prior amendments" are proposals that were to be adopted before final ratification and could occur in one of two ways: a second convention could meet to revise the Constitution, and any changes the convention made would then have to be approved by the requisite nine states; or a state could "conditionally" accept the Constitution, in that its ratification would take place only after eight other state conventions had agreed to certain specified amendments. The word *alteration* denotes those amendments that change the structure or weaken the powers of the national government. "Bill of rights," "rights-related amendments," "declaration of rights," and "charter of liberties" refer to amendments protecting individual freedoms.

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agree that Madison was deeply committed to the protection of personal liberty, many insist that he was motivated solely by political expediency and that he saw no theoretical value in a federal bill of rights.[3] Others recognize that Madison supported a charter of liberties on both pragmatic and abstract grounds; they suggest, however, that Madison was more interested in honoring an election promise and winning support for the Constitution than he was in making it a more perfect document.[4]

By explaining Madison's theoretical case for a federal bill of rights and by placing it in the context of his thinking during the months after the Constitutional Convention, this essay clarifies and supplements scholarship on Madison. He became an advocate of rights-related amendments not simply to win popularity for the Constitution or to fulfill a campaign pledge. An equally important element of his advocacy was the conviction that a federal bill of rights was an appropriate addition to the Constitution: a bill of rights would reduce unjust legislation by making popular majorities aware of the rights of individuals, and the amendments would provide political minorities and various levels and branches of government with a weapon against encroaching tyranny. Madison came to support a declaration of liberties because he believed that it could substitute for several features of government that he had vainly sought to include in the Constitution, such as a council of revision, a congressional veto, and a wholly national Senate. Since Madison was a politician who was willing to compromise in response to advice and criticism, a careful study of his approach to a bill of rights illuminates the relationship between thought and action and between theory and reality in American politics.

[3] See Hutson, "Birth of the Bill of Rights"; Robert J. Morgan, *James Madison on the Constitution and the Bill of Rights* (Westport, Conn., New York, and London, 1988), 131; Harold S. Schultz, *James Madison* (New York, 1970), 85-86; and Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity," *Supreme Court Review* (1990), 301-47.

[4] This group includes Jack N. Rakove, Robert Allen Rutland, Leonard W. Levy, Bernard Schwartz, Irving Brant, Ralph Ketcham, and Kenneth R. Bowling. For Rakove, see "James Madison and the Bill of Rights," *This Constitution*, XVIII (Spring/Summer 1988), 4-10; "The Madisonian Moment," *University of Chicago Law Review*, LV (Spring 1988), 473-505; "The Madisonian Theory of Rights," *William and Mary Law Review*, XXXI (Winter 1990), 245-66; *James Madison and the Creation of the American Republic* (Glenview, Ill., and London, 1990), 77-82; and "James Madison and the Bill of Rights: A Broader Context," *Presidential Studies Quarterly*, XXII (Fall 1992), 667-77. For Rutland, see *The Birth of the Bill of Rights* (Chapel Hill, 1955), 189-218; and *James Madison: The Founding Father* (New York, 1987), 45-49 and 59-69. For Levy, see "The Bill of Rights," in Jack P. Greene, ed., *Encyclopedia of American Political History: Studies of the Principal Movements and Ideas* (3 vols.; New York, 1984), I, 104-25. For Schwartz, see *The Great Rights of Mankind: A History of the American Bill of Rights* (New York, 1977), 115-18 and 160-91. For Brant, see *James Madison: Father of the Constitution, 1787-1800* (Indianapolis and New York, 1950), 235-44 and 264-75; and *The Bill of Rights: Its Origin and Meaning* (New York, Kansas City, and Indianapolis, 1965), 40-52. For Ketcham, see *James Madison: A Biography* (New York, 1971), 289-92 and 303. For Bowling, see "'A Tub to the Whale'."

A close, chronological reading of Madison's papers reveals four phases in his thinking over the critical period from September 1787 to September 1789. In the first phase, from September 1787 through March 1788, Madison was ambivalent about the usefulness of a federal bill of rights. He uncompromisingly opposed amending the Constitution prior to its adoption because he believed that burdening the document with changes before that point would weaken its chances of being approved and help the Antifederalists destroy it. In February 1788 the Massachusetts Convention ratified the Constitution and also recommended specific amendments to be made after its adoption. The success of the Massachusetts effort caused Madison to support recommendatory amendments as a means of broadening support for ratification. This was the second phase (lasting from April through September 1788) of his tactical thinking on the politics of ratification. Still uncompromising on prior changes, he agreed only to recommend amendments that would be enacted after launching the new government. Moreover, Madison initially made this concession not to improve the Constitution, but to achieve its ratification.

Madison's third phase, lasting from October 1788 to April 1789, came once ratification was complete, when the Antifederalists decided to elect enemies of the Constitution to the First Congress. Madison now realized that it would be politically advantageous for the Federalists to seize the amendment issue from their foes. Forthrightly championing amendments would ensure the election of Federalists who could add rights-related amendments to the Constitution without weakening it. At this point, Madison began to argue that a federal bill of rights would improve the Constitution. His advocacy of a charter of freedoms nevertheless reflected a slow but genuine conversion to the cause of a national guarantee of basic liberty. Madison's belief in the theoretical value of rights-related amendments continued to grow through the following March. By the beginning of the fourth phase, which coincided with the first session of the First Congress (April–September 1789), Madison's theoretical support for a federal bill of rights had fully matured, resulting in his indefatigable crusade for amendments.

The months after the Philadelphia Convention were a time of immense creativity, during which Federalists and Antifederalists tried to interpret the Constitution. The Federalists did not simply awe their opponents into acquiescing with their own views. Rather, it was a period of mutual learning, and James Madison's experience illustrates this process.[5]

[5] My argument is similar to Lance Banning's claim that only a few weeks after the Philadelphia Convention, Madison conceded the advantages of the Constitution's partly federal and partly national nature, a concept he had passionately opposed during the convention itself. See Banning, "The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the

Antifederalist arguments caused Madison to reconsider a federal bill of rights, but he did not simply adopt those arguments as his own. Instead, he formulated his own case. True, Madison came to accept the Antifederalist contention that a declaration of rights could be a bulwark against tyranny by an aristocratic minority, but he stood the Antifederalist argument on its head by insisting that the greatest threat to personal liberty was the tyranny of the majority, which a federal bill of rights could potentially diminish through its educative function. Unlike Antifederalists, who saw the national government as the great threat to personal liberty, Madison viewed the states as the likely sources of encroachment. Consequently, he conceived of the amendments as protectors of individual rights from violations by the states as well as by the national government.

Madison believed that the 1780s in general, and the period of ratification in particular, contained the seeds of American republicanism. During those years the American experience of forming a government had revealed that constitutions should be stable, balanced, and popularly based. In order for the rights of minorities to be secure, the government had to be insulated from the momentary passions of the people. Fervently adhering to these notions, Madison was naturally inclined to consider carefully any device, such as a federal bill of rights, that would provide the requisite balance and stability against sudden impulses from the masses.

During the Constitutional Convention of 1787, Madison had sought to strengthen the federal government's control over the states and to place as many checks as possible on the lower legislative house of the national government. These objectives reflect his belief that all-powerful legislatures (such as the states had created in 1776) could pass shortsighted and even tyrannical legislation because they blindly obeyed the will of the majority—often ignoring constitutions and violating minority rights. By shifting power from the state to the national level, Madison reasoned, the common good would prevail over factional interests because self-interested groups would find it more difficult to dominate a national government composed of thirteen states than to dominate a single state. Moreover, Madison believed that the federal government's large electoral districts would guarantee that broad-minded men would be elected over locally oriented candidates. Within the federal government the executive, judiciary, and Senate were to be strengthened with ample checks against the

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Emergence of Revolutionary Federalism," in Richard Beeman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill and London, 1987), 162-87. Madison went through a similar (although much slower) process with regard to a federal bill of rights, a measure he opposed at Philadelphia but which he gradually came to favor.

House of Representatives in order to prevent despotic or myopic legislation in the event that a national faction emerged.

Although generally successful in realizing his twofold purpose, Madison had been unable to persuade his fellow delegates to adopt a number of specific measures that he considered important. In particular, Madison had hoped to provide Congress with veto power over state legislation in order to keep the states from encroaching upon the powers of the central government, to protect the states from one another, and especially to guard the rights of minorities within states. In lieu of passing the congressional veto, the convention made the Constitution the supreme law of the land and prohibited the states from enacting many varieties of legislation, such as provisions for coining money and impairing contracts. Madison believed that these measures were inadequate substitutes for his proposed congressional veto power over state legislation.

Madison had also hoped to base each state's representation in the Senate on its population and to have the lower national legislative house—rather than the state legislatures—elect senators. The Senate would not then be chosen by the same shortsighted men whom Madison hoped to restrain, ensuring the election of farsighted men rather than factional candidates and demagogues. Madison failed as well to persuade the convention to approve a joint executive-judicial council to review and, if necessary, veto prospective federal laws. Madison preferred this method over judicial review of laws already enacted because a remedy could be obtained before unjust legislation took effect. He also feared that neither the executive nor the judiciary was individually powerful enough to nullify a law passed by a popularly elected legislature. These omissions eventually helped convince Madison of the theoretical need for a bill of rights.[6]

Shortly before the Constitutional Convention adjourned, Elbridge Gerry of Massachusetts proposed and George Mason of Virginia seconded a motion to include a bill of rights. Roger Sherman of Connecticut responded, "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." In the ensuing ballot, Madison, along with the majority of every delegation present, voted to defeat the motion.[7] Although he probably shared the delegates' commonly

[6] See Rakove, "Madisonian Moment"; and Madison to Thomas Jefferson, October 24, 1787, in William T. Hutchinson *et al.*, eds., *The Papers of James Madison* [congressional series] (17 vols.; Chicago, London, and Charlottesville, 1962-1991), X, 205-20. Madison also questioned whether giving the authority to revoke federal laws to the judiciary alone did not upset the balance of powers among the branches of the government. Observations on Jefferson's Draft of a Constitution for Virginia, October 15, 1788, *ibid.*, XI, 293.

[7] Max Farrand, ed., *The Records of the Federal Convention of 1787: 1937 Revised Edition in Four Volumes* (New Haven, 1966), II, 582 and 587-88.

held conviction that the federal government would pose no threat to individual liberties, Madison did not share Sherman's faith in the efficacy of the state bills of rights, as his desire for the congressional veto over state legislation indicates. Though it did not include a charter of liberties, the Constitution did protect various personal freedoms—for example, the right of habeas corpus.

The first phase of Madison's thinking about amendments lasted from September 1787 through March 1788, and, since he recognized that the Constitution would be a vast improvement over the Articles of Confederation, his greatest concern during this period was its ratification. Consequently, he threw himself wholeheartedly into the ratification fight, resisting any scheme to change the Constitution before it was adopted. He refused to compromise because he believed (wrongly, as he soon realized) that any concession on amendments would play into the hands of the Antifederalists. Yet, in the months following the convention, Madison privately acknowledged his dissatisfaction with the framework he had helped to build He worried that the states remained too powerful compared to the federal government: in the absence of the congressional veto, encroaching state power would debilitate the central government, supremacy clause or not. Madison also feared that the executive and judiciary had not been sufficiently bolstered to check Congress. He kept his fears private, however, because to express them openly would have provided the Antifederalists with ammunition against the Constitution.[8]

Because he believed that the federal government posed less of a threat to individual liberties than the states did, Madison doubted that a bill of rights would be useful.[9] On March 1, 1788, five months after the close of the convention, Madison wrote a letter to his fellow Virginian George Lee Turberville in which he listed (in Turberville's words) "powerfull reasons that may be urged agt. the adoption of a Bill of Rights." Madison's letter has been lost; the objections to the bill of rights that he expressed to Turberville can only be surmised.[10] Perhaps Madison's letter listed the same three objections that he summarized to Thomas Jefferson half a year later. The first, made famous by James Wilson in a speech before the

[8] Madison to Jefferson, October 24, 1787, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 205-20.

[9] This essay agrees with Finkelman that Madison was ambivalent about the value of a federal bill of rights during and immediately after the Constitutional Convention. Whereas Finkelman sees Madison's ambivalence continuing through the adoption of the first ten amendments, this work sees it as giving way to conviction beginning in the fall of 1788. See Finkelman, "James Madison and the Bill of Rights."

[10] George Lee Turberville to Madison, April 16, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 23.

Pennsylvania Convention, stated that a charter of liberties was unnecessary since the Constitution gave the government only powers that it explicitly delegated. A declaration of rights would carry the dangerous implication that the federal government might exceed its enumerated powers, not only in matters of individual freedom but also in other areas. Second, it would be difficult or impossible to persuade enough states to grant broad protections of personal liberty. In particular, the New England states would oppose any statement of freedom of conscience that interfered with their religious establishments. Third, the weakness of the national government created by the Constitution and the jealousy of the states left individual rights secure.[11]

The argument against a bill of rights, however, that Madison appears to have found most persuasive was that written declarations (or what he contemptuously referred to in *Federalist* 48 as "parchment barriers") could not prevent a government backed by a popular majority from trespassing on the rights of the minority. Only the multiplicity of interests, Madison argued in *Federalist* 10, could accomplish that. Madison had often seen this principle at work during his three years in the Virginia General Assembly. For example, in 1785 religious diversity, not the Declaration of Rights, had prevented the levy of taxes to support "teachers of the Christian religion" in Virginia.[12]

Despite these arguments, there are indications that Madison was ambivalent about a federal bill of rights. At the Philadelphia Convention he was uncharacteristically silent during the eleventh-hour debate on the matter. In his October 1787 attack on George Mason's *Objections to this Constitution of Government*, Madison ignored Mason's main criticism: the lack of a declaration of rights in the Constitution. In the same month, however, Madison grumbled in a letter to Jefferson that Mason considered "the want of a Bill of Rights as a fatal objection." The word *fatal* is significant because it is Madison's characterization of Mason's argument that the lack of a bill of rights was serious enough to justify not ratifying the

[11] Madison to Jefferson, October 17, 1788, *ibid.*, 295-300; and Farrand, ed., *Records of the Federal Convention*, III, 143-44.

[12] *Federalist* 48 and 10, and Madison to Jefferson, October 24, 1787, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 456, 263-70, and 205-20. Madison's other essays in the *Federalist* do not explicitly attack a national bill of rights on theoretical grounds, but they do argue against one by implication. For example, in numbers 46, 48, and 51, Madison maintains that federalism, checks and balances, and the "multiplicity of interests," not "parchment barriers," will protect rights. *Ibid.*, 438-44, 456-60, and 476-80 (quotations on pp. 479 and 456). For a discussion of Madison, rights-related amendments, and the *Federalist*, see Finkelman, "James Madison and the Bill of Rights," 316-19. For Madison's exploitation of religious diversity to help kill the General Assessment bill, see "Memorial and Remonstrance against Religious Assessments," [*ca.* June 20, 1785], in Hutchinson *et al.*, eds., *Papers of James Madison*, VIII, 295-306 (quotation in text is on pp. 298-99).

Constitution. Madison disagreed. At this time, he probably believed that the omission of a charter of liberties was a flaw but not critical enough to warrant Antifederalism.[13]

Madison recognized that the proponents of a federal bill of rights wielded powerful arguments. In particular, he probably asked himself whether the Constitutional Convention's decision to list only some freedoms in the Constitution jeopardized all others. In defending the convention's prohibition of bills of attainder and ex post facto laws in *Federalist* 44, Madison questioned whether rights upon which the federal government is not explicitly allowed to infringe are prima facie secure. These two types of legislation, he wrote, "are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted." If the Constitution needed protections against bills of attainder and ex post facto laws, Madison must have wondered why a complete bill of rights was not required as well. Moreover, the supremacy clause of the Constitution and the implied powers conferred by its necessary and proper clause undercut the notion that the rights of individuals would be protected by limiting the exercise of federal power to those areas explicitly enumerated by the Constitution.[14]

In light of the convention's failure to enact the congressional veto, the council of revision, and the wholly national Senate, a federal bill of rights took on greater urgency. There was neither an executive-judicial council to veto unjust federal laws nor a congressional veto to nullify tyrannical state legislation. Although he hoped the Senate would check despotic legislation at the national level, Madison feared that its election by the state legislatures might prevent it from being any more farsighted than the House. Since he still doubted the efficacy of judicial review, Madison also worried that there would be no remedy against measures that violated individual liberty after such measures had been passed by Congress. Thus, he believed that unjust legislation had to be stopped before it was passed. A federal bill of rights could educate the public, thereby making it less likely that an ignorant majority would demand tyrannical legislation. To borrow an architectural analogy used by Thomas Jefferson, a declaration of rights would bolster

[13] Farrand, ed., *Records of the Federal Convention*, II, 582 and 587-88; and Madison to Washington, October 18, 1787, and Madison to Jefferson, October 24, 1787, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 196-97 and 215 (quotation).

[14] *Federalist* 44, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 421 (quotation); and Levy, "Bill of Rights," 110-12. In *Federalist* 41, however, Madison insisted that the general welfare clause does not grant the federal government the power to interfere with freedom of the press or trial by jury. Hutchinson *et al.*, eds., *Papers of James Madison*, X, 396-97.

liberty as a structural brace would support a house. By itself, the brace could not hold up the edifice, but it "will often keep up the building which would have fallen with that brace the less."[15] A federal bill of rights also offered a second chance to check state laws that violated rights: perhaps the inclusion of an amendment restraining the states could take the place of the congressional veto in preventing despotic state legislation.

The educative role of a bill of rights was not merely a theoretical justification. There was a flaw in Madison's argument in *Federalist* 10 that, in an extended republic, self-interested factions would cancel each other out, thus providing the surest safeguard of rights. As Madison himself realized, the cleavage between the states was not between large and small but between northern and southern, and one section or the other would eventually gain the upper hand and have the potential to interfere with the rights of the other. A charter of liberties would teach the people that certain rights must remain inviolable. If the majority section nevertheless became tyrannical, rights-related amendments would provide the minority region with grounds for an appeal to the majority.[16]

Madison had dedicated much of his life to the protection of individual rights. In 1772 after returning home to Virginia from the College of New Jersey in Princeton, where he had received a liberal education, Madison condemned the persecution of Baptist ministers jailed for preaching without state licenses in Orange and Culpeper Counties. Four years later, while serving in the Virginia convention that adopted George Mason's Declaration of Rights, Madison suggested substituting the word *entitlement* for *toleration* in the sixteenth article, which protected freedom of worship. With this change, Madison converted religious liberty from a privilege to "a *natural and absolute* right." As a member of the Virginia General Assembly, Madison secured passage in 1786 of the Virginia Statute for Religious Freedom, which eliminated established religion in the state. This law was passed after Madison's "Memorial and Remonstrance" helped to generate a storm of petitions from Baptists and Presbyterians, defeating Patrick Henry's attempts to provide public funds for religious instruction. Madison's petition declared that freedom of worship was a natural right

[15] Jefferson to Madison, March 15, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 14.

[16] For an excellent discussion of this logical flaw in Madison's thinking, see Rakove, "Madisonian Moment," 485-89. As a member of Congress, Madison had witnessed the near triumph of such a national majority. In 1785 the northern states supported Secretary of Foreign Affairs John Jay's proposal to relinquish America's claim to the free navigation of the Mississippi River, which the South and West considered vital, in return for commercial concessions to northern shipping interests. Madison to James Monroe, October 5, 1786, in Hutchinson *et al.*, eds., *Papers of James Madison*, IX, 140-41.

that no majority could abridge. By 1787, in short, Madison had exhibited deep concern for the protection of personal liberty. Thus, any discussion or argument about safeguarding rights—however framed or incorporated—would always elicit his thoughtful attention.[17]

Madison may have had mixed feelings about the value of a federal bill of rights, but he had none whatsoever about whether the Constitution should be ratified or amended first. He firmly opposed any plan requiring amendments before the new government could commence, including a second convention to revamp the document prior to ratification. Arguing over "early" amendments, he believed, might prevent the Constitution's ratification. Madison categorized Virginians into three groups. The largest, in which he included himself, favored "adopting without attempting Amendments." The next largest wished to ratify the Constitution but wanted to obtain a few amendments first. The smallest, hostile to the Constitution and led by Patrick Henry, hoped to exploit the first two groups' differences to prevent adoption. Under these circumstances, Madison believed, it was necessary for the proponents of the Constitution to unite behind ratification without prior amendments.[18]

Madison and his fellow Virginians anxiously watched the struggle over ratification in Massachusetts, aware that the outcome would influence their own convention.[19] When rumors circulated that the Bay State would ratify the Constitution only if the Federalists agreed at the same time to recommend a series of amendments, Madison still refused to lend his moral support to the plan. Nevertheless, when the state convention ratified on February 8, 1788, it also recommended a number of amendments. The proposed amendments dealt with reserving powers to the states, representation, regulating elections, direct taxation, monopolies, jury trials, judicial jurisdiction, and titles of nobility, but not freedom of speech, worship, and the press. Madison described them as "a blemish, but . . . in the least Offensive form." Clearly, he was relieved that the state convention had ratified without succumbing to prior amendments and surprised about the good humor with which the Massachusetts Antifederalists accepted the result. It was a marked contrast to Pennsylvania, where Antifederalist demands fell on deaf ears, causing "the minority" to be "very restless under their defeat." The opposition in Massachusetts had not been able to use

[17] Douglass Adair, ed., "James Madison's Autobiography," *William and Mary Quarterly*, 3d Ser., II (April 1945), 198-99 (quotation); and "A Memorial and Remonstrance Against Religious Assessments," [*ca.* June 20, 1785] in Hutchinson *et al.*, eds., *Papers of James Madison*, VIII, 295-305.

[18] Madison to Jefferson, December 9, 1787, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 312.

[19] Madison to Rufus King, January 23, 1788, *ibid.*, 409.

amendments to kill the Constitution. On the contrary, the reverse occurred. By conceding recommendatory amendments, the Federalists achieved ratification.[20]

Indeed, the outcome in Massachusetts caused Madison to change his position. By April 1788 he had decided that recommendatory amendments were acceptable because they could placate enough Antifederalists to secure adoption in Virginia. This switch marks the beginning of the second phase of Madison's thinking about amendments, which continued through September 1788.

Madison first suggested that Virginia resort to recommendatory amendments in reaction to a letter from George Nicholas, a member of the General Assembly. On April 5, 1788, Nicholas had written, "Our freind [*sic*] E: R. [Governor Edmund Randolph] talks of a compromise between the freinds [*sic*] to the union, but I know of but one that can safely take place; and that is on the plan of the Massachusetts convention . . . . " Three days later Madison responded, "I think entirely with you on the subject of amendments. The plan of Massts. is unquestionably the Ultimatum of the foederalists. Conditional amendments or a second general Convention, will be fatal." On April 10 Madison notified Randolph, "I shall be extremely happy to see a coalition among all the real federalists. Recommendatory alterations are the only ground that occurs to me."[21]

As early as the previous November, Madison, at that time a member of the Confederation Congress meeting in New York, had been urged to seek election to the Virginia Convention. Although he wondered whether it would be appropriate for authors of the Constitution to sit in judgment of their own work, Madison decided to run. Madison's friends in Orange were concerned that he might not be elected and warned him that he must personally reassure his constituents about the proposed constitution. Late in February, Madison responded to their warnings.[22]

On his way home from New York, he stopped in Fredericksburg, where he received a letter from Joseph Spencer, a Baptist and a revolutionary war captain. Spencer warned "that Except you & yr. friends do Exerte yr. Selves Very much youl not obtain yr. Election in Orange Such are the predegeses

[20] Madison to Washington, January 20 and February 8 and 15, 1788, and Madison to Jefferson, February 19, 1788, *ibid.*, 399 (second quotation), 482, 510 (first quotation), and 519; and Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore and London, 1991), 14-15.

[21] George Nicholas to Madison, April 5, 1788, Madison to Nicholas, April 8, 1788, and Madison to Randolph, April 10, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 9, 12, and 19.

[22] Madison to Ambrose Madison, November 8, 1787, Lawrence Taliaferro to Madison, December 16, 1787, and William Moore to Madison, January 31, 1788, *ibid.*, X, 244, 329, and 454.

of the people for in short there is nothing so Vile, but what the Constitution is Charged with . . . . " Spencer suggested that Madison visit John Leland, an influential Baptist minister in Orange and a crusader for the separation of church and state. Spencer enclosed a copy of a document written by Leland that listed his "objections to the *Federal Constitution*" and contained Leland's complaints that "there is no Bill of Rights" and that "Religious Liberty, is not sufficiently secured . . . ."[23]

Madison followed Spencer's advice and met Leland about March 22, somewhere between Fredericksburg and Orange. Exactly what transpired has been obfuscated by local myth, but it is clear that Madison overcame Leland's doubts about the Constitution and gained his support in the campaign.[24] Possibly Madison did so by stating that he had concerns about a federal bill of rights but would nevertheless support recommendatory amendments if he were elected to the ratifying convention, the same assurances that he gave George Nicholas two weeks later. In light of the success of the ratification movement in Massachusetts, Madison's high standing among the Baptists as a crusader for religious freedom, and his own ambivalence about the value of a federal bill of rights, there is little reason to suspect that Madison was pressured into supporting recommendatory amendments in order to secure Leland's backing in the election. On March 24, Madison and another Federalist, James Gordon, Jr., defeated their Antifederalist opponents by a four-to-one margin.[25]

During the Virginia Convention, which met in Richmond from June 2 to 27, 1788, Madison spoke often and cogently in defense of the Constitution, usually in response to Patrick Henry's effusive oratory. The Federalists followed Massachusetts's recommendatory amendment example: to prevent those who wanted a declaration of rights in the Constitution from joining the intransigent opponents of the document and thereby defeating its ratification, Madison and the Federalists conceded recommendatory amendments. The plan worked well. On June 25 the convention rejected conditional amendments by a vote of 88 to 80 and then ratified the Constitution, 89 to 79.[26]

In the June 12 debate, Madison had insisted that there was no theoretical value in a bill of rights: "Is a bill of rights a security for religion? . . . If there

[23] Joseph Spencer to Madison, February 28, 1788, *ibid.*, 540-41; and L. H. Butterfield, "Elder John Leland: Jeffersonian Itinerant," *Proceedings of the American Antiquarian Society*, LXII (October 15, 1952), 184-92 (quotations on pp. 187-88).

[24] Butterfield, "Elder John Leland," 184-92.

[25] Madison to Eliza House Trist, March 25, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 6*n*2.

[26] Madison to Hamilton, June 22, 1788, *ibid.*, 166; and Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* . . . (5 vols.; Washington, D. C., 1861), III, 653-54.

were a majority of one sect, a bill of rights would be a poor protection for liberty. Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from 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." After this powerful indictment, Madison remained surprisingly silent during the June 14-15 debate over a declaration of freedoms.[27]

In his speech on June 24, Madison had mentioned two more arguments against a federal bill of rights. First, only powers explicitly granted to the national government belong to it. Second, a bill of rights is hazardous, since an incomplete listing of freedoms implies that those not included can be infringed. But then Madison agreed to support rights-related amendments because they could do no harm.[28] This inconsistency reveals Madison's continuing ambivalence about the value of a federal bill of rights. He was willing to support it to please others, not because he considered it worthwhile.

Conceding recommendatory amendments in Virginia had one result that Madison had hoped to avoid: the Antifederalists called not only for a twenty-article bill of rights but also for twenty alterations to the structure of the national government. The most objectionable of these (from the Federalist point of view) jeopardized federal control over taxation, commerce, and war- and treaty-making. Madison feared that the Antifederalists in Virginia would not accept defeat as well as their Massachusetts counterparts had. In particular, he worried that Patrick Henry's "plan will be to engage 2/3 of the Legislatures in the task of undoing the work; or to get a Congress appointed in the first instance that will commit suicide on their own Authority."[29]

Madison's concerns proved justified. In midsummer, at the direction of the New York Convention, Governor George Clinton released a circular letter to his fellow state executives calling for a second convention to amend the Constitution once the new government went into operation. Having returned to New York to resume his duties in the Confederation Congress, Madison was particularly sensitive to the threat. In vain he

[27] General Defense of the Constitution [speech before Virginia Convention], June 12, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 130 (quotation); and Elliot, ed., *Debates in the Several State Conventions*, III, 444-52 and 460-71.

[28] Ratification without Conditional Amendments [speech before Virginia Convention], June 24, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 175-77.

[29] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 17-21; and Madison to Washington, June 27, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 183 (quotation).

warned Governor Edmund Randolph of the circular letter's "pestilent tendency": the enemies of the Constitution were playing the same old game of trying to destroy it with amendments. When Randolph published Clinton's letter on August 13, the Virginia General Assembly responded with a resolution supporting it. Madison grumbled that the proposal "is a signal of concord & hope to the enemies of the Constitution every where . . . ."[30]

As the summer drew to a close, the second convention failed to materialize. With the first federal elections impending, the Antifederalists, despairing of another convention before the new government was launched, decided instead to elect enemies of the Constitution to the First Congress. The Antifederalists were not completely abandoning plans for a second convention, however; they hoped that by obtaining a majority in the First Congress they would be able to call one.[31]

Madison's recognition of the Antifederalists' plans altered his attitude toward amendments in general and a federal bill of rights in particular. The threat of a second convention was not over, but the new government would go into operation. The next battle would be to elect Federalists to office.[32] Now, for the first time, by advocating amendments, Federalists would be strengthening the Constitution, not helping its enemies destroy it. Admitting the need for a few changes would cut the ground from under the Antifederalists while placing true friends of the Constitution in office. The Federalists could then carefully modify the Constitution, not through a second convention but by the approval of two-thirds of Congress and three-fourths of the state legislatures.

Another factor influencing Madison was a letter from his close friend Thomas Jefferson, which had been written from Paris the previous December and received sometime during the spring of 1788.[33] After praising various features of the Constitution, Jefferson condemned "the omission of a bill of rights." He was unimpressed with the argument that the federal government would exercise only powers expressly delegated to it. "A bill

[30] Madison to Washington, August 11, 1788, Randolph to Madison, August 13, 1788, and Madison to Randolph, August 22, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 230 (first quotation), 231, and 237 (second quotation).

[31] Washington to Madison, September 23, 1788, *ibid.*, 261-62; and Robert Allen Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787–1788* (Norman, Okla., 1965), 288-98.

[32] Washington to Madison, September 23, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 261-62; and Rutland, *Ordeal of the Constitution*, 298-99.

[33] Madison received Jefferson's letter sometime between March 18, when he returned home (he wrote Jefferson that the letter caught up with him in Virginia), and June 12, when he referred to its contents before the convention. General Defense of the Constitution, [speech before Virginia Convention], June 12, 1788, and Madison to Jefferson, July 24, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 130 and 196.

of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference," Jefferson insisted.[34]

With the ratification of the Constitution finally secured, Madison was able to bring himself, during the summer of 1788, to address for the first time the theoretical value of a federal bill of rights. By the beginning of fall, his opposition started to crack. Writing Jefferson on September 21, Madison stated that initiating the amendment process in Congress would be the best way to introduce "those supplemental safeguards to liberty agst. which no objections can be raised." This letter marks the beginning of Madison's shift away from ambivalence about the usefulness of a federal bill of rights and toward endorsement of such a guarantee of individual liberties. He conceded that a charter of liberties could do no harm, even if he was not yet willing to admit that it had value.[35]

The third stage of Madison's thinking, in which he gradually developed his case for amendments on both practical and theoretical grounds, began with his October 17 letter to Jefferson and continued until April 1789. "My own opinion has always been in favor of a bill of rights," he wrote his friend. "At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice."

Madison then rehearsed his arguments against a federal bill of rights. First, the national government would exercise only powers explicitly granted to it. Yet Madison hastened to add that he did not adhere to this reasoning "in the extent argued by Mr. [James] Wilson." Second, the central government was already too weak vis-à-vis the states. Third, "a positive declaration of some of the most essential rights," Madison feared, "could not be obtained in the requisite latitude." In particular, he suspected that the New Englanders would never accept a broad definition of religious freedom. Fourth, paper declarations were ineffectual in the face of tyrannical majorities. This last reason Madison still considered the most telling: "Experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current."

[34] Jefferson to Madison, December 20, 1787, *ibid.*, X, 336-37.
[35] Madison to Jefferson, September 21, 1788, *ibid.*, XI, 257-59.

Although he was not yet able to dismiss these objections, Madison countered them with theoretical reasons for favoring a federal bill of rights. Ever since conceding recommendatory amendments, Madison had considered a charter of liberties valuable because it won support for the Constitution. But now he argued that it would be of value in and of itself. "What use then it may be asked can a bill of rights serve in popular Governments?" he rhetorically asked. "I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution." First, a declaration of rights would educate the public as to what the government can or cannot do to individuals, thus making tyrannical majorities less likely: "The political truths declared in that solemn manner 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." Thus a bill of rights would help create an informed public, a crucial component of republican government. Second, if the national government fell under the sway of an aristocratic minority, "a bill of rights will be a good ground for an appeal" to the majority to reassert itself. Madison doubted whether this scenario would ever occur, since he was sure that the federal government was inclined more toward tyranny by the majority than by the minority. Yet, "should this danger exist at all, it is prudent to guard agst. it, especially when the precaution can do no injury." While Madison did not consider a bill of rights essential, he recognized it as a potentially useful addition that involved no risk.

"Supposing a bill of rights to be proper," Madison pointed out that it would have to be written with great care. In many cases, Madison wrote, absolute guarantees of rights ought to be avoided because the government would have no choice but to violate them in emergencies. For example, elected officials would have little alternative but to ignore an absolute prohibition of the suspension of habeas corpus if a rebellion broke out. Similarly, an amendment prohibiting standing armies in peacetime would have to be violated if a foreign power placed a military force just across the U. S. border. After a few such "violations in extraordinary cases," a bill of rights would lose its "ordinary efficacy." Here Madison's ideas about a charter of liberties reflected his thinking about the Constitution in general: to become effective, each needed to become venerable. A document could attain that status only through years of strict public obedience to its injunctions.[36]

[36] Madison to Jefferson, October 17, 1788, *ibid.*, 295-300 (quotations in order of appearance on pp. 297, 298, 298-99, and 299). Rakove, Bowling, Schwartz, and Finkelman interpret this

Madison's arguments in favor of a bill of rights mark a clear shift in his thinking. It would be April 1789 before these ideas matured fully, but Madison's theoretical case for a declaration of freedoms had emerged in embryo. The timing of the change was caused by a realization that Federalists would have to be elected to office in order to defeat the Antifederalists' new strategy and by his personal desire to win a place in the First Congress. But there was also conviction behind his changing position, as his arguments to Jefferson demonstrate. In making his case for a federal bill of rights, Madison supplemented Antifederalist reasons with his own. For Madison, the most pressing threat to personal liberty was tyranny not by the minority but by the majority. A charter of liberties could help prevent this sort of despotism simply by making the people aware of individual rights. Given Madison's disappointment over the rejection of the council of revision and his doubts about the judiciary's ability to exercise judicial review, the need to prevent unjust legislation in the first place took on greater importance. Madison believed that a bill of rights would prevent unconstitutional laws by educating the people about their own rights.

It is hardly coincidental that late in August, shortly before he began to advocate rights-related amendments, Madison received the first inquiry from home as to whether he would rather serve in the House or the Senate. He announced that he preferred to serve in the House since his finances would not permit him to maintain a style of living expected of a senator. Madison was also aware that the Antifederalists dominated the Virginia legislature, which meant that he had little chance of winning a Senate seat. Nevertheless, Virginia's Federalists made him their candidate for the Senate because he was their only hope of victory. Madison was defeated by two Antifederalists on November 9. Richard Henry Lee received 98 votes;

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crucial letter differently, maintaining that Madison remained unconvinced about the theoretical value of a federal bill of rights and that his positive reasons for adopting one were grudging concessions. See Rakove, "Madisonian Theory of Rights," 255-57, and "Madisonian Moment," 501-2; Bowling, "'A Tub to the Whale'," 231-32; Schwartz, *Great Rights of Mankind*, 117-18; and Finkelman, "James Madison and the Bill of Rights," 331. Madison's reasons for favoring a national bill of rights are convincing enough to take at face value when examined in the context of his attitudes toward the Constitution at the time, particularly with respect to the features he failed to secure at Philadelphia. Robert J. Morgan hypothesizes that Madison offered positive reasons for rights-related amendments in his letter to Jefferson out of "fear that his friend would go to the public with this issue at this inauspicious time" (Morgan, *James Madison on the Constitution*, 135). Although impossible to disprove, this explanation seems unlikely to me because it would have been out of character for Madison to have deliberately aroused false hopes in his friend. If anything, Madison would have remained silent on an issue about which they disagreed. See, for example, how Madison handled his disagreement with Edmund Randolph over a second convention in Madison to Randolph, November 18, 1787, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 252.

William Grayson, 86; and Madison, 77. The only surprising thing about the outcome was the strength of Madison's showing.[37]

After the Senate election, attention shifted to the contest for the House. The Antifederalists, flushed with victory, determined to use their legislative majority to defeat Madison. To keep him from abandoning his strongly Antifederalist district in favor of a Federalist bastion, Patrick Henry led the legislature in passing a law requiring representatives to run in their home districts. Henry also persuaded Madison's friend James Monroe, who had a good military record in the revolutionary war, had been a member of the Confederation Congress, and was an outspoken advocate of amendments, to enter the race. It would not be an easy contest.[38]

Throughout November and December, Madison's friends in Virginia warned that he would not win on February 2 unless he came home and corrected the misrepresentations that Henry's minions were spreading about Madison's opposition to amendments. Madison's friends did not urge him to change his position on a bill of rights; he had done that already. Instead they admonished him to clarify his position to his constituents in person. On December 16 Hardin Burnley, his neighbor in Orange, wrote, "Great endeavors are making . . . to propagate an idea that you are wholly opposed to any alteration in the Govt. . . . This circumstance alone would render your presence necessary for let these reports be denied as often as they may by your friends there are others among those who oppose you who will as repeatedly revive them and nothing can give them an effectual check but a Denial of them in the face of the people and an avowal of your real Sentiments on the subject of Amendments." Although he hated electioneering, Madison headed home from Philadelphia, where he was visiting friends, in mid-December.[39]

George Eve, pastor of the Blue Run Baptist Church in Orange, provided Madison with a strategy to counteract the Antifederalists' charge that Madison opposed any change in the Constitution, particularly the adoption of rights-related amendments. Eve requested that Madison write a letter clarifying his stance on the Constitution, to be read to the members of Eve's church, who anxiously desired an amendment guaranteeing their religious

[37] James Gordon, Jr., to Madison, August 31, 1788, and Madison to Randolph, October 17, 1788, and November 2, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 246, 305, and 329; and Brant, *James Madison: Father of the Constitution*, 237. Considering Madison's tight budget and the absence of a precedent that would enable him to anticipate his expenses, his financial concerns ought to be taken seriously.

[38] Virginia House and Senate Proceedings, November 13, 1788, in Merrill Jensen *et al.*, eds., *The Documentary History of the First Federal Elections, 1788–1790* (4 vols.; Madison, Wisc., 1976–1989), II, 287. This is the best source on Madison's election to Congress.

[39] Burnley to Madison, December 16, 1788, and Madison Chronology, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 398–99 and xxv.

liberties against infringements by the Anglicans. Madison, eager to explain his behavior over the preceding months, hastened to put his support for a federal bill of rights in writing:

> Whilst it remained unratified, and it was necessary to unite the States in some one plan, I opposed all previous alterations as calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution. Circumstances are now changed: The Constitution is established on the ratifications of eleven States and a very great majority of the people of America; and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty. 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 for ratification, the most satisfactory 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.

The minister brandished the letter to good effect when local Antifederalists denounced Madison at worship services on January 17. Eve also reminded the gathering of Madison's support of religious liberty. On February 2 Madison easily won election to the House of Representatives by a margin of 1,308 to 972.[40]

En route to New York to take his seat in Congress, Madison sought advice on how to write a bill of rights that would be effective against majority and minority tyranny at both the state and national levels. Tench Coxe mailed his latest thoughts on how to prepare an amendment capable of substituting for the congressional veto that Madison had been unable to obtain at the Philadelphia Convention: "I have reflected since I had the pleasure of seeing you on the form of a declaration to be introduced into the constitution in favor of religious liberty, and I think the Idea of extending the powers of the union to an interposition between the state legislatures & their respective constituents might be accomplished . . . by something like the 4th. Sec. of the 4th. Article [of the Constitution] relating to a republican form of Government." Instead of following Coxe's advice, Madison would look to the last paragraph of Article III for guidance.[41]

The fourth and final phase of Madison's thinking about a bill of rights coincided with the first session of the First Congress, which convened on

[40] Madison to George Eve, January 2, 1789, *ibid.*, 404-5; Butterfield, "Elder John Leland," 192-93; and Brant, *James Madison: Father of the Constitution*, 240.

[41] Tench Coxe to Madison, March 18, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 21.

April 6, 1789. During this phase, Madison relentlessly pursued amendments for theoretical as well as political reasons. President George Washington asked Madison to write the Inaugural Address, and in the speech, delivered by Washington on April 30, Madison included a recommendation that Congress propose constitutional changes to protect individual rights and to generate goodwill without diminishing vital federal powers: "A reverence for the characteristic rights of freemen, and a regard for the public harmony, will sufficiently influence your [Congress's] deliberations on the question how far the former can be more impregnably fortified, or the latter be safely and advantageously promoted." On May 4 Madison announced his intention to introduce amendments. In so doing, he undercut fellow Virginian Theodorick Bland, who the next day introduced the Virginia General Assembly's call for a second convention. Madison then composed proposals to submit to the House. After studying the two hundred or so amendments recommended by the various state conventions, particularly those of Virginia, he drafted eight proposals and presented them to Congress on June 8.[42]

The first proposal would prefix the Constitution with a statement of Lockean principles, affirming that all power derives from the people, that government exists "for the benefit of the people," and that the people have the right "to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution." The second proposal limited the size of congressional districts to thirty thousand people. The third stipulated that a law changing congressional salaries could not take effect until after the following congressional election. The fourth forbade the establishment of a national religion and the abridgment of civil rights based on religious beliefs. It also guaranteed freedom of conscience, speech, the press, assembly, petition, and the right to bear arms. It assured the accused of speedy and public trials, of being informed of all charges, accusers, and witnesses, and of receiving counsel and witnesses for the defense. It prevented self-incrimination, double jeopardy, excessive fines and bail, "cruel and unusual punishments," seizure of property for use by the public without proper compensation, unreasonable searches and seizures, quartering troops in peacetime without consent or in wartime but by law, and "military service in person" by those "religiously scrupulous of bearing arms." It reserved to the people all individual rights not explicitly listed. Finally, Madison's fourth proposal read, "No person shall

[42] Address of the President to Congress, April 30, 1789, *ibid.*, 123; and Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 5 and 57–62, which is the best source on the legislative history of the Bill of Rights since it contains all the debates as well as the official Senate and House action.

be . . . deprived of life, liberty, or property without due process of law . . . ." Madison carefully selected the "due process" phrase, which came from the New York recommendatory amendments, rather than the more common "but by the law of the land" wording, a substitution that provided more encompassing protection of personal liberty. The fifth proposed amendment read, "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The sixth stipulated the conditions for appeals to federal courts, for example forbidding appeals in cases involving negligible sums of money. The seventh guaranteed trial by an impartial jury, to be preceded by a grand jury indictment for more serious crimes. The eighth prevented one branch of the government from assuming the responsibilities of another and reserved to the states powers not delegated to the Congress.[43]

Two of these proposed amendments did not appear among any of the recommended amendments that had accompanied the ratifications of the various states: the protection of property from public seizure and the restriction on state laws. That these suggestions had not been recommended by any of the ratifying conventions is an indication that Madison was intent on protecting rights, not merely placating Antifederalists. Both of these provisions were specifically designed to safeguard the rights of individuals, especially their property, from violation by a legislature backed by a popular majority. Madison's inclusion of them indicates his belief in the efficacy of a bill of rights even against impulses of the majority. The "No state shall" proposal, which Madison considered "the most valuable amendment on the whole list," was designed to protect individual liberties from infringements by the states.[44] Such a provision would help to rectify the absence of a federal veto of state laws, a shortcoming that had bothered him since 1787.

By using the words "shall not" instead of "ought not," Madison phrased his proposals as imperatives rather than suggestions. In so doing, he transformed his amendments into injunctions that the legislature could not ignore. This wording, which neither the state bills of rights nor the ratifying conventions' recommendatory amendments had used systematically, reflects Madison's concern with making parchment barriers effective against tyranny of the majority. Forceful language, he hoped, would deter legislative usurpations of minority rights.[45]

[43] Amendments to the Constitution [speech in the House of Representatives], June 8, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 196–210 (quotations in order of appearance on pp. 200, 201, and 202); and Schwartz, *Great Rights of Mankind*, 151–54 and 170–71.

[44] Amendments to the Constitution [speech in the House of Representatives], August 17, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 344.

[45] Schwartz, *Great Rights of Mankind*, 91 (quotations) and 170.

Since Madison planned to incorporate his proposals into the text of the Constitution, he specified where in the document each would be inserted. He believed that merely tacking amendments on the end of the Constitution would cause misinterpretations, since "the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superceded [*sic*], by the supplemental act."[46] Madison worried that appending the amendments would prevent them from becoming as authoritative as the rest of the Constitution.

On June 8 Madison asked the House to resolve itself into the committee of the whole to consider his recommendations. Realizing that Madison's amendments would not weaken the powers of the federal government, Antifederalist members opposed him. A number of Federalist representatives, led by Roger Sherman, also challenged him, arguing that the Constitution was too new for assessment and amendment and that other business should have priority. Madison countered that amendments had been postponed long enough; it was essential for consideration to begin at once in order to pass and send them to the state legislatures before the session ended. The absence of a bill of rights remained the main grievance against the Constitution, and the friends of the government needed to be reassured of its good intentions. In particular, proposing amendments would encourage North Carolina and Rhode Island to ratify.

Yet Madison hastened to add that amendments would improve the document itself and that they were not just sops to the fearful: "I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the general government may be guarded against in a more secure manner than is now done, while no one advantage, arising from the exercise of that power, shall be damaged or endangered by it. We have in this way something to gain, and, if we proceed with caution, nothing to lose . . . ." The context of the last sentence of the quote is crucial. When Madison said that a bill of rights could do no harm but much good if framed properly, it is often assumed that he was equating "good" with the defeat of Antifederalism. The passage above shows that he also considered a charter of liberties to be very valuable in a theoretical sense.

Overall, Madison spent more time discussing the abstract benefits of a federal bill of rights than he did elaborating on the political gains. He refuted the notion that republican governments did not need declarations of rights by pointing out that abuses of power in a republic came from the

[46] Madison to Alexander White, August 24, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 352.

legislature carrying out the will of the people as well as from the executive. In explaining the "salutary tendency" of a federal bill of rights, Madison cited the same arguments he had used in his letter to Jefferson the previous October. By informing the people of their inviolable rights, a bill of rights would discourage majorities from trampling the liberties of minorities. As bills of rights "have a tendency . . . to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean[s] to controul the majority from those acts to which they might be otherwise inclined." The proposition that the national government could not threaten liberties because it possessed only powers explicitly granted to it, Madison claimed, was "not conclusive to the extent which has been supposed." Rights-related amendments would prevent ambiguous delegations of power, such as the necessary and proper clause, from being used to violate personal liberties. By way of example, Madison suggested that without a bill of rights containing a provision guarding individuals against general search warrants, Congress might try to declare such warrants to be a necessary and proper exercise of its expressly delegated power to collect revenue. Madison explained that a declaration of rights would be effective, since the various branches and levels of government would jealously use it to keep one another from becoming tyrannical. In *Federalist* 51 Madison had written that "ambition must be made to counteract ambition." He now believed a federal bill of rights could facilitate that objective.[47]

Madison's June 8 speech also emphasized that a charter of liberties would be useful to "independent tribunals of justice [which] will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." In short, judicial review would make a federal bill of rights useful after unsound laws, even those backed by a majority, had gone into operation. By 1789 Madison had accepted the doctrine of judicial review of federal law despite his preference for a council of revision. He had originally favored the council because he doubted that the judiciary alone would be able to

[47] Amendments to the Constitution [speech in the House of Representatives], June 8, 1789, and *Federalist* 51, *ibid.*, XII, 196-210 and X, 477 (quotations in order of appearance, XII, 199, 203, and 204-5 and X, 477). Finkelman, in "James Madison and the Bill of Rights," argues that Madison's continuing ambivalence about the theoretical value of a federal bill of rights is revealed by his arguments before Congress, which (in Finkelman's view) emphasized expedience. Although it is by no means clear that Madison stressed practicality over theory, when one considers that the Federalist-dominated First Congress was hostile to amendments, any attention he called to expedience is understandable. The politically astute Madison used the argument most calculated to win the support of his particular audience. Pragmatic appeals were more likely to sway a hostile Congress than were abstract arguments.

stand up to Congress. Finally reconciled to judicial review, Madison wanted to provide the courts with the mechanism necessary to exercise that power. If legislation violating the rights of minorities did pass, a bill of rights would be necessary for the judiciary to strike it down.[48]

According to Madison, the amendment restraining state governments was essential since many state bills of rights were "defective."[49] He probably meant not only that many of them were incomplete, improperly worded, and had never been ratified by the people, but also that they were useless when they clashed with the will of the majority. But why would a federal bill of rights discourage tyranny of the majority within a given state any more than that state's own bill of rights would? Madison did not answer this question, but had he done so, his response might have followed the lines of *Federalist* 10: the emergence of majority factions was less likely in the extended federal republic than in individual states. Since the federal government included an independent judiciary that was lacking in many states, a bill of rights would enable the federal judiciary to nullify usurpations enacted within individual states.

Madison's June 8 speech went on to say that the evils that might spring from an incomplete enumeration of freedoms would be prevented by an amendment reserving to the states or to the people all rights not granted to the federal government. The speech concluded that "it will be proper in itself, and highly politic, for the tranquility of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated in the system of government, as a declaration of the rights of the people." The House agreed to resolve itself into the committee of the whole to debate Madison's proposals, but at a later date.[50]

Madison's fellow congressmen, Federalist and Antifederalist alike, believed that he was acting to win support for the Constitution and to save his political skin. For example, in urging that the subject of amendments be dropped, William Loughton Smith of South Carolina correctly pointed out that Madison had "done his duty" by supporting the motion "and if he did not succeed he was not to blame." By making the obligatory gesture for amendments, Madison had fulfilled his campaign pledge. Moreover, if his

[48] Amendments to the Constitution [speech in the House of Representatives], June 8, 1789, *ibid.*, XII, 207. While he had finally accepted judicial review, Madison was still troubled by the judiciary's power to strike down federal legislation. See Observations on Jefferson's Draft of a Constitution for Virginia, October 15, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 293.

[49] Amendments to the Constitution [speech in the House of Representatives], June 8, 1789, *ibid.*, XII, 206.

[50] *Ibid.*, 207.

goal had been to preempt Antifederalist amendments, Madison would have quickly realized the impossibility of getting any objectionable alterations through Congress. So why did he continue his fight for amendments? True, waging a battle for amendments would secure his seat in the House, but there was more at stake than a campaign pledge. Madison probably persisted because he had come to believe in a federal bill of rights. Congressman Fisher Ames, who agreed that Madison was inspired by politics, nevertheless divined that he was equally moved by principle and wrote that Madison was "too much attached to his theories, for a politician."[51]

Unfortunately, Madison's correspondence during the first session of the First Congress contains few thoughts on amendments. He did write that his proposals were designed to secure passage, to preserve the powers of the federal government, and to win new friends for the Constitution without losing old ones. These should not be seen as Madison's only reasons for backing a federal bill of rights, however. He may never have had time to write more than a few lines on the subject, let alone explain his abstract case for amendments.[52] Moreover, some of Madison's private writings contain evidence of his theoretical support for amendments, such as his letter to Pennsylvania Assemblyman Richard Peters. Peters grumbled that Madison was "offering Amendments to the Machine before it is known whether it wants any" and that he ought not to seek amendments simply to keep others from doing a bad job of it: "If Chips must be put into the Porridge however, I think 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." In response, Madison explained that he was not acting merely to preempt others or placate Antifederalists. Rather, "a constitutional provision in favr. of essential rights is a thing not improper in itself and was always viewed in that light by myself. It may be less necessary in a republic, than a Monarchy, & in a fedl. Govt. than the former, but it is in some degree rational in every Govt., since in every Govt. power may oppress, and declarations on paper, tho' not [by themselves] an effectual restraint, are not without some influence." Madison followed this statement with a list of reasons why a federal bill of rights was politically expedient.[53]

Unlike Peters, other correspondents understood that Madison meant the Bill of Rights to be a substantive addition to the Constitution. For example,

[51] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 74 (first quotation); and Seth Ames, ed., *Works of Fisher Ames* (2 vols.; Boston, 1854), I, 49.

[52] Madison to Tench Coxe, June 24, 1789, in Hutchinson *et al.*, eds., *Papers of James Madison*, XII, 257. On May 31 Madison wrote to Edmund Randolph, "I never had less time that I could truly call my own than at present." *Ibid.*, 190.

[53] Richard Peters to Madison, July 5 and 20, 1789, and Madison to Peters, August 19, 1789, *ibid.*, 283 (first quotation), 301-3, and 347 (second quotation).

Tench Coxe, with whom Madison had discussed the theoretical basis for a declaration of freedoms, understood that the amendments would improve as well as win support for the Constitution. Coxe wrote, "The most decided friends of the constitution admit (generally) that they [amendments] will meliorate the government by removing some points of litigation and jealousy, and by heightening and strengthening the barriers between necessary power and indispensible liberty."[54]

On July 21 Madison asked the House to resolve itself into the committee of the whole to consider his proposals. Instead, the House chose one person from each state (including Madison from Virginia) to serve on an amendment committee. One week later, the committee promptly reported Madison's recommendations back with few significant changes.

On August 13 after goading from Madison, the House finally resolved itself into the committee of the whole to examine the report. The committee considered the amendments through the eighteenth, after which the House discussed them until the twenty-fourth. During the debate, Madison defended the proposals against attacks from Federalists who thought they went too far and from Antifederalists who felt they did not go far enough. Roger Sherman opposed Madison's plan to incorporate the amendments into the text of the Constitution, moving instead that they should be added to the end of it. James Jackson of Georgia agreed, warning that otherwise the Constitution would be "patched up from time to time, with various stuffs resembling Joseph's coat of many colors." Madison resisted the change since he feared that to append the amendments would weaken their authority. On August 13 the motion failed in the committee of the whole; but on the nineteenth Sherman reintroduced it before the House, and it passed. Three days later, the House appointed a committee to transform the amendments from insertions to appendages. On August 24 the House sent seventeen amendments to the Senate.

After failing to postpone consideration until the following session, the senators took up the subject on September 2 and reduced the number of proposals to twelve. They accomplished this by consolidating some of the amendments and by striking out others in whole or in part, particularly the one Madison cherished most—the provision limiting the powers of the state governments. Since the Senate met in secret and the avid recorder of its debates, Senator William Maclay of Pennsylvania, was ill, little is known about its discussion of the Bill of Rights.[55]

[54] Coxe to Madison, June 18, 1789, *ibid.*, 239. Also see Joseph Jones to Madison, June 24, 1789, *ibid.*, 258-59.

[55] Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 6-11, 29-53, and 96-213 (quotation on p. 124).

After a conference committee resolved the differences, both houses approved the twelve proposals by the required two-thirds vote. Ultimately, of course, all but the two dealing with representation and salaries were approved by three-fourths of the state legislatures and became part of the Constitution. Ratification was completed with Virginia's approval on December 15, 1791. (In May 1992 when Michigan approved Madison's amendment on congressional salaries, the number of ratifying states finally reached the required three-fourths. This event sparked a debate over the validity of amendments ratified more than two hundred years after Congress dispatched them to the states.)

Although demands for alterations persisted into the nineteenth century, most Antifederalists were pleased with the Bill of Rights. Even George Mason expressed "much Satisfaction" with Madison's amendments, a significant change of heart in light of his earlier statement that "Mr. Madison [knew that he coul]'d not be elected, [to the House of Representatives] without making some such Promises [of amendments]. By them he carryed his Election; and in order to appear as good as his Word, he has made some Motions in Congress on the Subject; and to carry on the Farce, is now the ostensible Patron of Amendments. Perhaps some Milk & Water Propositions may be made . . . but of important & substantial Amendments, I have not the least Hope." By 1791 Mason was among the few who realized that Madison had not merely tossed "a tub to the whale." Writing to Jefferson, Mason begged "the Favour of you to present my best Respects to our Friend Mr. Madison," since "some late Difference . . . on political Questions had caused a Coolness between us." Mason was anxious to end the estrangement, he confided, because Madison "is one of the few Men . . . I really esteem." Jefferson promptly assured Mason that Madison's "value for you was undiminished." Perhaps with the Bill of Rights in mind, Jefferson added, "I have always heard him [Madison] say that 'tho you and he appeared to differ in your systems, yet you were in truth nearer together than most persons who were classed under the same appellation. You may quiet yourself in the assurance of possessing his complete esteem."[56]

The tenacity and impatience with which Madison waged his battle for a federal bill of rights indicate that he was motivated by more than political expedience. Madison's hostility to altering the Constitution before its adoption grew from his fear that prior amendments would destroy the Constitution because they would lead to an impasse among the proponents

[56] Mason to Samuel Griffin, September 8, 1789, Mason to John Mason, July 31, 1789, Mason to Jefferson, January 10, 1791, and Jefferson to Mason, February 4, 1791, in Robert Allen Rutland, ed., *The Papers of George Mason* (3 vols. paged consecutively; Chapel Hill, 1970), III, 1172, 1164, 1218, and 1224.

of ratification, which the Antifederalists would exploit to destroy the new political order altogether. Accordingly, he remained hostile to amendments until ratification was secured and the Antifederalists were preparing to elect enemies of the Constitution to the First Congress. Indeed, so great was Madison's fear of interfering with ratification that he opposed even recommendatory amendments until Massachusetts won well-meaning men to the side of the Constitution and isolated the Antifederalist minority. Madison's actions can easily be misunderstood as hostility to amendments per se. Although he was consistently hostile to prior amendments, Madison was merely ambivalent about the usefulness of a federal bill of rights. As the 1788-1789 congressional elections drew near, it became not only safe but also expedient to talk of amendments. Undoubtedly this practical consideration influenced the timing of Madison's decision to favor a federal bill of rights. Nevertheless, by October 1788 Madison also began to believe that such a charter of liberties would improve the Constitution. Though he admitted later that a bill of rights had been "safe, if not necessary," and "politic if not obligatory," he always considered it a worthwhile addition to the Constitution in its own right. The Alien and Sedition Acts of 1798 demonstrated the utility of a federal bill of rights. These threats to liberty came from the federal government acting on its own rather than in response to a popular majority, a source that Madison considered unlikely. Nevertheless, the first ten amendments provided the grounds "for an appeal to the sense of the community" (the Virginia and Kentucky Resolutions) that Madison had envisioned. Although these resolutions did not result in the repeal of the obnoxious acts, by helping to elect a Republican administration, they contributed to the demise of those laws.[57]

Madison wanted the Constitution to be venerated. Hasty amendments, enacted on sudden popular impulses, would harm it by threatening its stability. The more changes the document underwent, the more likely it would become the plaything of willful majorities. Hence Madison believed that the Constitution must not be tampered with lightly or for merely political reasons.[58] He led the fight for the Bill of Rights only because it protected the rights of those governed by the Constitution.

[57] Madison to John G. Jackson, December 27, 1821, in Gaillard Hunt, ed., *The Writings of James Madison* (9 vols.; New York and London, 1900-1910), IX, 75 (first quotation); and Madison to Jefferson, October 17, 1788, in Hutchinson *et al.*, eds., *Papers of James Madison*, XI, 299 (second quotation).

[58] *Federalist* 49 and 62, in Hutchinson *et al.*, eds., *Papers of James Madison*, X, 461-62 and 538-40; and Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge, Eng., and other cities, 1989), 71-73.