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The Bill of Rights and Federalism:
An Interpretation in Light of the Unwritten Constitution

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By

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The Bill of Rights and Federalism:
An Interpretation in Light of the Unwritten Constitution

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According to conventional understanding, the primary purpose behind the framing and ratification of the Constitution was to preserve liberty through a form of government that provided for a highly structured system of federalism and separation of powers. The primary purpose behind the framing and ratification of the Bill of Rights was to allay Anti-Federalist fears that the Constitution did not sufficiently secure individual rights. For that reason, the original Constitution is frequently contrasted with the Bill of Rights. Yet distinguishing between the Constitution and the Bill of Rights obscures more about the nature of the Bill of Rights than it discloses.

It is agreed that one of the primary Anti-Federalist objections to the Constitution was the absence of a bill of rights. A close examination of the debate over the absence of a bill of rights reveals that the first ten amendments to the Constitution occupy a much more complex place in the constitutional scheme than is commonly assumed. While individual rights did constitute an important theme during the ensuing debate concerning the importance of a bill of rights, they were not the only theme or even the prevailing theme. A historically, philosophically, and textually informed examination of the Bill of Rights reveals that it was attentive to constitutional structure and intended to reinforce the commitment to federalism in the original Constitution. The Federal government could not

intrude upon the subtle and often fragile social and legal arrangements pertaining to such matters which evolved over a long period of time at the state level. These prerogatives were protected by the several state constitutions, state statutes, and the unwritten common law.

This dissertation by Joseph S. Devaney fulfills the dissertation requirement for the doctoral degree in Politics approved by Claes G. Ryn, Ph.D., as Director, and by Dennis Coyle, Ph.D., and Robert Destro, J.D. as Readers.

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DEDICATION

This dissertation is dedicated, with great love, to my mother Rosemarie A. Devaney, my grandparents, Joseph and Josephine Devaney, and in memory of my aunt and uncle, Steven and Kathleen Jemo.

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“People will not look forward to posterity,” Edmund Burke wrote, “who never look backward to their ancestors.” This dissertation is not the result of my own unaided thought, but the qualities of character I acquired, despite my own moral failings, from my family and friends.

I am very grateful to the most important person in my life, my mom, Rosemarie A. Devaney. Every great accomplishment in my life, I owe to my mom. My mom taught me, through example, during the darkest moments of her life; the sin of despair can never triumph over the virtue of hope.

Sometimes, it is only in the after a great period of moral reflection and personal maturity that we really begin to appreciate the great gifts in our lives. I am very grateful for the love of my sister, Rosanne, and my brother James. My cousin Cynthia Jemo, who is more like a sister, has been a source of strength and support during many difficult times. My aunt and uncle, Richard and Jacqueline Zions, have supported my family in incomparable ways. As my godmother, my Aunt Jacqueline taught me the virtue of faith. Richard Viechec has been, in more ways than he knows, like a father to me. I love them all very much.

My grandparents were never afforded the opportunities I have had. My grandmother, Josephine Devaney, is one of the most important people in my life. She left school in the eighth grade, to support her family. My grandfather, Joseph Devaney, who passed away on January 1, 1963, prior to my birth, was a coal miner in the anthracite region of

northeastern Pennsylvania. The credit for this dissertation belongs to them more than it belongs to me.

My aunt and uncle, Steven and Kathleen Jemo, who were like parents to me, were among the two most charitable people I ever knew. More than they ever knew, they carried me through the most difficult times in my life. As my godfather, my Uncle Steven taught me the virtue of charity. My Uncle Steven and Aunt Kathleen passed away before the completion of this dissertation. I am deeply saddened that they are not here to see this day. I miss them very much. I am certain they would be very proud of me, as I was always proud of them. I take consolation in the words of T.S. Eliot: “The communication of the dead is tongued with fire beyond the language of the living.”

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INTRODUCTION

FEDERALISM AND THE BILL OF RIGHTS

On September 17, 1787, the delegates to the Philadelphia Convention finished their work of the preceding summer, and prepared to submit the newly proposed Constitution to the states for ratification. The Confederation Congress originally authorized the delegates to the Philadelphia Convention to revise and improve the Articles of Confederation. It soon became clear, however, that the delegates went beyond their original mandate during the course of the proceedings. The document emerging from the Philadelphia Convention proposed to divide authority between a more powerful national government and the several states. The departure of the Philadelphia Convention from its original mandate was not entirely unexpected, at least by Patrick Henry, who refused to attend the Philadelphia Convention because, in his words, “I smelt a rat.”¹ One of the principal objections to the Constitution, which emerged during the ensuing debate over ratification, was the absence of a bill of rights.²

The importance of a bill of rights was not foremost in the minds of many of the delegates to the Philadelphia Convention. “I cannot say,” James Wilson later recalled, what were the reasons of every member of that Convention for not adding a bill of

¹ Although it is frequently attributed to Patrick Henry, the quote is almost certainly apocryphal.

² For a general discussion of the proceedings of the Philadelphia Convention see Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kans.: University Press of Kansas, 1986), 225-260.

rights.”³ “[T]he truth is,” Wilson supposed, “that such an idea never entered the mind of many of them”⁴ At least until George Mason broached the matter, “almost as an afterthought,” during the waning days of the Philadelphia Convention.⁵ Mason “wished the plan had been prefaced with a Bill of Rights” because “[i]t would give great quiet to the people” Mason believed a bill of rights could be prepared in a matter of hours with the state bills of rights as a guide.⁶ On September 12, 1787, Elbridge Gerry moved for a committee to draft a declaration of rights, and the motion was seconded by Mason.

Roger Sherman supported “securing the rights of the people where requisite,” but objected to a bill of rights on the basis that “[t]he State Declarations of Rights are not

³ James Wilson, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 631.

⁴ James Wilson, “Pennsylvania Ratifying Convention,” 631. “I do not recollect,” Wilson states, “to have heard the subject mentioned till within about three days of the time of our rising” James Wilson, “Pennsylvania Ratifying Convention,” 631. He was certainly in error, however, when he recalled, “[E]ven then, there was no direct motion offered for any thing of the kind. I may be mistaken in this; but as far as my memory serves me, I believe it was the case.” “I have stated, according to the best of my recollection,” Wilson further adds, “all that passed in Convention relating to that business. Since that time, I have spoken with a gentleman, who has not only his memory, but full notes that he had taken in that body, and he assures me that, upon this subject, no direct motion was ever made at all” Wilson later repeats, “[T]he truth is, Sir, that this circumstance; which has since occasioned so much clamor and debate, never struck the mind of any member in the late convention till, I believe, within three days of the dissolution of that body, and even then of so little account was the idea that it passed off in a short conversation, without introducing a formal debate or assuming the shape of a motion.” James Wilson, “Pennsylvania Ratifying Convention,” 633-34.

⁵ Gordon S. Wood, *The Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, 1969; reissued, New York: W. W. Norton and Company, 1993), 536.

⁶ George Mason, “Records of the Federal Convention,” in *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, *Major Themes*, (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 447.

repealed by this Constitution; and being in force are sufficient”⁷ Mason's rejoinder that “[t]he Laws of the U.S. are to be paramount to State Bills of Rights,” however, did not persuade the Convention delegates.⁸ Gerry's motion was defeated by a vote of ten to zero.⁹ Charles Pinckney and Elbridge Gerry remained undeterred. On September 14, 1787, they moved to include a declaration “that the liberty of the Press should be inviolably observed”¹⁰ Sherman, anticipating an argument which would be proffered by the Federalists during the ratification debate, dismissed the motion as “unnecessary” because “[t]he power of Congress does not extend to the Press.”¹¹ This motion was defeated by a vote of seven to four.¹² Mason left the Philadelphia Convention, according to James Madison, “in an exceeding ill humour indeed.”¹³ The dispute regarding the importance of a bill of rights, which took place at the Philadelphia Convention, would foreshadow the impending fight over ratification of the Constitution.¹⁴

According to the conventional understanding, the primary purpose behind the framing and ratification of the Constitution was to preserve liberty through a form of government

⁷ Roger Sherman, “Records of the Federal Convention,” in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, *Major Themes*, (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 447.

⁸ George Mason, “Records of the Federal Convention,” 447.

⁹ “Records of the Federal Convention,” 447.

¹⁰ “Records of the Federal Convention,” 447.

¹¹ Roger Sherman, “Records of the Federal Convention,” 447.

¹² “Records of the Federal Convention,” 447.

¹³ James Madison to Thomas Jefferson, October 24, 1787, in *The Roots of the Bill of Rights*, ed. Bernard Schwarz, vol. 3 (New York: Chelsea House, 1980), 601.

¹⁴ Wilson later grumbled, without considerable justification, that “before we heard this so violently supported out of doors, some pains ought to have been taken to have tried its fate within” James Wilson, “Pennsylvania Ratifying Convention,” 634.

that provided for a highly structured system of federalism and separation of powers. The primary purpose behind the framing and ratification of the Bill of Rights was to allay

Anti-Federalist fears that the Constitution did not sufficiently secure individual rights. For that reason, the original Constitution is frequently contrasted with the Bill of Rights in the American constitutional system. The Constitution is viewed as being principally concerned with the structure of government such as federalism and separation of powers. The Bill of Rights, in comparison, is viewed as being principally concerned with the protection of individual rights against a potentially oppressive democratic majority. Contrasting the Constitution with the Bill of Rights, however, obscures more about the nature of the Bill of Rights than it discloses.

The Supreme Court has interpreted the Bill of Rights as a guarantee that every individual can pursue his own conception of the good life without undue interference from the will of the majority.¹⁵ In *Wallace v. Jaffree*, the Court invalidated moment of silent prayer in public schools. In his opinion for the Court, Justice John Paul Stevens wrote, “[T]he individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority” “[T]he Court has unambiguously concluded,” Stevens continued, “that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that

¹⁵ For an extensive analysis see Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: The Belknap Press of Harvard University Press, 1996).

religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.”¹⁶ In *Thornton v. Caldor, Inc.*, the Court invalidated a Connecticut statute which provided that those that the faithful could not be compelled to work on the day of their Sabbath. The Court invalidated the statute on First Amendment grounds because “[O]ther employees who have strong and legitimate, but non-religious reasons for wanting a day off have no rights under the statute.”¹⁷ In a concurring opinion, Justice Sandra O’Connor wrote, “All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor.”¹⁸ “Where freedom of conscience is at stake,” Michael Sandel observes, “the relevant right is to perform a duty, not make a choice.” The decision in *Thornton v. Caldor, Inc.*, Sandel argues, “confuses the right to perform a duty with the right to make a choice. Sabbath observers, by definition, do not *select* the day of the week they rest; they rest on the day their religion requires.”¹⁹

The Court’s predilection for interpreting the Bill of Rights as a source of individual freedom is evident in other areas of the law such as freedom of speech. In these areas the Court has given considerable protection for freedom of expression and the right of privacy. In *Cohen v. California*, the Court reversed the conviction of an individual for wearing the jacket reading “Fuck the Draft” in a Los Angeles courthouse. The Court reversed the conviction arguing that [N]o other approach would comport with the premise

¹⁶ *Wallace v. Jaffree*, 472 U.S. 38 (1985), 52-3.

¹⁷ *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), 710.

¹⁸ *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), 711.

¹⁹ Michael J. Sandel, *Democracy's Discontent*, 66-7.

of individual dignity and choice upon which our political system rests.”²⁰ The Court has variously described freedom of speech as “assur[ing] self-fulfillment for each individual” and the liberty to “autonomous control over the development and expression of one’s intellect, interests, tastes, and personalities.”²¹

The Court has expanded its jurisprudence into areas of individual privacy. The Court, in *Griswold v. Connecticut*, recognized the right of married couple to use contraceptives.²² The right of privacy expanded to include the rights of autonomous individuals to make certain choices, engage in certain activities, without interference by the will of the majority. In *Eisenstadt v. Baird*, the Court extended the right to have access to contraception to unmarried couples.²³ The Court further extended the right to use contraceptives, in *Carey v. Population Services International*, to minors under the age of sixteen.²⁴ In *Planned Parenthood v. Casey*, in which the Court declined to overrule *Roe v. Wade*, the Court gave full expression to the belief that liberty meant the right of the autonomous individual to choose his conception of the good life. The Court wrote:

“These matters, involving the most intimate and personal choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

²⁰ *Cohen v. California*, 403 U.S. 15 (1971), 24-5

²¹ *Chicago v. Mosley*, 408 U.S. 92 (1972), 96; *Doe v. Bolton*, 410 U.S. 179 (1973), 211.

²² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁴ *Carey v. Population Services International*, 431 U.S. 678 (1977).

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."²⁵

It is agreed that one of the primary Anti-Federalist objections to the Constitution was the absence of a bill of rights. The significance of that objection is commonly misunderstood. A close examination of the debate over the absence of a bill of rights reveals that the first ten amendments to the Constitution occupy a much more complex place in the constitutional scheme than is commonly assumed. The primary purpose behind the framing and ratification of the Bill of Rights was not necessarily to allay the fears of the opponents of the Constitution that the latter did not sufficiently guarantee individual rights. While individual rights did constitute an important theme during the ensuing debate concerning the importance of a bill of rights, they were not the only theme, or even the prevailing theme. "[T]he Antifederalists in their demand for amendments and a bill of rights," Gordon S. Wood observes, "had actually been more concerned with weakening the power of the federal government in its relation to the states in matters such as taxation than with protecting 'personal liberty alone'"²⁶ "The debate over a bill of rights," Herbert J. Storing agrees, "was an extension of the

²⁵ *Planned Parenthood v. Casey*, 505 U.S. 844 (1992), 58. Although the Supreme Court is, strictly speaking, referring to the due process clause of the Fourteenth Amendment, its interpretation is representative of the manner in which it approaches constitutional interpretation in other areas of the law.

²⁶ Gordon Wood, *Creation of the American Republic*, 543.

general debate over the nature of limited government, and at this level the Anti-Federalists can perhaps claim a substantial, though not unmitigated, accomplishment.”²⁷

A historically and textually informed examination of the Bill of Rights reveals that it was attentive to constitutional structure, and reinforced the commitment to federalism in the original Constitution. The Philadelphia Convention allocated powers among the states and the federal government in a manner that encouraged a decentralized society. The Bill of Rights served, in part, to make explicit what is already known by inference from Article I, Section 8 of the Constitution: the federal government is a government of delegated and enumerated powers, which must not encroach upon the powers reserved to the states or the people. Because it had no authority to interfere with matters pertaining to free speech or the free exercise of religion, for example, the federal government could not intrude upon the subtle and often fragile social and legal arrangements pertaining to such matters which evolved over a long period of time at the state level. These prerogatives were protected by the several state constitutions, state statutes, and the unwritten common law. Individual rights, to the extent they were recognized at all, were protected by the several state constitutions, state statutes, and the common law.²⁸ The early state constitutions often “assumed the rights of the community to be generally superior to the

²⁷ Herbert J. Storing, “What the Anti-Federalists Were For,” *The Complete Anti-Federalist*, vol. 1, ed. Herbert Storing (Chicago: University of Chicago Press, 1981), 67.

²⁸ “Other than the right of religious conscience,” Barry Alan Shain argues, “disfavored minorities had no rights that could protect them from the will of an opposed majority.” Shain, *Myth of American Individualism*, 254. “For eighteenth-century Americans, Shain observes, “the common or public good enjoyed preeminence over the immediate interests of individuals.” Shain, *Myth of American Individualism*, 3.

rights of the individual,”²⁹ permitting the community to abridge almost every “right we today consider inalienable.”³⁰ In this respect, the Bill of Rights preserved the authority of local communities, often to the disparagement of individual rights. Those rights of free speech, press, assembly, and petition, viewed by contemporary Americans as the paradigmatic rights of the individual dissenter against the will of the majority, have a very different meaning when viewed through the eyes of those who framed and ratified the First Amendment. From the perspective of these eighteenth-century Americans, the rights of free speech, press, assembly, and petition were the necessary means by which citizens could deliberate about matters concerning the good of the republic. They also served to protect popular majorities against a potentially indifferent, even oppressive, national government.

The Bill of Rights explicitly singles out for constitutional recognition and protection several intermediate institutions that afford local communities power and autonomy at the expense of individuals and the national government—juries, militias, and religious establishments. The First Amendment’s guarantee, for example, that “Congress shall make no law *respecting* an establishment of religion” made explicit the allocation of powers in the original Constitution: the federal government was prohibited from interfering with local autonomy over matters touching on religion. This limitation on the

²⁹ Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980), 50.

³⁰ Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 71. “The only right besides that of religious conscience that Revolutionary-era Americans held to be inalienable,” Shain observes, “was the corporate right of a people to be self-governing.” Shain, *Myth of American Individualism*, 256.

power of the federal government prohibited Congress from establishing a national religion or interfering with the number of church-state arrangements that existed in the several states. This argument is particularly problematic for those who defend the manner in which the Supreme Court has interpreted the establishment clause as limiting the authority of state governments to show preference toward religion. Professor Akhil Amar describes the “paradoxical effect” created by the manner in which the establishment clause has been applied to the states: “[T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself.”³¹

One of the most significant institutions in a republican form of government, the jury, is explicitly conferred with constitutional protection in the Bill of Rights: the grand jury in the Fifth Amendment, the criminal petit jury in the Sixth Amendment, and the civil jury in the Seventh Amendment. It is commonly understood that a jury trial is intended to provide the parties to a judicial proceeding, criminal defendants in particular, access to a fundamentally fair process for determining guilt or innocence. For eighteenth-century

Americans, however, the jury was one of the most important means by which the local community could participate in the judicial process. Through jury service, the local community could participate in judicial proceedings, and, in exceptional circumstances, exercise the power of jury review, the authority to disregard a law it considered unconstitutional. The grand jury had considerable inquisitorial authority to scrutinize

³¹ Akhil Amar. Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 33.

suspected misconduct by government officials, and thwart malicious prosecutions. In *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, historian Forrest McDonald concurs: “[T]he United States was a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members through two traditional institutions, the militias and the juries.”³²

What the Anti-Federalists sought were assurances, “a statement securing the sovereignty of the states,” which “was advanced within the greater argument for a bill of rights.”³³ The existing constitutional edifice, including the allocation of authority between the national government and the several states, would not be substantially altered by a bill of rights. A bill of rights would merely make explicit what was already recognized by inference from Article I, Section 8 of the Constitution: the federal government is a government of limited powers which must not encroach upon the authority reserved to the several states. “The primary concern,” as the ratification debate unfolded, “was the degree to which the people could find comfort in a constitution in which the notion of reserved powers was implied rather than explicit.”³⁴ The Anti-Federalists, finding little comfort in a constitution which did not explicitly reserve powers to the several states, unapologetically sought unambiguous constitutional protection for the prerogatives of the several states. The Anti-Federalists frequently underscored state prerogatives pertaining to matters such as liberty of the press, religious liberty, and criminal procedure, especially

³² Forrest McDonald, *Novus Ordo Seclorum*, 289.

³³ Eugene W. Hickok, Jr., “The Original Understanding of the Tenth Amendment, in *The Bill of Rights: Original Meaning and Current Understanding*, ed. Eugene W. Hickok, Jr. (Charlottesville: University Press of Virginia, 1991), 461.

³⁴ Hickok, “The Original Understanding,” 461.

trial by jury. These liberties were inherited by the colonists as the historic rights of Englishmen, although the Anti-Federalists would sometimes import the language of natural rights theory to describe these liberties.

The principal constitutional language, which Anti-Federalists sought, was found in Article II of the Articles of Confederation, which provided: “Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”³⁵ When Anti-Federalists argued for a bill of rights, they frequently invoked the language of Article II. Not unexpectedly, the repeated exchanges between Federalists and Anti-Federalists concerning the importance of a bill of rights were bound up with, and hardly distinguishable from, exchanges about the relative power of the national government and the several states under the proposed Constitution. Both Federalists and Anti-Federalists spoke in terms of powers being reserved or retained by the people of the several states, and rights being reserved or retained by the people of the several states.

“Gentlemen who oppose a federal bill of rights, or further declaratory articles,” The Federal Farmer explained, “seem to view the subject in a very narrow imperfect manner. These have for their objects, not only the enumeration of the rights reserved, but principally to explain the general powers delegated in certain material points, and to restrain them by fixed known boundaries.” “To make declaratory articles unnecessary

in an instrument of government,” The Federal Farmer further explained, “two circumstances must exist; the rights reserved must be indisputably so, and in their nature

³⁵ ART. OF CON. art. II.

defined; the powers delegated to the government, must be precisely defined by the words that convey them, and clearly be of such extent and nature as that, by no reasonable construction, they can be made to invade the rights and prerogatives intended to be left in the people.”³⁶ “[I]t is evident,” one Anti-Federalist pamphleteer charged, “that the general government would necessarily annihilate the particular governments, and that the security of the personal rights of the people by the state constitutions is superseded and destroyed; hence results the necessity of such security being provided for by a bill of rights to be inserted in the new plan of federal government.”³⁷ Another Anti-Federalist author declaimed, “Congress being possessed of these immense powers, the liberties of the states and of the people are not secured by a bill or DECLARATION OF RIGHTS.”³⁸ Yet another complained “that the different state constitutions are repealed and entirely done away, so far as they are inconsistent with [the Supremacy Clause of Article VI which guarantees that the Constitution and the laws of the United States made in pursuance of it, and all treaties made under the authority of the United States, are the supreme law of the land].” “[O]f what avail,” this Anti-Federalist asked, “will the constitutions of the respective states be to preserve the rights of its citizens?” “No privilege, reserved by

³⁶ The Federal Farmer, “Letters from The Federal Farmer XVI” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 325.

³⁷ Centinel, Letters of Centinel II, in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 152.

³⁸ Letter by An Officer of the Late Continental Army, *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 3, *Pennsylvania*, (Chicago: University of Chicago Press, 1981), 93.

bills of rights, or secured by the state government, can limit the power granted” by the Constitution or any law made in pursuance of it, according to this Anti-Federalist critique.³⁹ Another worried that the Constitution might extinguish the writ of habeas corpus, “that great privilege,” which he described as being “sacredly secured to us by our state constitutions.”⁴⁰ Another sought a “positive declaration” providing that those powers, not delegated to the national government, are reserved to the several states. “A bill of rights should either be inserted,” A Federal Republican submitted, “or a declaration made, that whatever is not decreed to Congress, is reserved to the several states for their own disposal.” “This will appear the more proper,” A Federal Republican argued, “if we consider that these *are rights* in which all the states are concerned.”⁴¹ If the proposed amendments were incorporated directly into the Constitution by the First Congress, the manner in which the Bill of Rights actually accommodates the original constitutional structure would not be obscured by the conventional understanding. “If the House of Representatives had gone along with Madison’s proposal to insert the new articles in the body of the Constitution,” Robert A. Goldwin argues, “it would have been difficult of think of them collectively as a body to be called the Bill of Rights, or any

³⁹ Brutus, “Essays of Brutus II” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 376.

⁴⁰ Thomas Tredwell, “New York Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 864.

⁴¹ A Federal Republican, “A Review of the Constitution Proposed by the Late Convention by A Federal Republican,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 3, *Pennsylvania*, (Chicago: University of Chicago Press, 1981), 84. A Federal Republican, “A Review of the Constitution Proposed by the Late Convention by A Federal Republican,” 85.

other collective name.” “They would more likely have been seen as integrally part of the Constitution,” Goldwin continues, “in no way unlike the rest of the text, and this less likely to be considered as some sort of corrective of a defective original, or of a different character, or as pointing in a different direction.” “With no substantive difference from what we have now,” Goldwin concludes, “they would nevertheless have blended in and become part and parcel of the original text, instead of seeming to stand apart and separate.”⁴² The view presented in this study challenges the conventional wisdom, and decades of constitutional jurisprudence, which has accepted the belief that the purpose of the Bill of Rights was to guarantee individual rights. The Bill of Rights was primarily concerned with maintaining the prerogatives of the several states, reaffirming the principle of federalism. If properly interpreted, the Bill of Rights would serve to decentralize authority, leaving many decisions to what Robert Nisbet described as “autonomous associations.”⁴³

Because a conventional and deeply ingrained view is being challenged, it is necessary to provide extensive evidence, directly culled from the writings and speeches of the Founders, to convince the skeptic. In *Paradoxes of Legal Science*, Benjamin Cardozo wrote, “I may seem to quote overmuch. My excuse is the desire to make manifest that back of what I write is the sanction of something stronger than my own unaided

⁴² Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: The AEI Press, 1997), 84.

⁴³ Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order & Freedom*. (New York: Oxford University Press, 1953. Reprint, San Francisco: Institute for Contemporary Studies, 1990.)

thought.”⁴⁴ I may seem to quote overmuch, but my excuse is that the conventional wisdom concerning the Bill of Rights can be more effectively challenged with primary evidence than just my unaided thought.

Chapter One of this study will examine the American War of Independence. Sometimes referred to as the American Revolution, the American War of Independence, was a revolution in the English constitutional and legal tradition. The American colonists were trying to preserve their inherited English liberties from arbitrary rule. With independence, sovereignty devolved on the people of the several states, not the people of the United States as an undifferentiated mass. The liberties of the people, inherited from the English tradition, were conserved in state constitutions, state statutes, and particularly the common law. These liberties formed an unwritten constitution, which would sustain the Constitution of 1787. With ratification of the Constitution, sovereignty did not pass to the people of the United States as a whole, but remained with the people of the several states. The people of the several states retained the rights they inherited from the English legal and constitutional tradition. This is confirmed by the very structure of the Constitution itself, which only recognizes the people as members of the several states.

Chapter Two will examine the origins of the Tenth Amendment. The Federalists argued that a bill of rights was not necessary in a constitution of limited powers. Unconvinced, the Anti-Federalists sought explicit recognition that those powers not delegated to the government were reserved to the states. The Anti-Federalists demanded a

⁴⁴ Benjamin Cardozo, *Paradoxes of Legal Science* in *Collected Writings of Benjamin N. Cardozo* (Margaret Hall, ed. 1947), 313.

bill of rights which they identified with Article II of the Articles of Confederation. This principle came to be embodied in the Tenth Amendment. Because the Tenth Amendment affirmed that matters pertaining to freedom of the press, religious liberty, and criminal procedure, for instance, were reserved to the people of the several states, the Tenth Amendment was effectively a bill of rights.

Chapter Three will examine the origins of the Ninth Amendment. The Federalists argued that a bill of rights would not only be unnecessary, but dangerous. If a bill of rights were affixed to the Constitution, it would presume that the national government was a government of general powers, which could exercise any authority not prohibited. The Ninth Amendment assured that the enumeration of particular rights in a bill of rights, did not abolish others retained by the people of the several states. These rights retained by the people were the inherited rights of Englishmen, preserved in state and common law.

Chapter Four will examine the Bill of Rights in the First Congress. James Madison, fearing a second constitutional convention, wanted to assuage the concerns of Anti-Federalists. Madison didn't, however, want to alter or weaken the authority of the federal government. With few exceptions, Madison introduced amendments which did not alter the constitutional structure. The bill of rights merely made explicit what was already implicit, the Constitution was a government of limited powers. Madison succeeded by staving off Anti-Federalist efforts to weaken the national government.

Chapter Five will consider the importance of James Madison's efforts to protect the minority from a potentially oppressive majority, through an extended republic. While

other thinkers were concerned with the allocation of power between the national government and the several states, and protecting the liberties of the people against a potentially oppressive government, Madison was concerned with protecting the minority from the majority. Madison's view might suggest that this was the primary concern among those who framed and ratified the Bill of Rights. Madison's concern, however, was on the periphery. Madison made efforts to strengthen the national government in the Philadelphia Convention. When his efforts failed, Madison sought an amendment in the First Congress which would employ the national government to protect the minority by placing additional limitations on the states. Madison's effort failed. Although this concern would draw the attention of later constitution writers, it was not a primary concern for eighteenth-century Americans, and not the primary principle behind the ratification of the bill of rights.

CHAPTER ONE

DECLARING INDEPENDENCE: A REVOLUTION PREVENTED

Often referred to as the American Revolution, the war between England and its American colonies was not a “revolution,” at least not in the contemporary meaning of the word. The colonists, who led the American effort by declaring independence, never intended to renounce the rights and traditions they inherited as Englishmen. The American Revolution, rather, was a revolution in the English constitutional and legal tradition, such as the Glorious Revolution of 1688. In *Reflections on the Revolution in France*, Edmund Burke wrote, apropos the Glorious Revolution of 1688, “[F]rom [the] Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity”⁴⁵ The American War of Independence, like the Glorious Revolution, was an effort to preserve rights, which the colonists regarded as an entailed inheritance.

When independence severed the colonies from England, sovereignty devolved on the people of the several states. The people continued to claim those liberties, especially the

⁴⁵ Edmund Burke, *Reflections on the Revolution in France*, Edited by J.G.A. Pocock (Indianapolis: Hackett, 1987), 29.

common law, which they received from the English constitutional and legal order. The liberties of the people were adapted to fit the unique historical circumstances of the people in the several states. The adoption of the Constitution, however, did not change his arrangement. With the ratification of the Constitution, the people of the several states did not renounce their sovereign authority. The people delegated certain enumerated powers to the national government pursuant to Article I, Section 8 of the Constitution, placing limitations on their sovereign authority in Article I, Section 9 and Article I, Section 10.⁴⁶ All remaining sovereign authority was reserved to the people of the several states. Those liberties, which the people of the several states claimed as an entailed inheritance, were embodied in myriad subtle and often fragile political, legal, and social arrangements, an unwritten constitution, which evolved over a long period of time. These arrangements, which came to be secured in state constitutions, state statutes and the unwritten common law, supported the American constitutional structure. The Constitution and the Bill of Rights were a framework which is supported by the unwritten constitution, and supports the unwritten constitution through the principle of federalism. The American constitutional tradition reflects, in the words of Edmund Burke, a view of society as “a partnership not only between those who are living, but between those who are dead, and those who are to be born.”⁴⁷

⁴⁶ U.S. CONST. art. I, § 9; U.S. CONST. art. I, § 10.

⁴⁷ Burke, *Reflections*, 85.

Prior to 1789, the year the Bastille was stormed, marking the beginning of the French Revolution, the word “revolution” had a connotation radically different in meaning as well as temperament from the connotation it assumed following the Reign of Terror.

Although *Reflections on the Revolution in France* was written prior to the Reign of Terror, Edmund Burke anticipated that the events occurring in France were not a “revolution” in the traditional understanding, a revolution in the English tradition. In the

Dictionary of the English Language, published in 1755, Samuel Johnson defined “revolution” as “the course of anything which returns to the point at which it began to move.” “[S]pace measured by some revolution,” for example, “the short revolution of a day.” The word “revolution” was also defined as “change in the state of a government or country,” such as “the change produced by the admission of King William and Queen Mary” in 1688.⁴⁸ Prior to the French Revolution, the word was not associated with the radical, and often violent, social and political upheavals identified as “revolutions” today. Edmund Burke identified the pre-French Revolution signification of “revolution” with the Glorious Revolution of 1688. Thus, Burke and other eighteenth-century Whigs understood the Glorious Revolution, not as a radical upheaval that forever changed the constitution of the English political and social order, but as a return to the old political and constitutional order that James II had altered. James II was an innovator who had committed “acts which were justly construed into an abdication of his crown.” Burke

⁴⁸ Quoted in Peter J. Stanlis, *Edmund Burke: Enlightenment and Revolution* (New Brunswick: Transaction, 1991), 195.

found the monarch's claim to royal prerogative, which gave James II the authority to suspend or revoke any of the laws of England, as an attempt to establish arbitrary power.

The actions of James II were anathema to Burke. The events occurring in England in

1688-89, accompanied by the accession of William and Mary to the throne and the issuance of the Declaration of Rights, also referred to the English Bill of Rights, served to preserve the inherited rights of Englishmen.⁴⁹

Thus, when Burke identified that period of English history associated with William and Mary as a "revolution," he was referring to a return to a starting point, the original point of departure. For England, the starting point was the inherited constitutional order, which James II had altered. With the accession of William and Mary, the monarchy was restored upon tradition. Like the Magna Charta, issued in 1215, the Declaration of Rights affirmed the rights and liberties of Englishmen. "If the principles of the Revolution of 1688 are anywhere to be found," Burke observed, "it is on the statute called *Declaration of Right*. . . . This Declaration of Right . . . is the cornerstone of our constitution as reinforced, explained, improved, and in its fundamental principles for ever settled. It is called, 'An Act for declaring the rights and liberties of the subject'"⁵⁰

When discussing the Glorious Revolution, in *Reflections on the Revolution in France*, Burke makes an allusion to the events of 1688-89 as a "revolution" in the sense of a circular motion of conservation and correction, the completion of which is a return to the old order, albeit with improvement. "A state without the means of some change," Burke

⁴⁹ Stanlis, *Edmund Burke*, 218-19.

⁵⁰ Burke, *Reflections*, 15.

maintained, “is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished to most religiously to preserve.” “The two principles of conservation and correction operated strongly at the . . . Revolution,” Burke continued, “when England found itself without a king. . . . [T]he nation had lost the bond of union in their ancient edifice: they did not, however, dissolve the whole fabric. On the contrary . . . they regenerated the deficient part of the old Constitution through the parts which were not impaired. . . . This is the spirit of our constitution, not only in its settled course, but in all its revolutions.”

Unlike the French Revolution, the purpose of the Glorious Revolution was not to disparage the established rights and liberties of Englishmen in favor of abstract ahistorical rights like “liberty, fraternity, and equality,” as stated in the French Declaration of the Rights of Man. The Revolution of 1688 was, according to Burke, “[M]ade to preserve our ancient indisputable laws and liberties, and that ancient constitution of government which is our only security for law and liberty.” Unlike those leading the French Revolution, Burke understood that in order to secure liberty, it was not enough to proclaim it in the abstract. Liberty comprises something that exists only with reference to the historical circumstances that surround it. Hence, Burke wrote, “We wished at the period of the [Glorious] Revolution, and do now with, to derive all we possess as an inheritance from our forefathers.”⁵¹

⁵¹ Burke, *Reflections*, 15, 27-8.

By the time the French Revolution was well underway, Burke and other Whigs of his persuasion were becoming increasingly distressed that the French revolutionaries were equivocating the word “revolution” by comparing the events in France to the experience of the English in 1688 and the Americans in 1776. But whereas the events in England and American were a “revolution” in the sense of a healthy reaction to unconstitutional innovation by the Crown, the events transpiring in France were a violent overthrow of the established traditions and liberties. In the *Glorious Revolution of 1688*, Maurice Ashley, observes that the English experience in 1688 “undoubtedly contributed to the evolution of parliamentary democracy in England and of a balanced constitution in the United States of America.”⁵² Such were not the circumstances in France following the French Revolution.

What Burke objected to the most about the French Revolution was the reliance of the Jacobins, not on inherited liberties and tradition, but on abstract metaphysical rights and theories as proclaimed in the Declaration of the Rights of Man. His criticism of abstract theories, appealing to nebulous ideas of “equality” and “fraternity” was directed at the revolutionary disdain for tradition in favor of change for the sake of change, the formulation of *a priori* concepts without regard to experience, the uniform application of such abstract speculations without regard to individual circumstances and moral prudence, and the reckless disregard these theories had for the moral consequences of

⁵² Maurice Ashley, *The Glorious Revolution of 1688* (New York: Scribner’s, 1966), 198.

political action.⁵³ Because Burke saw society as a “partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born,” he objected to the arrogance of those who would reject the wisdom of their forefathers thinking they alone had the knowledge and wisdom to recreate society on some speculative theory.⁵⁴

However, Burke’s concept of change did not include the wholesale rejection of the traditional order. The “revolution,” resulting in the accession of William and Mary, represented for Burke the proper method for making important political and social changes in society. These changes were made by the moral prudence of experienced statesmen, not philosophies. Burke saw that the proper method of change as a constant process of decay and renewal in accordance with the political virtue of moral prudence as opposed to its antithesis—abstract theorizing and ideology. The role of the statesman, for Burke, would be to provide the necessary means of change that would allow the social order to act in concert with moral natural law.⁵⁵ In *Reflections on the Revolution in France* Burke wrote, “[T]he whole, at one time, is never old or middle-aged or young, but, in a condition of unchangeable constancy, moves on through the varied tenor of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of

⁵³ Stanlis, *Edmund Burke*, 78-9.

⁵⁴ Burke, *Reflections*, 85.

⁵⁵ Stanlis, *Edmund Burke*, 240, 86.

nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete.”⁵⁶

Burkes’ criticism of speculative political reasoning and absolute rights, as observed in the revolutionary call for “liberty, fraternity, and equality,” in the Declaration of the Rights of Man was directed at the Jacobin’s attempt to divorce the rights and liberties enjoyed by many from their historical circumstances. Burke was aware that it was not possible to force human nature into an *a priori* theory of liberty and government, observing that it would be “a very great mistake to imagine, that mankind follow up practically any speculative principle, either of government or of freedom, as far as it will go in argument and logical illation.” It was not possible to fashion a commonwealth on the basis of a speculative theory, but only on history and tradition. Such an attempt inverted the essential order between tradition and established custom with speculative theory. “Prescriptive government, such as ours, never was the work of any legislator, never was made upon any foregone theory. It seems to me a preposterous was of reasoning, and a perfect confusion of ideas, to take the theories which learned and speculative men have made on those theories, which were made from it, to accuse government as not corresponding with them.”

During the period of the American War of Independence, Burke questioned the possibility of formulating a speculative theory of liberty with regard for moral prudence or practicality. In regards to arriving at a settlement with the American colonies, he

⁵⁶ Burke, *Reflections*, 30.

supported a policy of prudence and moderation as opposed to “geometric exactness.” In 1777, he wrote, “There are people, who have split and anatomised the doctrine of free government, as if it were an abstract question concerning metaphysical liberty and necessity; and not a matter of moral prudence and natural feeling. . . . Civil freedom is not an abstract speculation. . . . Far from any resemblance to those propositions in geometry and metaphysics, which admit no medium, but must be true or false in all their latitude; social and civil freedom, like all other things in common life, are variously mixed and modified enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community. The extreme liberty (which is its abstract perfection, but its real fault) obtains nowhere, nor ought to obtain anywhere. . . . Liberty too must be limited in order to be possessed.”⁵⁷

In juxtaposition to the approach of philosophers, such as Jean-Jacques Rousseau and John Locke, Burke saw moral prudence as the primary political virtue. In the tradition of Aristotle, Burke saw politics as not a theoretical but a practical science and this was the key to his understanding of prudence. Because Burke agreed with Aristotle that civil society was a natural condition as opposed to an artificial condition, he identified civilization with man’s original natural state in contrast to Locke’s state of nature. Understanding the need for meaningful change in society to meet new and unique circumstances, Burke saw the importance of prudence as a way of providing change

⁵⁷ Quoted in Stanlis, *Edmund Burke*, 241, 87, 81.

through conservative growth and historical respect without detracting from the dictates of natural law.

Nowhere was Burke's point that ideological revolutions run to the most horrendous extremes more aptly demonstrated than during the Reign of Terror. The extreme ideology of the Girondists, who wished to level France in order to recreate it on the basis of abstract revolutionary ideology, was moderate when compared with the ideology of the Jacobins and their leader of sensibility, Robespierre. As the revolutionaries became more extreme in their desire to force humanity into the mold of their revolutionary ideology, "moderates" were condemned for treachery and sent to the guillotines.⁵⁸ As the inscription read on one such "machine," as they were called, "Traitors, look at his and tremble. It will still be active while all of you have lost your lives."⁵⁹ The extremes to which the French Revolution ran were not the unfortunate isolated incidents of war, but the inevitable result of an uprising based on abstract ideals without regard for historical circumstances and inherited liberties. Simon Schama, in his acclaimed account of the French Revolution, *Citizens: A Chronicle of the French Revolution* observes, "I have returned it [revolutionary violence] to the center of the story since it seems to me that it was not merely an unfortunate by-product of politics, or of the disagreeable instrument by

⁵⁸ Stanlis, *Edmund Burke*, 84, 87, 239-40.

⁵⁹ Quoted in Simon Schama, *Citizens: A Chronicle of the French Revolution* (New York: Knopf), 622.

which other more virtuous ends were accomplished or vicious ones were thwarted. In some depressingly unavoidable sense, violence *was* the Revolution itself.”⁶⁰

In order to fully understand the American War of Independence, it is necessary to look at it through the Burkean understanding of “revolution” paralleled by the Burkean respect for inherited liberty and constitutionalism as opposed to abstract rights. The objective of the American War of Independence, the formation of a new government as embodied in the Constitution and the Bill of Rights, was a successful attempt to return to a starting point—the affirmation of the inherited rights the colonists enjoyed as Englishmen.

Like his predecessor James II, George III was an innovator. His appeal to abstract royal prerogative and sovereignty was an affront to the established constitutional order. The causes of the American War of Independence were a series of political and economic conflicts culminating in colonial protest against the Stamp Act with cries of “Taxation without representation is tyranny.” Beginning in 1764, with the passage by the British Parliament of the Revenue Act, friction between the American colonists and England intensified. Supported by Prime Minister George Grenville, the Revenue Act levied a tax on each gallon of molasses imported by the colonists from the West Indies islands other than those owned by the British. The intent was to force the colonists to purchase molasses from the British West Indies. In 1765, the British Parliament, with the urging of

⁶⁰ Schama, *Citizens*, XV.

Grenville, passed the Quartering and Stamp Acts. The first of these acts required the colonists to provide lodging and food for the British soldiers stationed in the colonies.

The colonists interpreted the Quartering Act as an illegal tax. To the extent that the British Parliament required the colonists to support the British army, the colonists saw the Act as mandating taxation without representation. Likewise, the Stamp Act was another illegal tax in that it required the colonists to purchase stamps for affixation to newspapers, diplomas, and various legal documents.⁶¹

In 1769, Burke criticized Grenville's defense of George III and the Monarch's blueprint for governing the American colonies. Attacking the abstract "right" of Parliament to lay taxes on the colonists, Burke suggested that George III's plan included "many new, dangerous and visionary projects." Such projects, Burke noted, contained no consideration of the individual circumstances or traditions of the colonists. Burke was equally distressed by Grenville's scheme for equality in the tax burden among the colonies. Denouncing the plan as "the most chimerical of all enterprises," Burke directed his criticism at the notion of abstract "equality." Grenville failed to take into account the individual circumstances of the colonies. In his criticism of Prime Minister Grenville's tax scheme, Burke anticipated an argument he would use a number of years later to condemn the abstract egalitarian principles of the Jacobins. His criticism of Jacobin "equality" was a more developed version of the argument originally forwarded in 1769. "The legislators who framed the ancient republics knew that their business was too

⁶¹ Russell Kirk, *The Roots of American Order* (Washington: D.C.: Regnery Gateway, 1991), 378.

arduous to be accomplished with no better apparatus than the metaphysics of an undergraduate. . . .” They had to do with men,” Burke observed, “and they were obliged to study human nature. They had to do with men, and they were obliged to study the effects of those habits which are communicated by the circumstances of civil life. . . .” “[T]hence arose many diversities amongst men,” Burke continued, “according to their birth, their education, their professions, the period of their lives, their residence in towns or in the country, their several ways of acquiring and of fixing property. . . . The [ancient] legislator would have been ashamed, that the coarse husbandman should well know how to assort and to use his sheep, horses, and oxen, and should have enough of common sense, not to abstract and equalize them all into animals, without providing for each kind an appropriate food, care, and employment. . . .” Burke adds, “[T]he first sort of legislators attended to the different kinds of citizens, and combined them into one commonwealth, the other, the metaphysical and alchemistical legislators, have taken the direct contrary course. They have attempted to confound all and then they divided this their amalgama into a number of incoherent republics.”⁶²

Probably the most explicit evidence that the Founding Fathers were engaged in a “counter-revolution” against the innovations of King George III and Prime Minister Grenville comes from the United States Constitution itself. This document, the result of the Philadelphia Convention, is the primary source for determining the Founding Fathers’ purpose in waging a war for independence. With the gathering of delegates in 1787, the

⁶² Quoted in Stanlis, *Edmund Burke*, 79, 82.

Framers began the serious business of forming a new government. Although the Declaration of Independence states various grievances the colonists had against England, that document was not intended as a model for government. Rather, it was a politically oriented document veiled in abstract prose, partly designed to appeal to potential allies of the American colonists in Europe.

Representing the aspirations of the Founders who waged the War of Independence, the Constitution was not based on theories of natural right. The Constitution was the result of prudent men influenced by their inherited rights as Englishmen, and the text of the document bears this out. The Fifth Amendment, written by James Madison and proposed in the First Congress, contains distinctively Lockean language. The Fifth Amendment states, “No person shall . . . deprived of life liberty, or property, without due process of law”⁶³ Despite the apparent appeal to theories of natural right, the amendment, like the Constitution and the rest of the Bill of Rights, has little to do with abstract speculative theories about rights and liberties. The colonists’ notions of life, liberty, and property had deep historical roots.⁶⁴ The concept of due process, as contained in the Fifth Amendment, is a right with strong historical underpinnings which the American colonies received as an inheritance based on tradition.

The history of the concept of due process is heavily documented by legal historians. The concept of due process finds its origins in the Magna Charta of 1215. In Chapter 39

⁶³ U.S. CONST. amend. I.

⁶⁴ See, for example, Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kans.: University Press of Kansas, 1986).

of that document, King John promises the barons of Runnymede that “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.” The crucial phrase is *per legem terrae*—“By the law of the land.” In the 1225 reissue of the Great Charter under King Henry III, that phrase, which came to be identified with due process, was moved to Chapter 29. It is Chapter 29 of this reissue which is most commonly referred to by the English legal scholar Sir Edward Coke, who had considerable standing among American lawyers, when commenting on the concept.⁶⁵ In 1354, the Magna Charta was reissued by King Edward III in which *per legem terrae* was replaced with ‘by the due process of the law.’ Coke identified the two phrases with each other, defining due process as requiring “indictment and presentment of good and lawful men, and trial and conviction in consequence.”⁶⁶ In the *Second Part of the Institutes of England*, Coke’s illustrations of what is required by due process are procedural: indictment, presentment, warrants, writs.⁶⁷

Legal commentator Sir William Blackstone also understood due process as requiring a procedure. In *Commentaries on the Laws of England*, he writes, “[F]or the indictment cannot be tried unless he personally appears, according to the rules of equity in all cases, and the express provision of statute Edw. III, 3 in capital ones, that no man shall be put to

⁶⁵ Charles A. Miller, “The Forest of Due Process of Law: The American Constitutional Tradition,” in *Nomos XVIII: Due Process*, ed. by J. Roland Pennock and John W. Chapman (New York: New York University Press, 1977), 4.

⁶⁶ Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge Made Law* (New York: Basic Books, 1986), 134.

⁶⁷ Miller, “Forest of Due Process,” 6.

death without being brought to answer by due process of law.”⁶⁸ The concept of due process, as conceived in the tradition with which the colonists aligned themselves, did not arise from theories of natural right.

It was in this historical context that the Founding Fathers understood due process. Addressing the New York Assembly in 1787, Alexander Hamilton explained the origins and meaning of due process. “In one article of it,” Hamilton observed, “it is said that no man shall be disfranchised or deprived of any right he enjoys under this constitution, but by the law of the land, or the judgment of his peers.” “Some gentlemen hold,” Hamilton continued, “that the law of the land will include an act of the legislature.” “But Lord Coke,” Hamilton noted, “that great luminary of the law, in his comment upon a similar clause, in Magna Carta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury.” “But if there were any doubts upon the constitution,” Hamilton stated, “the bill of rights enacted in this very session removes it.” “It is there declared that,” Hamilton observed, “no man shall be disfranchised or deprived of any right, but by due process of law, or the judgment of his peers.” “The words ‘due process,’ ” Hamilton concluded, “have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.”⁶⁹

⁶⁸ Wolfe, *Modern Judicial Review*, 135.

⁶⁹ Alexander Hamilton, “Remarks of Hamilton on an Act for Regulating Elections, 1787,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 919.

Other than Hamilton's remarks, there was little debate over the due process clause in the congressional and state ratifications proceedings, suggesting that its meaning was well understood. Despite the reference to "life, liberty, and property" in the due process clause of the Fifth Amendment, John Locke's theories of individual rights had little, or no, influence on the development of that constitutional guarantee. The Magna Charta itself, from which the concept of due process descended, was viewed by Burke as the "oldest reformation" in English history, distinguished by its preservation of the basic social institutions, while correcting the abuses of power by the Crown. The document did not create new abstract liberties, but in the Burkean tradition created precedent for future rights and liberties by looking to the past. The Magna Charta based its declaration of rights and privileges on the laws and charters of England from antiquity. The rights enunciated were passed as an entailed inheritance through generations until they were received by the Founding Fathers and particularized in the Constitution and the Bill of Rights. Part of this entailed inheritance was the concept of due process.⁷⁰ Since the passage of the Stamp Act, the colonists appealed to the rights of Englishmen for a redress of their grievances. The Stamp Act Congress in October 1765, influenced by the arguments of John Dickinson, declared that the colonists were entitled "to all the inherent rights and liberties" of English citizens.⁷¹ One of these rights—taxation without representation—was violated by the lack of representation of the colonists in parliament.

⁷⁰ Stanlis, *Edmund Burke*, 210-11.

⁷¹ Kirk, *Roots*, 378.

The colonial assertion of independence, a theoretical matter following the Declaration of Independence in 1776, became an officially recognized political reality following the Treaty of Paris in 1783. What independence meant in terms of the sovereign power, however, was a vexing question. Following independence, did the sovereign power pass to the American people as a whole, as an undifferentiated mass, or to the American people as thirteen separate political communities? That is, “[w]here did sovereignty go when George III ‘abdicated’ it?” If sovereignty devolved to the people of the several states, then the people could claim the inherited rights of Englishmen as thirteen separate political societies. The American colonists were divided in their answer to this question. They may be identified, generally speaking, as having one of four separate positions. The governments of Rhode Island and Connecticut both continued to function under their seventeenth-century colonial charters.⁷² In his *Two Treatises of Government*, John Locke noted what happened under such circumstances, “The *Power that every individual gave the Society*, when he entered into it can never revert to individuals again, as long as society lasts.”⁷³ Such was the case in both Rhode Island and Connecticut where the governments continued to operate under their colonial charters, albeit without allegiance to the British Crown.

A similar situation existed in Massachusetts and New Hampshire which operated under charters from the British crown. Unlike Rhode Island and Connecticut, however,

⁷² Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: Kans.: University Press of Kansas, 1986), 147.

⁷³ Quoted in McDonald, *Novus Ordo Seclorum*, 147.

these colonies experienced overwhelming difficulties because they were royal charters. The legislative branch of government in both of these colonies, including the governor and council, was appointed by the monarch. Independence, therefore, invalidated these appointments, although the elected colonial assemblies continued to function. These assemblies drafted new state constitutions not unlike the governments established under the royal charters with the exception that all the positions, previously appointed by the

Crown, were popularly elected. This approach, however, did not sit well with the more rural inhabitants who declared that no legally recognized government could exist until the people framed and ratified a new constitution. Significantly, until such time as Massachusetts called a popularly elected constitutional convention which framed a document subsequently ratified in town meetings did the state begin to operate under its new constitution. This practice of ratification by town meetings suggested that sovereignty reverted to the towns with the declaration of independence.

Another theory as to where sovereignty devolved with independence was more nationalist in character. This position maintained that sovereignty had passed to the Continental Congress. In the beginning, this position had little support but gained influence by the time the Philadelphia Convention met in 1787. Although men such as Alexander Hamilton took this position based primarily on nationalist aspirations, others were motivated by more ordinary concerns. Potential land speculators who lived in states without claims to western lands understandably wanted all the land to be held in common by the Continental Congress. The manner in which the Constitution was finally ratified

by conventions of the people in the several states called into serious question the belief that sovereignty existed in the Continental Congress following independence, but it had support at the Philadelphia Convention nevertheless.

The widely embraced theory was that sovereignty passed to the people of the several states as previously existing political societies. The people of each state returned to a state of nature among themselves, that is, there was no common authority among the thirteen separate political societies. In each colony, however, the people continued to exist as separate political societies, or returned to a state of nature only among themselves and restored themselves as political societies. Even in this context, a state of nature referred not, as in Locke, atomistic individuals with no common authority, but to the absence of organized political authority. In any case, however, there was no viable alternative, either in theory or practice, that sovereignty passed to the American people as an undifferentiated mass of individuals.

The Declaration of Independence was equivocal as to whether sovereignty resided in the people of the several states or the American people as a whole. Although the Declaration described the colonists as “one people,” it also affirmed that the American colonies were “free and independent states.”⁷⁴ The Articles of Confederation, ratified in 1781, further provided that “each state retains its sovereignty, freedom, and independence.”⁷⁵ Finally, the Treaty of Paris which ended hostilities between the American colonies and the British Crown provided that “His Britannic Majesty

⁷⁴ McDonald, *Novus Ordo Seclorum*, 147-150.

⁷⁵ ART. OF CON. art. II.

acknowledges the said United States, viz. New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent states.”⁷⁶

The most persuasive authority, however, that sovereignty is divided among the people of the several states and not the American people as a whole, is the United States Constitution. Under the Constitution sovereign power is divided between a national government of limited, enumerated powers under Article I, Section 8, and the several states, in effect creating separate sovereign governments in the United States. Sovereign power was understood by eighteenth-century thinkers to be absolute, but none of the Framers of the Constitution believed that the combined powers of the state and federal governments were absolute. In the view of the Framers, there were additional powers which were outside the purview of both the national government and the states. Article VII of the Constitution suggested where this residual sovereignty, which did not belong to either the national government or the several states, resided.

Article VII of the Constitution provided that “[r]atification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between States so ratifying the Same.” In providing for ratification by conventions of the people in nine states, Article VII circumvented the arduous process under the Articles of Confederation whereby all amendments had to be proposed by Congress and approved by the

⁷⁶ Quoted in McDonald, *Novus Ordo Seclorum*, 150.

legislatures of all thirteen states.⁷⁷ The Constitution was submitted to conventions of the people in the several states for several reasons. A primary concern, as identified by James

Madison during the Philadelphia Convention, was that a constitution ratified by the state legislatures could be interpreted as a mere treaty “among the Governments of Independent States” and that “a breach of any one article, by any of the parties, absolved the other parties” from further obligation.⁷⁸ This position was consistent with well-established legal principles in 1787.

More importantly, the Constitution had to be submitted to the people assembled in state ratifying conventions for both theoretical and legal reasons. The states, as political societies, as opposed to the governments of the same, did not cease to exist following the Declaration of Independence in 1776. The people in each of the thirteen political societies, formerly ruled as British colonies, framed and ratified state constitutions during the revolutionary period. The Constitution proposed by the Philadelphia Convention amended or altered each of the thirteen state constitutions in myriad ways. If the Constitution were adopted by a simple majority vote of the whole people of the United States, the people in some states would be altering, not just the state constitutions, but the political societies of the other states. The Constitution proposed by the Philadelphia Convention, therefore, had to be submitted for ratification to the people of the several states, to the thirteen separate political societies which, together, formed the American people. As the text of the Constitution suggests, the sovereign power is divided between

⁷⁷ McDonald, *Novus Ordo Seclorum*, 278-279.

⁷⁸ Quoted in McDonald, *Novus Ordo Seclorum*, 279-280.

the national government and the several states with a degree of residual sovereignty remaining with the people of the several states. Because of the unique historical circumstances of the colonies, sovereignty was divided and decentralized as it came to be embedded in the Constitution of the United States.

“Under the Articles of Confederation and under the several state constitutions,” Forrest McDonald maintained, “sovereignty, as defined, rested in the state legislatures, on the understanding that it had been delegated to them by the people of the several states severally and could be withdrawn by the people at will.” Under the Articles of Confederation and under the several state constitutions, the states retained the authority to maintain civil liberties. The rights retained by the people in the several states found their origins in natural rights theory, and the inherited rights of Englishmen. Natural rights theory posited the existence of natural rights which individuals, in a state of nature, retain when entering political society. The inherited rights of Englishmen retained by the people of the several states refer to those liberties, conserved in state constitutions, state statutes, and the common law, which the colonists inherited from the English constitutional tradition. This was the accepted position during the Philadelphia Convention, Luther Martin was the only delegate explicitly to adopt it. “This was that the several states, as previously existing political societies,” Forrest McDonald concurs, “continued to exist—or, alternatively, that the people of each state returned to a state of nature only among themselves, and subsequently reconstituted themselves as political societies—and that as sovereign entities, they were in a state of nature with one another.”

In this respect, the American Constitution truly inaugurated a *novus ordo seclorum*, a new order for the ages, because it is not a compact in the Lockean sense of an implicit agreement between the people and the rulers, or a compact among the people, as a whole, to govern themselves, but a compact among *political societies*.⁷⁹ Writing in Federalist No. 32, Alexander Hamilton was explicit on this point, “An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependant on the general will. But as the plan of the convention aims only at partial union or consolidation, the State governments would clearly retain all of the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”⁸⁰

The principle that the Constitution is a compact among separate political societies gains further support from the language of Article IV, Section III of the Constitution which limits the constitutional amendment process. Article IV, Section III asserts that “no new State shall be formed or erected within the Jurisdiction of any other State; nor any state be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” This provision effectively prohibits any constitutional amendment, duly proposed and ratified

⁷⁹ McDonald, *Novus Ordo Seclorum*, 280-281, 150, 279-281.

⁸⁰ Alexander Hamilton, “Federalist No. 32,” in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 154-57.

under Article V, which alters the political composition of any state without the consent of the state legislature.

Further textual support for the idea that the Constitution is a compact among separate political societies is provided by yet another limitation on the constitutional amendment process. Article V of the Constitution, which provides for constitutional amendment, guarantees that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” A constitutional amendment may be duly proposed and ratified, under the process set forth in Article V, which alters the number of Senators from each state, such as, for example, an amendment providing for three Senators from each state. Equal representation among the states in the Senate, however, must still be maintained under the provisions of Article V. By exempting the separate political societies in the several states from being denied equal representation in the Senate or being divided without their consent, even when three-fourths of the states concur under the provisions set forth in Article V, the language of the Constitution provides considerable evidence that the residue of sovereignty not delegated to the federal government remained with the states themselves or the people of the several states.⁸¹

The Tenth Amendment's guarantee that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

⁸¹ McDonald, *Novus Ordo Seclorum*, 281.

respectively, or to the people,”⁸² and the Ninth Amendment's guarantee that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or

disparage others retained by the people,”⁸³ complements Article IV, Article V, and Article VII by supplying additional textual support for the position that the powers not delegated to the national government resided with the states or the people of the several states. Those powers reserved by the people under the Tenth Amendment, and those rights retained by the people under the Ninth Amendment, are held by the people in their capacity as the people of the several states—not the American people as an undifferentiated mass.

A closer examination of the Constitution discloses that there is not one instance in the entire body of the document where the “general will” of the American people as an undifferentiated mass can express itself and act without any constitutional limitation.⁸⁴

The people are only recognized as members of social, legal, and political subdivisions, who are separated from themselves in both space and time for the purpose of expressing their will. This is accomplished by separating the people in space and time from those they elect.⁸⁵ The United States Senate, which gives each state equal representation regardless of the state's population, is arguably the least democratic of the representative

⁸² U.S. CONST. amend. X.

⁸³ U.S. CONST. amend. IX.

⁸⁴ Claes G. Ryn, “Political Philosophy and the Unwritten Constitution,” *Modern Age* 34, no. 4 (1992), 303-309.

⁸⁵ Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790* (Boston: Houghton Mifflin Company, 1965; Indianapolis: *LibertyPress*, 1979), 314.

branches of government. The representative organization of the Senate rejects the belief that each individual should be represented equally in accordance with the principle of one person, one vote. Because each state is represented by exactly two senators regardless of the state's population, the votes of citizens in lower populated states will be weighed more heavily in the upper chamber of Congress. The people are not represented in the Senate as discrete individuals whose votes should be weighed equally. The Senate represents the interests of the states as sovereign entities separate and distinguishable from the American people as a whole. Even with the ratification of the Seventeenth

Amendment, which provided for direct election of senators by the people of the respective states, the prior commitment to equal representation for each state is still required by Article V.⁸⁶ The senators are further removed from the people in time because only one-third of them are elected every two years for six-year terms.⁸⁷

Although the House of Representatives is generally recognized for its democratic impulses with the direct election of all its members every two years, the people are not represented in this body as an undifferentiated mass but as members of the states. Each state has a congressional delegation the size of which is based on the state's population. The members of the House of Representatives are not elected on the basis of proportional representation from the United States as a whole. Because the size of the House delegation from each state is based on population, the lower chamber does not strictly observe the one person, one vote principle since each state is guaranteed one

⁸⁶ Ryn, "Political Philosophy and the Unwritten Constitution," 304-05.

⁸⁷ McDonald, *E Pluribus Unum*, 314.

representative regardless of population. Further, congressmen are elected from single-member districts representing geographical subunits of the state from which they are elected.

The election every four years of the chief executive might, at first glance, appear to be an instance where the American people as a whole can express their will, but this appearance is misleading. The president is not elected by the people of the United States, but by members of the electoral college who are, in turn, selected in a manner to be decided by the several state legislatures. The members of the electoral college, under this arrangement, may be chosen directly by the state legislatures, directly by the people, or in any other manner to be prescribed by the state legislatures. Since each state is afforded a number of presidential electors equal to the number of its congressional delegation, representatives and senators, the electoral college does not, strictly speaking, adhere to the principle of one person, one vote since the composition of the Senate and House of Representatives is not based on one person, one vote.⁸⁸ Finally, federal court judges and justices of the United States Supreme Court are appointed by the president subject to approval of the Senate.⁸⁹

There is no manner in which the American people as a whole can immediately express their “general will” under the Constitution of the United States. If the American people were to express their will as a whole, they would have to sustain substantial

⁸⁸ Ryn, "Political Philosophy and the Unwritten Constitution," 304-05.

⁸⁹ For an extensive discussion see Claes G. Ryn, *Democracy and the Ethical Life: A Philosophy of Politics and Community* (Washington, D.C.: The Catholic University of America Press, 1990), 154-160.

consent over a period of at least fifteen to twenty years.⁹⁰ Forrest McDonald observes, “[T]he constitutional order, in the circumstances, confirmed that the country was not to be one republic or even thirteen, but a multitude of them. For the United States was a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members through two traditional institutions, the militias and the juries.”⁹¹ The basic structure of the Constitution singles out for protection those insular communities identified by Professor McDonald—juries, militias, and, one may add, churches, and a myriad of local political and social institutions like the family, township, and guild. The constitutional arrangement provided for a decentralized, group-oriented society because each of these intermediate institutions was understood by eighteenth-century Americans as having intrinsic value. These were historically protected from federal intrusion by state statutes, state constitutions, and the common law.

⁹⁰ McDonald, *E Pluribus Unum*, 315.

⁹¹ McDonald, *Novus Ordo Seclorum*, 289.

CHAPTER TWO THE TENTH AMENDMENT AS A BILL OF RIGHTS

On May 28, 1788, Alexander Hamilton's celebrated rejoinder to "[t]he most considerable of the remaining objections" to the proposed Constitution, "that the plan of the convention contains no bill of rights," was published as Federalist No. 84.⁹² Hamilton's opposition to a bill of rights did not arise from hostility, or even mere indifference, to civil liberties. Hamilton's view was predicated on his conviction that a bill of rights was not necessary in a government of limited powers, such as that proposed by the Philadelphia Convention. The authority delegated to the national government under the Constitution was limited to those powers particularly enumerated in Article I, Section 8. Those powers enumerated in Article I, Section 8, would be delegated to the national government by the people of the several states, in ratification conventions assembled for that purpose, pursuant to Article VII of the Constitution. It would not be necessary, Hamilton argued, to include a bill of rights, since the federal government would not have the authority to encroach on the sovereignty reserved to the people of the several states.

Hamilton's argument was met with dismay by Anti-Federalist opponents of the Constitution. The Anti-Federalists were apprehensive about the powers conferred on the

⁹² Alexander Hamilton, "Federalist No. 84," in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 442.

federal government, which were more comprehensive than those exercised by the national government under the Articles of Confederation. It is commonly agreed that one of the primary Anti-Federalist objections to the Constitution was the absence of a bill of rights. According to a widely held belief, the primary purpose behind the framing and ratification of the Bill of Rights was to allay fears of the Anti-Federalists that the proposed Constitution did not sufficiently guarantee individual liberty. Although individual liberty did constitute an important theme during the debate over a bill of rights, it was not the only theme, or even the prevailing theme. What many Anti-Federalists sought, as a condition for ratification, were assurances securing the principle of federalism. For many Anti-Federalists, a bill of rights was necessary to secure the sovereignty of the people in the several states. The Anti-Federalists underscored state authority pertaining to matters such as liberty of the press, religious liberty, criminal procedure, and especially trial by jury in civil cases. These ancient liberties were conserved in state constitutions, state statutes, and the unwritten common law, which the Anti-Federalists feared would be supplanted by federal law.

Anti-Federalists in several states sought constitutional amendments as a condition for ratification. Robert Whitehill introduced several amendments, during the Pennsylvania Ratifying Convention.⁹³ The Pennsylvania Anti-Federalists insisted on a provision, among several other amendments, “[t]hat the sovereignty, freedom, and independency of the several States shall be retained, and every power, jurisdiction and right which is not

⁹³ Robert Whitehill, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 660.

by this Constitution expressly delegated to the United States in Congress assembled.”

Although the Pennsylvania Ratifying Convention rejected Whitehill’s amendments, the Anti-Federalists issued “The Address and Reasons of Dissent of the Minority of the Convention.”⁹⁴ The example of the Pennsylvania Anti-Federalists emboldened opponents of the Constitution in several other states, who sought amendments as a condition for ratification. Although those efforts failed, several states did approve recommendatory amendments to be accompanied with ratification, for adoption by the First Congress. These included some of the most influential states in the nation: Massachusetts, South Carolina, New Hampshire, Virginia, and New York. Among the constitutional amendments recommended, every state was united in proposing a statement securing the sovereignty of the people in the several states.⁹⁵ Of all the objections raised by the Anti-

⁹⁴ The Address and Reasons of Dissent of the Minority of the Convention, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 662-73.

⁹⁵ “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 665-66; “Massachusetts Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 712; “Maryland Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 732; “South Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 756-57; “New Hampshire Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 760; “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 842; “New York Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 911-12; “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 968.

Federalists during the ratification debate, save the common law right of trial by jury, no other concern was more passionately debated than the need for a statement, reserving to the people of the several states those powers not delegated to the national government. When the ratification debate concluded, the Anti-Federalists received assurances that the Constitution would be amended effectively to secure the sovereignty of the people in the several states.

Explicit constitutional language for the protection of such sovereignty was culled from Article II of the Articles of Confederation: “Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”⁹⁶ The Tenth Amendment, which was proposed by the First Congress, guarantees that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people.”⁹⁷ Since the Supreme Court’s decision in *U.S. v. Darby* (1941), many political and legal scholars have dismissed the Tenth Amendment as a mere “truism,” attached to the Bill of Rights almost as an afterthought.⁹⁸ For most Anti-Federalists, however, such a reservation of powers to the states was effectively an abridged bill of rights.

⁹⁶ ART. OF CON. art. II.

⁹⁷ U.S. CONST. amend. X.

⁹⁸ The Supreme Court unanimously upheld the constitutionality of the Fair Labor Standards Act of 1938, which established minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The Fair Labor

A bill of rights, in Hamilton's estimation, was not necessary in a government of limited powers. "[A] minute detail of particular rights," Hamilton argued in *Federalist* No. 84, "is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns," such as a government of general powers. Hamilton's argument was founded on a distinction concerning a government of general powers and government of limited powers. A government of limited powers, such as that put forward by the Philadelphia Convention, could only exercise those powers delegated by the people of the several states. "[W]hy declare," Hamilton asked, "that things shall not be done, which there is no power to do?" "Why, for instance, should it be said," Hamilton wondered, "that the liberty of the press

Standards Act not only prohibited the shipments of good in interstate commerce produced by employees under conditions that violated the minimum wage and maximum hour provisions, but criminally proscribed employing workers in the production of goods for interstate commerce, except under the prescribed working conditions. The Court, reasoning that "[t]he [Tenth Amendment] states but a truism that all is retained which has not been surrendered," concluded that the Tenth Amendment was not an independent limitation on the power of Congress. *United States v. Darby*, 312 U.S. 100 (1941), 123-24. The Supreme Court has been more receptive to recognizing state immunity from federal regulation in recent years. See, for example, *New York v. United States* in which the Court ruled that Congress "may not commandeer[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144 (1992), 188. Similarly, in *Printz v. United States*, the Supreme Court concluded that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898 (1997), 548. "It is an essential attribute of the States' retained sovereignty," the Court reasoned, "that they remain independent and autonomous within their proper sphere of authority" *Printz v. United States*, 521 U.S. 898 (1997), 548. The Court has placed additional limits on the authority of Congress to regulate interstate commerce in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

shall not be restrained, when no power is given [under Article I, Section 8 of the proposed Constitution] by which restrictions may be imposed?”⁹⁹ It would be unnecessary, even redundant, to include a bill of rights protecting the liberty of the press, particularly since the federal government did not have the authority, under Article I, Section 8 of the proposed Constitution, to infringe the liberty of the press. A bill of rights would only restate, in more explicit constitutional language, what was already confirmed by Article I, Section 8 of the proposed Constitution: the federal government was a government of limited powers, which did not have the authority to encroach upon the concerns reserved to the people of the several states. Such concerns included authority over matters pertaining to freedom of speech, liberty of the press, religious liberty, criminal procedure and, trial by jury in civil cases. These privileges, which developed over a considerable period of time at the state level, included those subtle and often fragile political, legal, and social arrangements, both written and unwritten.

On October 6, 1787, James Wilson presented one of the most significant arguments against the necessity for a bill of rights in his celebrated “State House Speech.” The occasion was a meeting in Philadelphia, which Wilson considered the “proper occasion” for answering “the objections which have been raised” against the proposed Constitution. Those objections, which Wilson denounced as “insidious attempts” to “pervert and destroy” support for the proposed Constitution, only strengthened his resolve. Wilson, while “unprepared for so extensive and so important a disquisition,” considered it his

⁹⁹ Hamilton, “Federalist No. 84,” 445.

“duty to comply with the request of many gentlemen” in the assembly, having received the honor of an appointment as a delegate to the Philadelphia Convention. Wilson was confident, however, that his constant attention to the matter had “not been so easily effaced” as to leave him unarmed. Wilson proceeded to “elucidate and explain,” to the assembled gentlemen, “the principles and arrangements of the constitution that has been submitted to the consideration” of the people of the several states for ratification.¹⁰⁰

Wilson’s address, which preceded Federalist No. 84, had “great influence” and would become “the classic Federalist defense on the Bill of Rights issue.”¹⁰¹

Wilson’s argument was predicated on a distinction between a government of general powers and a government of limited powers. Before commencing with a “refutation of the charges that are alleged” against the proposed Constitution, Wilson believed it would be “proper” to explain the difference, “mark the leading discrimination,” between a government of general powers, such as those established in the several states, and a government of limited powers, such as in the proposed Constitution. “This distinction being recognized,” Wilson hoped, “will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution,” particularly the Anti-Federalists.¹⁰²

¹⁰⁰ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 528-32.

¹⁰¹ Bernard Schwartz, “Commentary” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 527.

¹⁰² James Wilson, “An Address to a Meeting of the Citizens of Philadelphia,” 528.

“Sovereignty, in its eighteenth-century signification,” according to Forrest McDonald, “was absolute,” comprehending “the power to command anything and everything that was naturally possible.” “Under the Articles of Confederation and under the several state constitutions,” McDonald explains, “sovereignty, as defined, rested in the state legislatures, on the understanding that it had been delegated to them by the people of the several states severally and could be withdrawn by the people at will.”¹⁰³ The powers exercised by the governments of the several states were generally indefinite, even absolute, unless the people placed limitations on those powers through declarations of rights, contained within the text of the state constitutions or attached to the state constitutions as a prefix. “When the people established the powers of legislation under their separate [state] governments,” Wilson asserted, “they invested their representatives with every right and authority which they did not in explicit terms reserve” in a declaration of rights. It necessarily followed that “upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete.” A bill of rights was the manner in which the people of the several states placed limitations on an otherwise indefinite grant of power to the state government.

“[I]n delegating federal powers,” Wilson contended, “another criterion was necessarily introduced” which foreclosed the need for a bill of rights.¹⁰⁴ That criterion,

¹⁰³ Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: Kans.: University Press of Kansas, 1986), 278-79.

which Federalists were quick to exploit during the ratification struggle, was the manner in which a government of general powers compared with a government of limited powers. It was not necessary to append a bill of rights to the Constitution put forward by the Philadelphia Convention because the national government, to be established under the Constitution, was to be a government of enumerated powers. “[T]he congressional authority is to be collected,” Wilson maintained, “not from tacit implication, but from the positive grant, expressed in the instrument of union,” that is, the enumeration of powers in Article I, Section 8 of the proposed Constitution. In a government of general powers “it is evident,” Wilson contended, that “everything which is not reserved, is given” to the government, such as those established in the several states. A government of general powers, such as those of the several states, could exercise any powers, unless those powers were limited by means of a declaration of rights. In the Constitution, however, “the reverse of the proposition prevails, and every thing which is not given, is reserved.” A government of limited powers, such as that proposed by the Philadelphia Convention, could only exercise those powers, enumerated in Article I, Section 8, which were delegated by the people of the several states, meeting in convention for that purpose. “This distinction being recognized,” Wilson contended, “will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution

. . . .” It would be “superfluous and absurd,” Wilson observed, “to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which

we are not divested either by the intention or the act that has brought that body into existence.”

As a means of demonstrating his argument, Wilson used as an example “that sacred palladium of national freedom,” the liberty of the press, which had been “a copious subject of declamation and opposition” by the Anti-Federalists. “[W]hat controul,” Wilson asked, “can proceed from the federal government, to shackle or destroy that sacred palladium of national freedom?” Because “the proposed system possesses no influence whatever upon the press,” Wilson believed the introduction of “a formal declaration upon the subject” would have been “merely nugatory.”¹⁰⁵

A few weeks following his fêted “State House Speech,” Wilson restated his argument against the necessity of a bill of rights. During the Pennsylvania Ratifying Convention, which convened on November 20, 1787, Wilson revived the distinction between a government of general powers and a government of limited powers. “There are two kinds of government,” Wilson explained, “that where general power is intended to be given to the legislature, and that where the powers are particularly enumerated.” “In the last case,” Wilson continued, “the implied result is, that nothing more is intended to be given than what is so enumerated, unless it results from the nature of the government itself.”

“[W]hen general legislative powers are given,” however, “then the people part with their authority, and, on the gentlemen’s principle of government, retain nothing.” “But in a government like the proposed one,” Wilson concluded, “there can be no necessity for a

¹⁰⁵ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia,” 528-529.

bill of rights for, on my principle, the people never part with their power.” “What harm,” Wilson asked, “could the addition of a bill of rights do?” “If it can do no good,” Wilson answered, “I think that a sufficient reason to refuse having any thing to do with it.”¹⁰⁶ According to Herbert J. Storing, Wilson’s argument has become “a part of American constitutional orthodoxy.”¹⁰⁷

Wilson’s argument was highly regarded, at least among the Federalists, who invoked it repeatedly during the state ratification debates. During the Pennsylvania Ratifying Convention, Thomas M’Kean, responding to the Anti-Federalist charge, “[t]hat there is no bill or declaration of rights in this Constitution,” agreed that a bill of rights was not necessary in a government of limited powers. “For the powers of Congress, being derived from the people in the mode pointed out by this Constitution, and being therein enumerated and positively granted,” M’Kean argued, “can be no other than what this positive grant conveys.” M’Kean expanded his exegesis of the constitutional text, arguing that the executive branch of government would be similarly circumscribed by the limitations imposed on Congress by Article I, Section 8 of the proposed Constitution. “With respect to executive officers,” M’Kean argued, “they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them.”¹⁰⁸ The executive branch of the national government could not exercise legislative authority,

¹⁰⁶ James Wilson, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 634.

¹⁰⁷ Herbert J. Storing, “What the Anti-Federalists Were For,” *The Complete Anti-Federalist*, vol. 1, ed. Herbert Storing (Chicago: University of Chicago Press, 1981), 65.

¹⁰⁸ Thomas M’Kean, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 641.

unless such authority was expressly delegated to the executive by the national legislature, pursuant to Article I, Section 8 of the proposed Constitution.

Thomas Hartley answered Anti-Federalist charges that “the proposed system is not coupled with a bill of rights, and therefore, it is said, there is no security for the liberties of the people” and the Constitution “has been represented as an instrument to undermine the sovereignty of the States and destroy the liberties of the people.” Hartley believed that the foremost Anti-Federalist objections to the proposed Constitution were “ably refuted” by “the honorable members from the city,” gentlemen of such caliber as James Wilson. The Anti-Federalist argument, therefore, “will admit of little more animadversion than has already been bestowed upon it, in the course of their arguments.” Hartley asserted, however, a few additional observations in response to the Anti-Federalist assessment that a bill of rights was necessary in a government such as that proposed by the Philadelphia Convention.

“As soon as the independence of America was declared,” Hartley maintained, “all our natural rights were restored to us, and we were at liberty to adopt any form of government to which our views or our interest might incline us.” “This truth,” Hartley continued, “expressly recognized by the act of declaring our independence, naturally produced another maxim, that whatever portion of those natural rights we did not transfer to the government, was still reserved and retained by the people,” the people upon whom sovereignty devolved. “[I]f no power was delegated to the government,” Hartley declared, “no right was resigned by the people,” an argument consistent with the

Federalist argument that a government could not exercise any powers except those which were delegated by the people of the several states. “[I]f a part only of our natural rights was delegated,” Hartley asked, “is it not absurd to assert that we have relinquished the whole?” “Where then is the necessity of a formal declaration,” Hartley inquired, “that those rights are still retained, of the resignation of which no evidence can possible be produced?” “[I]t is enough for me,” Hartley answered, “that the great cardinal points of a free government are here secured without the useless enumeration of privileges, under the popular appellation of a bill of rights.”¹⁰⁹

During the Massachusetts Ratifying Convention, which convened on January 9, 1788, Joseph Bradley Varnum advanced a similar argument. An inquiry, asking “why a bill of rights was not annexed to this Constitution,” presented Varnum with the occasion to

¹⁰⁹ Thomas Hartley, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 654-655. Under the Articles of Confederation and under the several state constitutions, the people of the several states retained the authority to maintain civil liberties. The rights retained by the people in the several states found their origins in natural rights theory, and the inherited rights of Englishmen. Natural rights theory posited the existence of natural rights which individuals, in a state of nature, retained when entering political society. The inherited rights of Englishmen retained by the people of the several states refer to those liberties, conserved in state constitutions, state statutes, and the common law, which the colonists inherited from the English constitutional tradition. Both traditions, which posited that upon independence sovereignty devolved on the people of the several states, not the people of the United States as a whole, supported the constitutional language embodied in both the Ninth and Tenth Amendments. Hartley’s appeal to natural rights theory is consistent with the essential argument: the government does not have authority beyond that which was delegated by the people of the several states, either in their state constitutions or the Constitution proposed by the Philadelphia Convention, a principle embodied in the language of the Tenth Amendment. The significance of these traditions for the Ninth Amendment will be further examined in Chapter Three, which concerns the rights retained by the people.

advance the Federalist position.¹¹⁰ Varnum's rejoinder distinguished between a government of general powers and a government of limited powers. Varnum observed that the Massachusetts legislature, had authority to make "all laws" which did not conflict with the state constitution. "[I]f there is such a clause in the Constitution under consideration," Varnum conceded, "then there would be a necessity for a bill of rights." In "the section under debate," however, the Philadelphia Convention proposed a national government of limited powers.¹¹¹ "Congress have an expressed power," Varnum argued, to levy taxes pursuant to Article I, Section 8 of the proposed Constitution, and even "to pass laws to carry their requisitions into execution." Because the authority vested under Article I, Section 8 of the proposed Constitution was an "expressed" power, however, it precluded the need for a bill of rights. Following his exegesis of Article I, Section 8, "stating the difference between delegated power and the grant of all power, except in certain cases," Varnum sought to allay Anti-Federalist concerns that the proposed Constitution would undermine the prerogatives of the states.¹¹² The Philadelphia Convention only envisaged "a consolidation of strength" under the proposed Constitution, not a "consolidation of the Union." Varnum's assured the Anti-Federalists

¹¹⁰ Joseph Bradley Varnum, "Massachusetts Ratifying Convention" in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 681.

¹¹¹ U.S. CONST. art. I, § 8.

¹¹² Those limitations imposed on the authority of the national government in Article I, Section 9 of the Constitution. Article I, Section 9 was described as a "partial bill of rights" by The Federal Farmer. The Federal Farmer, "Letters from The Federal Farmer IV" in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 248.

that the national government “had no right to alter the internal relations of a state” under the proposed Constitution.¹¹³ Varnum’s assurance underscored the view that the Anti-Federalists were principally concerned with preserving the sovereignty of the people in the several states, not individual liberty as such.

During the South Carolina Ratifying Convention, which convened on May 12, 1788, James Lincoln decried the absence of a bill of rights, particularly the liberty of the press. Lincoln “would be glad to know why, in this Constitution, there is total silence with regard to liberty of the press.” Lincoln believed it to be “impossible” that the matter was merely forgotten. It must have been “purposely omitted” by the Philadelphia Convention. The liberty of the press was “the tyrant’s scourge” and “the true friend and firmest supporter of civil liberty,” in Lincoln’s estimation. “Why,” Lincoln asked, “pass it by in silence?”¹¹⁴ “Why was not this Constitution,” Lincoln continued, “ushered in with the bill of rights?” “Are the people,” Lincoln inquired, “to have no rights?”

Charles Cotesworth Pinckney sought to answer Lincoln’s objections concerning the absence of a bill of rights, and, in particular, protection for the liberty of the press. “With regards to liberty of the press,” Pinckney answered, “the discussion of the matter was not forgotten by members of the Convention.” “It was fully debated,” Pinckney noted, “and the impropriety of saying any thing about it in the Constitution clearly evidenced.” Like his Federalist colleagues, Pinckney believed protection for liberty of the press was unnecessary in a government of limited powers. Because “[t]he general government has

¹¹³ Joseph Bradley Varnum, “Massachusetts Ratifying Convention,” 681-82.

¹¹⁴ James Lincoln, “South Carolina Ratifying Convention,” 744.

no powers but what are expressly granted to it,” Pinckney argued, “it therefore has no power to take away the liberty of the press.” The greater significance of Pinckney’s argument, however, was his belief that liberty of the press was protected by the constitutions of the several states. “That invaluable blessing, which deserves all the encomiums the gentlemen has justly bestowed upon it,” Pinckney observed, “is secured by all our state constitutions,” precluding the need for a bill of rights.¹¹⁵ Liberty of the press, for Charles Cotesworth Pinckney, a matter reserved to the several states, was secured by maintaining the sovereignty of the people over their respective state constitutional and legal institutions.

During the Virginia Ratifying Convention, which assembled on June 2, 1788, Edmund Randolph made a similar distinction between a government of general powers and a government of enumerated powers. When the Philadelphia Convention completed its work on September 17, 1788, Randolph had refused to support the proposed Constitution.¹¹⁶ When the Virginia Ratifying Convention later convened in Richmond, however, Randolph unapologetically avowed the Federalist position. “It is objected,” Randolph noted, “that the trial by jury, the writ of habeas corpus, and the liberty of the press, are insecure.” “Where,” Randolph asked, “is the danger of it?” “He says,” Randolph noted, “that every power is given to the general government that is not reserved

¹¹⁵ Charles Cotesworth Pinckney, “South Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 745.

¹¹⁶ Edmund Randolph, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 786.

to the states.”¹¹⁷ “Pardon me,” Randolph answered, “if I say the reverse of the proposition is true. I defy any one to prove the contrary. Every power not given it by this system is left with the states.” “This being the principle,” Randolph inquired, “from what part of the Constitution can the liberty of the press be said to be in danger?” Randolph then proceeded to recite, clause by clause, Article I, Section 8 of the Constitution, enumerating the powers delegated to Congress.¹¹⁸

On a later occasion, Randolph again introduced the subject of “reserved rights” with some reservation.¹¹⁹ So long as “it would not fatigue the house too far,” Randolph decried the Anti-Federalist position, that “complete and unlimited legislation is vested in the Congress of the United States,” as “founded on false reasoning.” “On the subject of a bill of rights, the want of which has been complained of,” Randolph asserted, “I will observe that it has been sanctified by such reverend authority, that I feel some difficulty in going against it. I shall not, however, be deterred from giving my opinion on this occasion, let the consequence be what it may.” Randolph came to the same conclusion as James Wilson: a bill of rights was not necessary in a government of enumerated powers.

“What is the present situation,” Randolph asked, “of this state?” The state government retains all the “rights of sovereignty” save those delegated to the national government under the Articles of Confederation. A delegation of power to the national

¹¹⁷ Randolph is referring to Patrick Henry.

¹¹⁸ Edmund Randolph, “Virginia Ratifying Convention,” 786.

¹¹⁹ Edmund Randolph, “Virginia Ratifying Convention,” *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, *Major Themes* (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 471.

government is necessary, “[s]he *must* delegate powers to the confederate government,” because such delegation is “necessary for her public happiness.” “Her weakness,” Randolph continued, “compels her to confederate with twelve other governments” together with whom “[s]he trusts certain powers to the general government, in order to support, protect, and defend the Union.” “[I]s there not a demonstrable difference,” Randolph further asked, “between the principle of the state governments and of the general government?” This “demonstrable difference,” of which Randolph spoke, was the distinction between a government of general powers and a government of limited powers. This was the “distinction between the representatives of the people of a particular country, who are appointed as the ordinary legislature, having no limitation to their powers,” according to Randolph, and “another body arising from a compact, and with certain delineated powers.” “There is not a word said, in the state government, of the powers given to it,” Randolph explained, “because they are general.” “But in the general Constitution,” however, “its powers are enumerated.” “Were a bill of rights necessary in the former, it would not be in the latter,” Randolph concluded, “for the best security that can be in the latter is the express enumeration of its powers.” “Is it not, then, fairly deducible,” Randolph asked, “that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless.”¹²⁰ If the Philadelphia

¹²⁰ Edmund Randolph, “Virginia Ratifying Convention,” *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, *Major Themes* (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 471.

Convention anticipated a government of general powers, Randolph reasoned, those powers specifically enumerated in Article I, Section 8 would not have been necessary.

George Nicholas also recognized the distinction between a government of general powers and a government of limited powers. “In Virginia,” Nicholas observed, “all powers were given to the government without any exception.” “It was different in the general government,” however, “to which certain special powers were delegated for certain purposes.” “Was it safer,” Nicholas asked, “to grant general powers than certain limited ones?” “[I]t is a principle universally agreed upon,” Nicholas argued, “that all powers not given are retained.” “Where, by the Constitution,” Nicholas continued, “the general government has general powers for any purpose, its powers are absolute.”¹²¹ “Where it has powers with some exceptions,” however, “they are absolute only as to those exceptions.”¹²² “In either case,” Nicholas concluded, “the people retain what is not conferred on the general government, as it is by their positive grant that it has any of its powers.”¹²³

When the North Carolina Ratifying Convention convened on July 21, 1788, William Maclaine argued that “[i]t would be very extraordinary to have a bill of rights,” given that the powers of Congress were “expressly defined” in Article I, Section 8 of the proposed

¹²¹ George Nicholas, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 791.

¹²² Article I, Section 9 of the Constitution, which The Federal Farmer described as a “partial bill of rights,” placed limitations on the powers of the federal government, those powers enumerated in Article I, Section 8. The Federal Farmer, “Letters from The Federal Farmer IV,” 248.

¹²³ George Nicholas, “Virginia Ratifying Convention,” 791.

Constitution.¹²⁴ The constitutional structure, allocating authority between the national government and the several states, was a sufficient safeguard against a potentially oppressive federal government. A government of limited powers, such as that proposed by the Philadelphia Convention, was “as valid and efficacious a check as a bill of rights could be,” without the attending danger.¹²⁵ A bill of rights would only serve to make explicit what is already known from Article I, Section 8 of the Constitution: the federal government is a government of limited powers. Because “[t]he powers of Congress are limited and enumerated,” Maclaine continued “[w]e say we have given them those powers, but we do not say we have given them more.” “We retain those rights,” Maclaine maintained, “which we have not given away to the general government.” “If a gentleman had made his last will and testament, and devised or bequeathed to a particular person the sixth part of his property, or any particular specific legacy, could it be said,” Maclaine inquired, “that that person should have the whole estate?”

An appeal to “common sense” is informative: “[I]f we had all power before, and give away but a part, we still retain the rest.” “It is a plain thing as possibly can be,” Maclaine argued, “that Congress can have no power but what we expressly give them.” Maclaine

¹²⁴ William Maclaine, “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 938.

¹²⁵ An additional argument proffered by the Federalists was that the addition of a bill of rights would be, not only unnecessary, but dangerous. With the addition of a bill of rights, the national government could be interpreted as a government of general powers, like the several states. A bill of rights would be dangerous because the federal government could plausibly exercise all authority, except those rights which were expressly singled out for constitutional protection. This fear, which accounts for the origins of the Ninth Amendment, will be further examined in Chapter Three, which concerns the rights retained by the people.

reasoned, like Edmund Randolph, that it would have been redundant to enumerate powers in a government of general powers. “If they can assume powers not enumerated,” Maclaine observed, “there was no occasion for enumerating any powers.”

“There is an express clause,” Maclaine conceded, “which, however disingenuously it has been perverted from its true meaning, clearly demonstrates that they are confined to those powers which are given them.” Maclaine then proceeded to quote Article I, Section 8, Clause 18 of the proposed Constitution. Maclaine interpreted the “necessary and proper” clause, which concerned many Anti-Federalists, not as a source of indefinite federal power, but as a limitation on power already conferred on the national government pursuant to Article I, Section 8 of the Constitution. “This clause specifies,” Maclaine explained, “that they shall make laws to carry into execution all the powers vested by this Constitution; consequently, they can make no laws to execute any other power.”

“This clause,” Maclaine continued, “gives no new power, but declares that those [powers] already given are to be executed by proper laws.” “I hope,” Maclaine concluded, “this will satisfy gentlemen.”¹²⁶

“To have had a bill of rights, as a matter of fact,” Forrest McDonald agrees, “would have been inconsistent with the overall theory on which the Constitution was based, and the nationalists in the convention as well as Federalists in the ratifying conventions were quick to point this out.” “[I]f the national government was a creature of the states or of the people of the states,” McDonald argues, “then it could have only such powers as were

¹²⁶ William Maclaine, “North Carolina Ratifying Convention,” 938.

expressly granted it, together with certain powers implied in the general grant of power to ‘make all laws which shall be necessary and proper for carrying into execution’ the specified powers.” “After it enumerated all the powers the national government could exercise, it made no sense,” McDonald concludes, “for the Constitution then to enumerate certain powers that it could not exercise.”¹²⁷ The Federalist argument against the necessity of a bill of rights, according to McDonald’s assessment, supports the view that sovereignty ultimately resides in the several states, or people of the several states, not the people of the United States as a whole. The proposition that sovereignty resides in the people of the United States as a whole, would be anathema to the Anti-Federalists.

Anti-Federalists, speaking in the ratifying conventions and writing in public essays, assailed the Federalist argument that a bill of rights was not necessary in a government of limited powers, especially James Wilson’s “State House Speech.”¹²⁸ The Anti-Federalists, arguing for a bill of rights, repeatedly underscored Article II of the Articles of Confederation. The essential Anti-Federalist argument was that the liberties of the people would be secure so long as the sovereignty of the people in the several states was maintained. Although the Anti-Federalists repeatedly invoked the liberties of the people, they believed such liberty was hardly inseparable from state sovereignty. The sovereignty of the people in the several states was the foundation for state constitutions, statutes, and, most importantly, the common law.

¹²⁷ Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790* (Boston: Houghlin Mifflin Company, 1965; Indianapolis: LibertyPress, 1979), 316-317.

¹²⁸ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia,” 528-32.

One of the more prolific Anti-Federalist pamphleteers, writing in response to James Wilson's influential "State House Speech," considered Wilson's argument thoroughly unconvincing.¹²⁹ "[S]o serious and general has been the impression of the objections urged against the new plan, on the minds of the people, that its advocates," Centinel observed, "finding mere declamation and scurrility will no longer avail, are reluctantly driven to defend it on the ground of argument." "Mr. *Wilson*, one of the deputies of this State in the late Convention," Centinel noted, "has found it necessary to come forward." Wilson submitted that a bill of rights was not necessary in a government of limited powers, such as that proposed by the Philadelphia Convention. It would not be necessary to secure the liberties of the people, Wilson argued, because the federal government did not have such authority under Article I, Section 8 of the Constitution.

Regarding the stated reason for the omission of a bill of rights, proffered by James Wilson in his "State House Speech," as "an insult to the understanding of the people," Centinel was certain that the proposed Constitution would annihilate the several states, and the liberties of the people. "Mr. *Wilson*," Centinel charged, "has recourse to the most flimsey sophistry in his attempt to refute the charge that the new plan of general government will supersede and render powerless the state governments." Concerned that the national government would have authority to infringe on the liberties of the people, Centinel sought assurances that "the *liberty of the press, and other invaluable personal*

¹²⁹ Centinel, "Letters of Centinel I-XVIII" in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 130-213.

rights” would be secure from a potentially oppressive national government.” A statement, affirming the sovereignty of the people in the several states, would secure these liberties by providing unambiguous constitutional protection for local arrangements. These arrangements, which the several states inherited from the English constitutional and legal tradition, were secured by the several state constitutions, state statutes, and the common law. Centinel held that the sovereignty of the people in the several states, and their liberties, would be secured through explicit constitutional language, language not unlike Article II of the Articles of Confederation. Like many Anti-Federalists, Centinel thought that the foundation, which secured the liberties of the people, was the sovereignty of the people in the several states.

Centinel was especially concerned with securing “that grand palladium of freedom,” the liberty of the press. “As long as the liberty of the press continues unviolated, and the people have the right of expressing and publishing their sentiments upon every public measure,” Centinel maintained, “it is next to impossible to enslave a free nation.” “The state of society must be very corrupt and base indeed,” Centinel continued, “when the people in possession of such a monitor as the press, can be induced to exchange the heaven-born blessings of liberty for the galling chains of despotism.” “Men of an aspiring and tyrannical disposition, sensible to this truth, have ever been inimical to the press,” Centinel warned, “and have considered the shackling of it, as the first step towards the accomplishment of their hateful domination, and the entire suppression of all liberty of public discussion, as necessary to its support.” “Even a standing army, that grand engine

of oppression, if it were as numerous as the abilities of any nation could maintain,” Centinel insisted, “would not be equal to the purposes of despotism over an enlightened people.” “The abolition of that grand palladium of freedom, the liberty of the press, in the proposed plan of government, and the conduct of its authors, and patrons,” Centinel contended, “is a striking exemplification of these observations.”¹³⁰

Evoking James Wilson’s “State House Speech,” Centinel sought to impeach Wilson’s argument. During his “State House Speech,” Wilson asked, “What controul can proceed from the federal government to shackle or destroy that *sacred palladium* of national freedom, the *liberty of the press*?” Centinel was not convinced that the authority of the federal government was so circumscribed, especially to as preclude a threat to the liberty of the press. “Cannot Congress, when possessed of the immense authority proposed to be devolved,” Centinel rejoined, “restrain the printers, and put them under regulation[?]”

“Recollect that the omnipotence of the federal legislature over the State establishments,” Centinel warned, “is recognized by that special article,” Article VI of the Constitution.¹³¹ Centinel understood that the “*liberty of the press and other invaluable personal rights*,” secured by the constitutions, statutes, and common law of the several states, was imperiled by Article VI of the Constitution. “After such a

¹³⁰ Centinel, “Letters of Centinel II,” 144-146.

¹³¹ Article VI, Clause 2 of the Constitution, the “supremacy clause,” provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall by bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

declaration,” Centinel asked, “what security does the *Constitutions* of the several States afford for the *liberty of the press and other invaluable personal rights*, not provided for by the new plan?” “Does not this sweeping clause,” Centinel submitted, “subject every thing to the controul of Congress?”

Unconvinced that the liberties of the people would be secured by limiting the allocation of authority of the federal government to those powers enumerated in Article I, Section 8 of the Constitution, Centinel sought a statement explicitly securing the sovereignty of the people in the several states from federal infringement.

Only a statement, explicitly providing that those powers not delegated to the national government were reserved to the several states, would sufficiently secure the sovereignty and liberties of the people in the several states. Such constitutional language originated in

Article II of the Articles of Confederation. Such a statement was believed to be necessary in the Articles of Confederation, although its authority was considerably more limited than the authority conferred on the federal government in the proposed Constitution. Centinel was especially concerned because such a statement was omitted from the proposed Constitution, which conferred considerable more authority on the national government, at the expense of the several states. “*Positive* grant was not *then* thought sufficiently descriptive and restraining upon Congress,” Centinel maintained, “and the omission of such a declaration *now*, when such devolutions of power are proposed, manifests the design of reducing the several States to shadows.”

“But Mr. Wilson tells you,” Centinel continued, “that every right and power not specifically granted to Congress is considered as withheld.” “Is this principle,” Centinel asked, “established by the proper authority?” “Has the Convention,” Centinel wondered, “made such a stipulation?” Centinel was incredulous. Citing Article VI of the Constitution, Centinel maintained that the national government “would be *paramount* to all *State* authorities.” “The lust of power is so universal,” Centinel warned, “that a speculative unascertained rule of construction would be a *poor* security for the liberties of the people.” Only an explicit statement such as Article II of the Articles of

Confederation would suffice. “Such a body as the intended Congress,” Centinel submitted, “unless particularly inhibited and restrained, must grasp at omnipotence, and before long swallow up the Legislative, the Executive, and the Judicial powers of the several States.”

“From the forgoing illustration of the powers proposed to be devolved to Congress, it is evident, that the general government would necessarily annihilate the particular governments, and that the security of the personal rights of the people by the state constitutions is superseded and destroyed; hence results,” Centinel maintained, “the necessity of such security being provided for by a bill of rights to be inserted in the new plan of federal government.” A bill of rights for Centinel, who voiced considerable apprehension concerning the annihilation of the several states, was a statement providing that those powers not delegated to the federal government were reserved to the people of the several states. “What excuse can we then make for the omission of this grand

palladium,” Centinel wondered, “this barrier between *liberty* and *oppression*[?]” “For universal experience demonstrates the necessity of the most express declarations and restrictions,” Centinel concluded, “to protect the rights and liberties of mankind, from the silent, powerful and ever active conspiracy of those who govern.”¹³²

The Federal Farmer, who was apprehensive about the powers conferred on the federal government, sought a statement explicitly securing the sovereignty of the people in the several states. “It is said,” The Federal Farmer observed, “that when the people make a constitution, and delegate powers that all powers not delegated by them to those who govern is [*sic*] reserved in the people; and that the people, in the present case, have reserved in themselves, and in their state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government.” “It is said on the other hand, The Federal Farmer continued, “that the people, when they make a constitution, yield up all power not expressly reserved to themselves.” “But the general presumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favourably for encreasing their own powers,” The Federal Farmer warned, “all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved.”¹³³

¹³² Centinel, “Letters of Centinel II,” 146-152.

¹³³ The Federal Farmer, “Letters from The Federal Farmer IV” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 247-248.

“[T]o examine more particularly those clauses which respect its powers,” The Federal Farmer began Letter XVI “with those articles and stipulations which are necessary for accurately ascertaining the extent of powers, and what is given, and for guarding, limiting, and restraining then in their exercise.” “We often find,” The Federal Farmer observed, “these articles and stipulations placed in bills of rights” “[B]ut they may as well,” The Federal Farmer noted, “be incorporated in the body of the constitution, as selected and placed by themselves.” “The supreme power,” The Federal Farmer maintained, “is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern”

“Many needless observations, and idle distinctions, in my opinion,” The Federal Farmer asserted, “have been made respecting a bill of rights.” “On the one hand,” The Federal Farmer noted, “it seems to be considered as a necessary limb of the constitution, and as containing a certain number of very valuable articles, which are applicable to all societies” “[O]n the other,” The Federal Farmer noted, a bill of rights is, “useless, especially in a federal government, possessing only enumerated power—nay, dangerous, as individual rights are numerous, and not easy to be enumerated in a bill of rights, and from articles, or stipulations, securing some of them, it may be inferred, that others not mentioned are surrendered.”¹³⁴ “There appears to me to be a general indefinite

¹³⁴ The Federal Farmer is addressing the Federalist argument, proffered primarily by Alexander Hamilton and James Wilson, that the addition of the bill of rights to the proposed Constitution would not only be unnecessary, but dangerous. This concern

proposition without much meaning,” The Federal Farmer concluded, “and the man who first advanced those of the latter description, in the present case, signed the federal constitution, which directly contradicts him.”¹³⁵

The Federal Farmer’s primary concern in this examination of the proposed Constitution, however, was to ascertain how the allocation of authority between the national government and the several states would secure the liberties of the people. “The supreme power is undoubtedly in the people,” The Federal Farmer argued, “and it is a principle well established in my mind that they reserve all powers not expressly delegated by them to those who govern” “This is as true,” The Federal Farmer noted, “in forming a state as in forming a federal government.” “In forming a state constitution, under which to manage not only the great but the little concerns of the community,” The Federal Farmer noted, “the powers to be possessed by the government are often too numerous to be enumerated” “[T]he people to adopt the shortest way often give general powers, indeed all powers, to the government, in some general words, and then,” The Federal Farmer continued, “by a particular enumeration, take back, or rather say they however reserve certain rights as sacred, and which no laws shall be made to violate . . .

served as the foundation of the Ninth Amendment, which will be examined in Chapter Three, along with The Federal Farmer’s analysis of this matter.

¹³⁵ The Federal Farmer is referring to James Wilson, who supported the proposed Constitution at the Philadelphia Convention. Although Wilson argued that the addition of a bill of rights would be dangerous, he supported the Constitution even though Article I, Section 9 contained several protections for the liberties of the people, which The Federal Farmer called a “partial bill of rights.”

.”¹³⁶ From this observation, The Federal Farmer concluded, “that all powers are given which are not reserved” “[B]ut in forming a federal constitution, which *ex vi termine*, supposes state governments existing, and which is only to manage a few great national concerns,” The Federal Farmer argued, “we often find it easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved; and the principle will operate in its full force, when we carefully adhere to it.” The Federal Farmer was careful to note that the formation of a federal government presupposed the existence of the several states. This is consistent with the historical analysis that upon independence, sovereignty devolved on the people of the several states in their separate capacities, not the people of the United States as an undifferentiated whole.¹³⁷

The Federal Farmer proceeded with a discussion which examined the relationship between those powers reserved to the people of the several states, and those rights retained by the people of the several states. “When we particularly enumerate the powers given,” The Federal Farmer warned, “we ought either carefully to enumerate the rights reserved, or to be totally silent about them” “[W]e must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved” The Federal Farmer believed it was “most advisable” “particularly to enumerate the former and not the latter .

¹³⁶ The Federal Farmer, “Letters from The Federal Farmer XVI,” 323-24.

¹³⁷ The conclusion established in Chapter One was that sovereignty devolved on the people of the several states from the moment of independence.

. . .” That is, The Federal Farmer thought it was “most advisable” to particularly enumerate the powers delegated to the national government, and remain silent concerning the rights reserved. The Federal Farmer understood, however, that “men appear generally to have their doubts about these silent reservations,” “silent reservations” enumerating the rights retained by the people. “The Federal Farmer proposed that “we might advantageously enumerate the powers given, and then in general words . . . declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.” The Federal Farmer recommended the manner adopted by Article II of the Articles of Confederation. For The Federal Farmer, a bill of rights was essentially a statement, like Article II of the Articles of Confederation, demarcating the allocation of authority between the national government and the several states.

“It is not merely in this point of view,” The Federal Farmer urged “engrafting in the constitution additional declaratory articles.” “The distinction, itself,” The Federal Farmer maintained, “that all powers not given are reserved, is in effect destroyed by this very constitution, as I shall particularly demonstrate” “[A]nd even independent of this,” The Federal Farmer continued, “the people, by adopting the constitution, give very many undefined powers to congress, in the constitutional exercise of which, the rights in question might be effected.” “Gentlemen who oppose a federal bill of rights,” The Federal Farmer believed, “view the subject in a very narrow imperfect manner.” “They have for their objects,” The Federal Farmer maintained, “not only the enumeration of rights reserved, but principally to explain the general powers delegated in certain material

points, and to restrain those who exercise them by fixed known boundaries.” “To make declaratory articles unnecessary in an instrument of government,” The Federal Farmer argued, “two circumstances must exist” “[T]he rights reserved must be indisputable so, and in their nature defined,” and, The Federal Farmer maintained, “the powers delegated to the government, must be precisely defined by the words that convey them, and clearly be of such extent and nature as that, by no reasonable construction, that can be made to invade the rights and prerogatives intended to be left with the people.”¹³⁸

Brutus was equally unimpressed, even incredulous, with James Wilson’s “State House Speech.”¹³⁹ “Though it should be admitted, that the arguments[s] against reducing all the states into one consolidated government, are not sufficient fully to establish this point; yet they will, at least justify this conclusion,” Brutus wrote, “that in forming a constitution for such a country, great care should be taken to limit and define its powers, adjust its parts, and guard against an abuse of authority.” “It has been said, in answer to this objection,” Brutus observed, “that such declaration[s] of rights, however requisite they might be in the constitutions of the states, are not necessary in the general constitution, because, ‘in the former case, every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given is reserved.’ ” “It requires but little attention to discover,” Brutus replied, “that this mode of reasoning is rather specious than solid.” Brutus remained thoroughly unconvinced that the national government, unlike the governments of the several states, was a government

¹³⁸ The Federal Farmer, “Letters from The Federal Farmer XVI,” 323-326.

¹³⁹ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia,” 528-32.

of limited powers. “The powers, rights, and authority, granted to the general government by this constitution,” Brutus argued, “are as complete, with respect to every object to which they extend, as that of any state government,” the powers of which were unlimited unless limited by a declaration of rights. The authority of the national government “reaches to every thing,” Brutus believed, “which concerns human happiness—Life, liberty, and property, are under its control.”

“This system,” Brutus warned, “if it is possible for the people of America to accede to it, will be an original compact; and being the last, will, in the nature of things, vacate every former agreement inconsistent with it.” In Brutus’ view, the constitution annihilated the sovereignty of the people in the several states. Brutus then proceeded to cite Article VI of the Constitution, the “supremacy clause.” Brutus further noted that legislative, executive, and judicial officers of the several states were bound to take an oath to support the Constitution. “It is therefore not only necessarily implied thereby, but positively expressed,” Brutus objected, “that the different state constitutions are repealed and entirely done away” if they are not in agreement with, “so far as they are inconsistent with,” Article VI of the Constitution. “[O]f what avail,” Brutus asked, “will the constitutions of the respective states be to preserve the rights of its citizens?” “No privilege, reserved by a bill of rights, or secured by the state governments,” Brutus despaired, “can limit the power granted by this, or restrain any laws made in pursuance of it.” Again, Brutus complained, “[T]hat not only the constitution and laws made in pursuance thereof, but all treatises made, or which shall be made, under the authority of

the United States, are the supreme law of the land, and supersede the constitutions of all the states.” “Ought not a government, vested with such extensive and indefinite authority,” Brutus asked, “to have been restricted by a declaration of rights?” “It certainly ought,” Brutus answered. And the declaration of rights which Brutus sought, like many other Anti-Federalists, was a statement securing to the people of the several states those powers not explicitly delegated to the federal government.¹⁴⁰

An Old Whig described the power vested in Congress under Article I, Section 8, Clause 18, as “*undefined, unbounded and immense*.” “Under such a clause as this,” An Old Whig asked, “can any thing be said to be reserved and kept back from Congress?” “Can it be said,” An Old Whig inquired, “that the Congress have no power but what is *expressed*?” “‘To make all laws which shall be necessary and proper’ is in other words to make all laws,” An Old Whig maintained, “which *the Congress shall think necessary and proper . . .*” “[F]or who shall judge for the legislature,” An Old Whig asked, “what is necessary and proper?” “What inferior legislature,” An Old Whig continued, “shall set itself above the supreme legislature?” “To me it appears,” An Old Whig observed, “that no other power on earth can dictate to them or controul them, unless by force . . .” An Old Whig asked, “[W]ithout force what can restrain the Congress from making such laws as they please?” “What limits,” An Old Whig inquired, “are there to their authority?” In

¹⁴⁰ Brutus, “Essays of Brutus II” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 372-377.

answer to these questions An Old Whig could only reply, “I fear none at all . . . unless we have a bill of rights to which we might appeal.”¹⁴¹ For An Old Whig, like other Anti-

Federalists, a bill of rights would not be a declaration of individual rights, but a positive declaration of prerogatives reserved to the several states.

A Democratic Federalist proceeded with a close exegesis of James Wilson’s “State House Address.”¹⁴² Wilson’s arguments, “although extremely *ingenious* and the best that could be adduced in support of so bad a cause,” A Democratic Federalist wrote, “are yet extremely *futile*, and will not stand the test of investigation.” “In the first place,” A Democratic Federalist submitted, “Mr. Wilson pretends to point out a leading discrimination between the State Constitutions, and the Constitution of the United States.” “In the former,” A Democratic Federalist observed, “he says, every power which is not *reserved* is *given*, and in the latter, every power which is not *given* is *reserved* . . .” “[T]his may furnish an answer,” Wilson had added, “to those who object, that a bill of rights has not been introduced in the proposed Federal Constitution.” “If this doctrine is true, and since it is the only security that we are to have for our natural rights,” A

Democratic Federalist suggested, “it ought at least to have been clearly expressed in the plan of government.”

A Democratic Federalist sought explicit constitutional language culled from Article II of the Articles of Confederation. The liberties of the people were suitably secured, not by

¹⁴¹ An Old Whig, “No. 2,” in *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 3, *Article 1, Section 8, Clause 5, through Article 2, Section 1*, (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 239

¹⁴² James Wilson, “An Address to a Meeting of the Citizens of Philadelphia,” 528-32.

enumerating individual rights, but in a statement which affirmed the principle of federalism, providing that those powers not delegated to the federal government were reserved to the several states. “The 2d. section of the present article of confederation says,” A Democratic Federalist noted, “*Each State retains its sovereignty, freedom and independence*, AND EVERY POWER, JURISDICTION AND RIGHT WHICH IS NOT BY THIS CONFEDERATION EXPRESSLY DELEGATED TO THE UNITED STATES IN CONGRESS ASSEMBLED.” “This declaration (for what purpose I know not),” A Democratic Federalist observed, “is entirely omitted in the proposed Constitution.”

A statement securing the sovereignty of the several states, A Democratic Federalist contended, was even more important in a government, such as that proposed by the Philadelphia Convention. A Democratic Federalist recognized a “material difference” between the proposed Constitution and the Articles of Confederation. In the Articles of Confederation, Congress was “merely an executive body,” with “no power to raise money” or “no *judicial jurisdiction*.” The Constitution vested the federal government with significantly more power. “In the other,” A Democratic Federalist observed, “the federal rulers are vested with each of the three essential powers of government,” the legislative, executive, and judicial powers. Perhaps more importantly, “their laws are *paramount* to the laws of the different States,” pursuant to Article VI of the Constitution. “[W]hat then,” A Democratic Federalist asked, “will there be to oppose their encroachments?” “Should they ever pretend to tyrannize over the people,” A Democratic

Federalist warned, “their *standing army* will silence every popular effort, it will be theirs to explain the powers which have been granted to them” under the Constitution. “Mr.

Wilson’s distinction,” A Democratic Federalist despaired, “will be forgot, denied or explained away, and the liberty of the people will be no more.” “I lay it down as a general rule,” A Democratic Federalist concluded, “that wherever the powers of a government extend to the lives, the persons, and properties of the subject, all their rights ought to be clearly and expressly defined—otherwise they have but poor security for their liberties.” For A Democratic Federalist, the liberties of the people would be “clearly and expressly defined” in a statement securing the sovereignty of the several states.¹⁴³

After examining the “blemishes” of the Constitution as they “statedly exist,” A Federal Republican voiced concern over defects in the Constitution “derived from omission.” Among those defects “derived from omission,” A Federal Republican identified “the grand one, upon which is indeed suspended every other,” as the absence of a bill of rights. A Federal Republican sought to impeach James Wilson’s “State House Speech.” “One of the learned members of the late convention,” A Federal Republican noted, “observes in his speech, that all powers which are not by the constitution given up to Congress, are reserved for the disposition of the several states.” “This observation,” A Federal Republican agreed, “is wise and true, because properly speaking it should be so.” “In entering into the social contract,” A Federal Republican continued, “all rights which

¹⁴³ A Democratic Federalist, “Essay of a Democratic Federalist,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 3, *Pennsylvania*, (Chicago: University of Chicago Press, 1981), 58-59.

are not expressly given up to the governors are reserved to the people. That it is so from a just construction is it easy to discover.”

A Federal Republican, however, remained apprehensive that the Constitution did not include a statement explicitly providing that those powers not delegated to the federal government were reserved to the several states. “But notwithstanding, if the people are jealous of their rights,” A Federal Republican asked, “where will be the harm in declaring them?” “If they are meant as they certainly are to be reserved to the people,” A Federal Republican inquired, “what injury can arise from a positive declaration of it?” “Although in reasoning it would appear to be unnecessary,” A Federal Republican agreed, “yet if the people prefer having their rights state[d]ly defined, it is certainly reasonable, that it should be done.”¹⁴⁴

A Federal Republican sought a “positive declaration” providing that those powers, not delegated to the national government, are reserved to the several states. “A bill of rights should either be inserted,” A Federal Republican submitted, “or a declaration

¹⁴⁴ “It is said that the insertion of a bill of rights,” A Federal Republican observed, “would be an argument against the present liberty of the people.” “To have the rights of the people declared to them,” A Federal Republican continued, “would imply, that they had previously given them up, or were not in possession of them.” Not only would a bill of rights be unnecessary in a government of enumerated powers, the Federalists argued, but potentially dangerous. If a bill of rights were annexed to the Constitution, the federal government would be presumed to be a government of general powers, which would have the authority to exercise any power not retained by the people of the several states. A Federal Republican remained thoroughly unconvinced. “This indeed is a distinction,” A Federal Republican declaimed, “of which the votaries of scholastic philosophy might be proud,” but “in the political world, where reason is not cultivated independently of action and experience, such futile distinctions ought not to be agitated.” This argument, which accounts for the origins of the Ninth Amendment, will be further examined in Chapter Three, which concerns the rights retained by the people.

made, that whatever is not decreed to Congress, is reserved to the several states for their own disposal.” A Federal Republican found applicable constitutional language in Article II of the Articles of Confederation. “In this particular,” A Federal Republican argued, “the articles of the present confederation have an evident advantage.”¹⁴⁵ “This will appear the more proper,” A Federal Republican argued, “if we consider that these *are rights* in which all the states are concerned.” “It is thought proper,” A Federal Republican observed, “to delegate to Congress supreme power on all occasions where the *natural* [mutual?] interests of the states are concerned, and why not for the same reason grant and declare to the states a bill of *those rights* which are also *mutual*?” “At any rate,” A

Federal Republican concluded, “it is certain that no injury can arise from it, and to do it, would be satisfactory and wise.”¹⁴⁶

Agrippa’s argument supports the view that the essential concern of the Anti-Federalists was to maintain the authority of the several states over matters, such as the maxims of the common law. “We find in it,” Agrippa observed, “that there is to be a legislative assembly, with authority to constitute courts for the trial of all kinds of civil causes, between citizens of different states.” This authority is provided for in Article III, Section 2, Clause 1 of the Constitution. “The right to appoint such courts,” Agrippa

¹⁴⁵ A Federal Republican then proceeded to quote Article II of the Articles of Confederation. “The second article says,” A Federal Republican stated, “that ‘each state retains its *sovereignty, freedom and independence*, and every power, *jurisdiction, and right, which is not* by this confederation *expressly declared* to the United States in Congress assembled.’ ” ART. OF CON. art. II.

¹⁴⁶ A Federal Republican, “A Review of the Constitution Proposed by the Late Convention by A Federal Republican,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 3, *Pennsylvania*, (Chicago: University of Chicago Press, 1981), 84-85.

noted, “necessarily involves in it the right of defining their powers, and determining the rules by which their judgment shall be regulated; and the grant of the former of those rights is nugatory without the latter.” “It is vain to tell us,” Agrippa explained, “that a maxim of common law requires contracts to be determined by the law existing where the contract was made” “[F]or it is also a maxim,” Agrippa continued, “that the legislature has a right to alter the common law.” “Such a power,” Agrippa concluded, “forms an essential part of legislation.” “Here,” Agrippa concluded, “a declaration of rights is of inestimable value.” “Such a declaration,” Agrippa argued, “ought to have come to the new constitution in favour of the legislative rights of the several states, by which their sovereignty over their own citizens within the state should be secured.” “Without such an express declaration,” Agrippa warned, “the states are annihilated in reality upon receiving this constitution—the forms will be preserved only during the pleasure of Congress.”¹⁴⁷

“Let us now consider,” Agrippa continued, “the probable effects of a consolidation of the separate states into one mass; for the new system extends so far.” “Many ingenious explanations have been given of it,” but, Agrippa argued, “there is this defect, that they are drawn from the maxims of the common law, while the system itself cannot be bound by such maxims.” “A legislative assembly,” Agrippa noted, “has an inherent right to alter the common law, and to abolish nay of its principles, which are not particularly granted

¹⁴⁷ Agrippa, “Letters of Agrippa VI,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 4, *Massachusetts and New England*, (Chicago: University of Chicago Press, 1981), 79-80.

in the constitution.” “Any system,” Agrippa noted, “which appoints a legislature without any reservation of rights of individuals, surrender[s] all power in every branch of legislation to the government.” “The universal practice of every government,” Agrippa continued, “proved the justness of this remark” “For in every doubtful case,” Agrippa maintained, “it is an established rule to decide in favour of authority.” “The new system is, therefore,” Agrippa concluded, “in one respect at least, essentially inferior to our state constitutions.” “There is no bill of rights, and consequently,” Agrippa feared, “a continental law may controul any of those principles, which we consider at present as sacred,” that is the common law which maybe altered by the national government. “It is a mere fallacy,” Agrippa concluded, “invented by the deceptive powers of Mr. Wilson, that what rights are not given are reserved. The contrary has already been shewn.” Agrippa’s essential concern was that the national government would have the authority to alter, or abolish, the unwritten common law of the several states, laws which Agrippa considered “sacred.”¹⁴⁸

Like other Anti-Federalists, who objected to the proposed Constitution, because it did not contain a bill of rights, A Farmer believed a bill of rights was “absolutely necessary” to secure the liberties of the people. “[T]he celebrated Mr. Wilson, in his address to the citizens of Philadelphia [urged],” A Farmer recounted, “that in a state government, every thing that was not reserved, was given; but, in a Federal Constitution, the reverse of the

¹⁴⁸ Agrippa, “Letters of Agrippa XII,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 4, *Massachusetts and New England*, (Chicago: University of Chicago Press, 1981), 96.

proposition prevailed, and what was not given was reserved.” “I must confess it was ingeniously got over,” A Farmer opined, “but not to my satisfaction.” “[F]or upon the principle that Mr. Wilson urged,” A Farmer observed, “that there is no need for a bill of rights, for what is not given is reserved, would be the foundation I should go upon to urge the great necessity of one” [F]or if we look into the Constitution,” A Farmer observed, “we shall find the different articles therein contained, are expressed in very general and extensive terms” A Farmer then proceeded to quote Article VI, the “supremacy clause,” of the Constitution. “Therefore, I say,” A Farmer, argued, “take this clause, together with the extensive latitude given in several other articles, is too much power to lodge in the hands of any set of man, however, virtuous they may be without being properly guarded” “[N]or can I think it in the least derogatory to the honour of the supreme authority of the United States,” A Farmer believed, “to have a Bill of Rights stated in the Constitution, wherein it shall be declared, thus far you may go and no further.” “We have found by experience,” A Farmer concluded, “the great advantage of a Bill of Rights in our State constitution; when the legislature passed sundry laws infringing on the Bill of Rights, we had it in black and white to show them they were wrong”¹⁴⁹

¹⁴⁹ A Farmer, “Essays by A Farmer,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 4, *Massachusetts and New England*, (Chicago: University of Chicago Press, 1981), 205-206.

During the Pennsylvania Ratifying Convention, John Smilie further developed the theme that the powers of the national government were vague and undefined. Smilie coupled his argument, however, to the need for a bill of rights. “The arguments which have been urged,” Smilie commenced, “have not, in my opinion, satisfactorily shown that a bill of rights would have been an improper, nay, that it is not a necessary appendage to

the proposed system.” “[W]hen we consider the extensive, the undefined powers vested in the administrators of this system, when we consider that the system itself as a great political compact between the governors and the governed,” Smilie argued, “a plain, strong, and accurate criterion by which the people might at once determine when, and in what instance their rights were violated, is a preliminary, without which, this plan ought not to be adopted.” “So loosely,” Smilie continued, “so inaccurately are the powers which are enumerated in this constitution defined, that it will be impossible, without a test of that kind, to ascertain the limits of authority, and declare when government has degenerated into oppression.” “In that event,” Smilie warned, “the contest will arise between the people and the rulers” “ ‘You have exceeded the powers of your office, you have oppressed us,’ ” would, in Smilie’s view, “be the language of the suffering citizen.” “The answer of the government,” Smilie believed, “will be short— ‘We have not exceeded our power; you have no test by which you can prove it.’ ” “[I]t will be impracticable to stop the progress of tyranny,” under these circumstances because “there will be no check but the people, and their exertions must be futile and uncertain; since it

will be difficult, indeed, to communicate to them the violation that has been committed, and their proceedings will be neither systematical nor unanimous.” The protection of rights was inexorably bound to the belief that the national government under the proposed Constitution should be a government of limited, enumerated powers which preserved the prerogatives of the several states. “It is said,” Smilie noted, “that the difficulty of framing a bill of rights was insurmountable” Smilie disagreed with that judgment. “Our experience, and the numerous precedents before us,” Smilie explained,

“would have furnished a very sufficient guide.” The most obvious precedent for framing a bill of rights, cited repeatedly by Anti-Federalists, was Article II of the Articles of Confederation. Smilie concluded with a bitter complaint, “[T]here is no security even for the rights of conscience, and under the sweeping force of the sixth article, every principle of a bill of rights, every stipulation for the most sacred and invaluable privileges of man, are left at the mercy of government.”¹⁵⁰

“I differ, Sir, from the honorable member from the city,” Robert Whitehill began, “as to the impropriety or necessity of a bill of rights.”¹⁵¹ Whitehill invoked language evocative of Article II of the Articles of Confederation. “If, indeed, the constitution itself is so well defined the powers of the government that no mistake could arise, and we were well assured that our governors would always act right,” Whitehill observed, “then we might be satisfied without an explicit *reservation* of those rights with which the people ought not, and mean not to part.” “[I]t is the nature of power to seek its own

¹⁵⁰ Smilie is referring to the “supremacy” clause. U.S. CONST. art. IV.

¹⁵¹ Smilie is referring to James Wilson.

augmentation,” Whitehill warned, “and thus the loss of liberty is the necessary consequence of a loose or extravagant delegation of authority.” Whitehill then protested that the proposed Constitution was “incontrovertibly designed to abolish the independence and sovereignty of the states” Again, for Whitehill, the essential concern was securing the sovereignty of the people in the respective states.

When Whitehill spoke to the “impropriety or necessity of a bill of rights,” he repeatedly used language invoking reservations of rights, and the sovereignty of the states. “Thus, Mr. President,” Whitehill exclaimed, “must the powers and sovereignty of the states be eventually destroyed” “[T]he proposed constitution,” Whitehill feared, “must eventually annihilate the independent sovereignty of the several states” “[T]his system contains the seeds of self-preservation independent of all the forms referred to—seeds which will vegetate and strengthen in proportion to the decay of state authority,” Whitehill continued, “and which will ultimately spring up and overshadow the thirteen commonwealths of America with a deadly shade.” Whitehill linked the need for a bill of rights with the preservation of state prerogatives. “I consider it,” Whitehill complained, “as the means of annihilating the constitutions of the several States, and consequently the liberties of the people” Whitehill further warned that “the dissolution of our State constitutions will produce the ruin of civil liberty is a proposition easy to be maintained”¹⁵²

¹⁵² John Smilie, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 645-652.

What was particularly significant about the Massachusetts Ratifying Convention was the manner in which the Anti-Federalists explicitly tied a bill of rights to language which would be ratified by the First Congress as the Tenth Amendment. The Federalists initially suggested recommendatory amendments, to accompany ratification. The amendments were, in fact, written by Federalist leader Theophilus Parsons. The convention president, John Hancock, purportedly an Anti-Federalist, introduced the amendments, which dispelled much of the opposition among Anti-Federalists. The amendments were endorsed by Samuel Adams, an influential Anti-Federalist. Without such a concession to Anti-Federalists, who had a slender majority in the convention, Federalists feared the

Constitution would not be ratified.¹⁵³ The very first amendment among the Massachusetts proposals, written by Federalists, provided, “That it be explicitly declared that all powers not expressly delegated to Congress, are reserved to the several States, to be by them exercised.”

It was Anti-Federalist Samuel Adams who explicitly invoked the language of the Article II of the Articles of Confederation, later the Tenth Amendment, as a bill of rights. “Your excellency’s first proposition is,” Adams stated, “ ‘that it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several states, to be by them exercised.’ ” “This appears, to my mind,” Adams maintained, “to be a summary of a bill of rights, which gentlemen are anxious to obtain.” “It removes a doubt,” Adams continued, “which many have entertained respecting the matter, and gives

¹⁵³ Bernard Schwartz, “Commentary,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 674-75.

assurance that, if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the constitution of this state, it will be an error, and adjudged by the courts of law to be void.” Adams, describing the proposed first amendment as a bill of rights, invoked Article II of the Articles of Confederation. “It is consonant with the second article in the present Confederation,” Adams noted, “that each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not, by this Confederation, expressly delegated to the United States in Congress assembled.” “I have long considered,” Adams concluded, “the watchfulness of the people over the conduct of their rulers the strongest guard against the encroachments of power; and I hope the people of this country will always be thus watchful.”¹⁵⁴

Later during the ratification debates, Charles Jarvis added his own observations concerning the absence of a bill of rights. “[W]ith respect to the prospect of these amendments, which are the subject of discussion, being adopted by the first Congress which shall be appointed under the new Constitution,” Jarvis observed, “I really think, sir, that it is only far from being improbable, but is in the highest degree likely.” “When we talk of our wanting a bill of rights to the new Constitution,” Jarvis continued, “the first article proposed must remove every doubt on this head; as, by positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, or to

¹⁵⁴ Samuel Adams, “Massachusetts Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 712, 697.

the refinements of implication, but is an explicit reservation of every right and privilege which is nearest and most agreeable to the people.”¹⁵⁵

When the Massachusetts Ratifying ratified the Constitution, it proposed amendments which accompanied the ratification, with the recommendation that they be adopted by the First Congress. The Massachusetts Ratifying Convention recommended, “*First*. That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution, are reserved to the several States, to be by them exercised.”¹⁵⁶

During the Virginia Ratifying Convention, George Mason, charging that the proposed scheme of government “is a national government, and no longer a confederation,” held that the liberties of the people would be secured with a statement reserving to the several states those powers not expressly delegated to the national government.¹⁵⁷ “If such amendments be introduced as to exclude danger,” Mason agreed, “I shall gladly put my hand to it.” “When such amendments as shall, from the best information, secure the great essential rights of the people, shall be agreed to by gentlemen,” Mason continued, “I shall most heartily make the greatest concessions, and concur in any reasonable measure to obtain the desirable end of conciliation and unanimity.”

¹⁵⁵ Charles Jarvis, “Massachusetts Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 703.

¹⁵⁶ “Massachusetts Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 712.

¹⁵⁷ One of the most formidable Anti-Federalists at the Virginia Ratifying Convention, Patrick Henry, will be discussed on Chapter Three, concerning the rights retained by the people.

“We wish only,” Mason submitted, “our rights to be secured.” The federal government should have “sufficient energy,” Mason agreed, on the condition that the federal government was established on “republican principles.” Mason was concerned that the powers delegated to the national government may be “extremely dangerous.” Those

powers, which were not “absolutely necessary in themselves,” Mason argued, should be withheld from the federal government. Mason insisted on amendments which would secure the liberties of the people. His proposed amendments, however, evidently concerned with securing the liberties of the people, were hardly distinguishable from concerns about the allocation of power between the national government and the several states under the proposed Constitution. “We ask such amendments,” Mason explained, “as will point out what powers are reserved to the state governments, and clearly discriminate between them and those which are given to the general government, so as to prevent future disputes and clashing of interests.” Mason wanted to make certain that the allocation of authority between the national government and the several states was established on a “simple construction,” not on a “doubtful ground.” “Grant us amendments like these,” Mason assured his colleagues, “and we will cheerfully, with our hands and hearts, unite with those who advocate it, and we will do every thing we can to support and carry it into execution.” “But in its present form,” Mason lamented, “we can never accede to it.”

Mason's appeal to "the great essential rights of the people" is consistent with the view that the Anti-Federalists were primarily concerned with preserving the sovereignty of the people in the several states. The Anti-Federalists, including Mason, sought a concession providing that all power not expressly delegated to the national government is reserved to the several states, a principle embodied in the language of the Tenth Amendment. Mason sought another "indispensable amendment" which was necessary to secure the "great essential rights of the people." Mason's amendment, however, was essentially concerned, not with individual liberty, but securing the sovereignty of the several states. Mason's amendment was essentially concerned with constitutional structure, and the principle of federalism, not individual liberties. "An indispensable amendment in this case is," Mason argued, "that Congress shall not exercise the power of raising direct taxes till the states shall have refused to comply with the requisitions of Congress." "On this condition," Mason conceded, "it may be granted; but I see no reason to grant it unconditionally, as the states can raise the taxes with more ease, and lay them on the inhabitants with more propriety, than is possible for the general government to do." "If Congress hath this power without control," Mason warned, "the taxes will be laid by those who have no fellow-feeling or acquaintance with the people." "This is my objection," Mason stated, "to the article now under consideration." "Should this power be restrained," Mason agreed, "I shall withdraw my objections to this part of the Constitution; but as it stands, it is an objection so strong in my mind, that its amendment is with me a *sine qua non* of its adoption." "I wish for such amendments, and such only," Mason concluded, "as are

necessary to secure the dearest rights of the people.” Such amendments “necessary to secure the dearest rights of the people” would, for Mason, would be amply secured through a statement which reserves to the several states those powers not expressly delegated to the national government, a statement which explicitly affirms, and clarifies the principle of federalism.¹⁵⁸

The Virginia Ratifying Convention ended its deliberations by recommending a constitutional amendment providing, “1st. That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.”¹⁵⁹

During the New York Ratifying Convention, Thomas Tredwell observed that “the design of the people, in forming an original constitution of government, is not so much to give powers to their rulers, as to guard against the abuse of them” “But, in a federal one,” Tredwell noted, “it is different.” “I introduce these observations,” Tredwell explained, “to combat certain principles which have been daily and confidently advanced by favorers of the present Constitution” Tredwell regarded the Federalist argument, “whatever powers are not expressly granted or given the government, are reserved to the people,” or “rulers cannot exercise any powers but those expressly given to them by the Constitution,” as “totally indefensible.” “The absurdity of this principle will evidently appear,” Tredwell maintained, “when we consider the great variety of objects to which

¹⁵⁸ George Mason, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 770-793.

¹⁵⁹ “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 771.

the powers of the government must necessarily extend,” which the Anti-Federalist’s maintained were considerable.

Tredwell merged the liberties of the people with the sovereignty of the people in the respective states. “Here we find no security,” Tredwell complained, “for the rights of individuals, no security for the existence of our state governments” “[H]ere is no bill of rights, no proper restriction of power;” Tredwell maintained, “our property, and our consciences, are left wholly at the mercy of the [national] legislature, and the powers of the judiciary may be extended to any degree short of almighty.” “The sole difference,” Tredwell continued, “between a state government under this Constitution, and a corporation under a state government, is, that a state being more extensive than a town, its powers are likewise proportionately extended, but neither of them enjoys the least share of sovereignty” “For, let me ask,” Tredwell pleaded, “what is a state government?” “What sovereignty, what power is left to it,” Tredwell wondered, “when the control of every source of revenue, and the total command of the militia, are given to the general government?” “That power,” Tredwell warned, “which can command both the property and the persons of the community, is the sovereign, and the sole sovereign.”

“The idea of two distinct sovereigns in the same country,” that of the national government and those of the several states, “separately possessed of sovereign and supreme power, in the same matters at the same time,” Tredwell maintained, “is as supreme an absurdity, as that two distinct separate circles can be bounded by exactly the same circumference.” “This, sir, is demonstration; and from it I draw one corollary,

which I think, clearly follows, although it is in favor of the Constitution,” Tredwell continued, “to wit—that at least that clause in which Congress guarantees to the several states a republican form of government, speaks honestly; that is, that no more is intended by it than what is expressed” “[A]nd I think it is clear,” Tredwell concluded, “that, whilst the mere form is secured, the substance—to wit, the whole power and sovereignty of our state governments, and with them the liberties of the country—is swallowed up by the general government” Tredwell then, once more coupled the liberties of the people with the sovereignty of the people in the several states. “[F]or it is well worth observing, that, while our state governments are held up to us as the great and sufficient security of our rights and privileges,” Tredwell observed, “it is carefully provided that they shall be disarmed of all power, and made totally dependent on the bounty of Congress for their support, and consequently for their existence,—so that we have scarce a single right secured under either.”¹⁶⁰

The New York Ratifying Convention approved a recommendatory amendment providing “that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom that may have granted the same” Alexander Hamilton sought successfully, however, to eliminate the word “expressly” in the statement, such

¹⁶⁰ Thomas Tredwell, “New York Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 842, 863-866.

that the provision would not provide that those powers expressly delegated to the national government were reserved to the states.¹⁶¹

During the North Carolina Ratifying Convention, Samuel Spencer objected, “I see no power that can keep up the little remains of the power of the states.” “All officers are to take an oath,” Spencer noted, “to support the general government” “This will produce,” Spencer maintained, “that consolidation through the United States which is apprehended.” Spencer, like many other Anti-Federalists, was concerned over the absence of a bill of rights in the proposed Constitution. And, like many other Anti-Federalists, Spencer did not see a precise demarcation between the liberties of the people and the sovereignty of the people in the several states. Securing the liberties of the people was, in Spencer’s view, inextricably coupled with securing the sovereignty of the people in the several states. “There is no declaration of rights,” Spencer warned, “to secure to every member of the society those inalienable rights which ought not to be given up to any government.” “Such a bill of rights,” Spencer maintained, “would be a check upon men in power.” Spencer, however, was not principally concerned with the probable danger to individual liberty as such, but the danger to the authority of the state legislatures. “Instead of a bill of rights,” Spencer protested, “this Constitution has a clause which may warrant encroachments on the power of the respective state legislatures.” “I know it is said,” Spencer acknowledged, “that what is not given up to the

¹⁶¹ “New York Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 911-912, 854.

United States will be retained by the individual states.” “I know it ought to be so, and should be so understood,” Spencer agreed, “but, sir, it is not declared to be so.”

Spencer identified the constitutional language which would suffice, Article II of the Articles of Confederation. “In the Confederation,” Spencer reminded the assembly, “it is expressly declared that all rights and powers, of any kind whatsoever, of the several states, which are not given to the United States, are expressly and absolutely retained, to be enjoyed by the states.” Spencer sought a bill of rights modeled on the language of Article II of the Articles of Confederation. “There ought to be a bill of rights,” Spencer argued, “in order that those in power may not step over the boundary between the powers of government and the rights of the people, which they may do when there is nothing to prevent them.” “They may do so without a bill of rights,” Spencer warned, because “notice will not be readily taken of the encroachments of the rulers, and they may go a great length before people are alarmed.” “Oppression may therefore take place by degrees,” Spencer continued, “but if there were express terms and bounds laid down, when these were passed by, the people would take notice of them, and oppressions would not be carried on to such a length.” “I look upon it, therefore,” Spencer reasserted, “that there ought to be something to confine the power of this government within its proper boundaries.” Spencer explicitly tied the liberties of the people to the preservation of the legal and constitutional structures of the several states. “I know that several writers,” Spencer recognized, “have said that a bill of rights is not necessary in the country; that some states had them not, and others had.” This argument did not pass muster with

Spencer. “To these,” Spencer answered, “that those states that have them not as bills of rights, strictly so called, have them in the frame of their constitution, which is nearly the same.” Spencer later returned to his central theme: securing the liberties of the people was hardly indistinguishable from securing the sovereignty of the people in the several states. “I wish to have a bill of rights,” Spencer repeated, “to secure those unalienable rights, which are called by some respectable writers the *residuum* of human rights, which are never to be given up.” “It might not be necessary to have a bill of rights in the government of the United States,” Spencer argued, “if such means had not been made use of as endanger a consolidation of all the states” Spencer concluded that a bill of rights “would keep the states from being swallowed up by a consolidated government.” And a bill of rights, for Samuel Spencer, would provide, like Article II of the Articles of Confederation, those powers not expressly delegated to the federal government were reserved to the respective states.

Later during the North Carolina Ratifying Convention, Samuel Spencer revisited his essential theme: the security of the people in the several states was predicated on a statement affirming the principle of federalism. “I still think,” Spencer commenced, “that my observations are well founded, and that some amendments are necessary.” What amendments did Samuel Spencer believe were necessary? “The gentleman said,” Spencer noted, “all matters not given up by this form of government were retained by the respective states.” “I know it ought to be so,” Spencer conceded, “it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution, and

not left to mere construction and opinion.” “I am authorized to say,” Spencer noted, “it was heretofore thought necessary,” in Article II of the Articles of Confederation. “The Confederation says, expressly,” Spencer explained, “that all that was not given up by the United States was retained by the respective States.” “If such a clause had been inserted in this Constitution,” Spencer maintained, “it would have superseded the necessity of a bill of rights.” For Samuel Spencer, and many other Anti-Federalists, Article II of the Articles of Confederation was the constitutional equivalent of a bill of rights. They both were evocative of the same constitutional principle: those powers not expressly delegated to the national government were reserved to the states. A statement like Article II of the Articles of Confederation was the constitutional equivalent of a bill of rights. Such a statement, however, was conspicuously absent from the proposed Constitution. “[T]hat . . . being the case,” Spencer concluded, “it was necessary that a bill of rights, or something of that kind, should be a part of the Constitution.”¹⁶²

North Carolina refused to ratify the Constitution until the First Congress secured a bill of rights.¹⁶³ Among those amendments proposed by the North Carolina Ratifying Convention, as a condition for ratification, was a provision providing: “1. That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by

¹⁶² Samuel Spencer, “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 937-945.

¹⁶³ Bernard Schwartz, “Commentary,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 932-33.

this Constitution delegated to the Congress of the United States, or to the departments of the federal government.”¹⁶⁴

Anti-Federalist opponents of the Constitution also secured recommendatory amendments in the South Carolina Ratifying Convention and the New Hampshire Ratifying Convention. The South Carolina Ratifying Convention recommended: “And Whereas it is essential to the preservation of the rights reserved to the several states, and the freedom of the people under the operations of a General government that

the right of prescribing the manner time and places of holding the Elections to the Federal Legislature, should be for ever inseparably annexed to the sovereignty of the states. This convention doth declare that the same ought to remain to all posterity a perpetual and fundamental rights in the local, exclusive of the interference of the General Government except in cases where the Legislatures of the States, shall refuse or neglect to perform and fulfill the same according to the tenor of said Constitution.”¹⁶⁵ The New Hampshire Ratifying Convention also provided: “*First*, That it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised.”¹⁶⁶

Anti-Federalist opponents of the Constitution proposed a similar recommendatory amendment during the Maryland Ratifying Convention, although it was not supported by

¹⁶⁴ “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 968.

¹⁶⁵ “South Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 756-57.

¹⁶⁶ “New Hampshire Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 760.

the assembled delegates. During the Maryland Ratifying Convention, Anti-Federalists proposed: “1. That Congress shall exercise no power but what is expressly delegated by this Constitution. By this amendment, the general powers given to Congress by the first and last paragraphs of the 8th sect. of art. 1, and the 2d paragraph of the 6th article, would be in a great measure restrained; those dangerous expressions, by which bills of rights, and constitutions, of the several states may be repealed by the laws of Congress, in some degree moderated; and the exercise of constructive powers wholly prevented.”¹⁶⁷

The significance of Article II of the Articles of Confederation as an abridged bill of rights has been obscured. Although the Anti-Federalists repeatedly appealed to the liberties of the people, they were principally concerned with securing the sovereignty of the people in the several states. The Federalists and Anti-Federalists differed on the relative allocation of power between the national government and the several states. The ratification debate concerned the proper means of securing that allocation of power in the text of the Constitution which would be agreeable to both the Federalists and Anti-Federalists. The Anti-Federalists were unrepentant in seeking explicit constitutional

¹⁶⁷ “Maryland Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 732. The constitutional amendment proposed by the Maryland Anti-Federalists addresses two fundamental concerns. The Anti-Federalists were concerned that the national government would have the authority to repeal the constitutions of the several states, a concern remedied by the Tenth Amendment. The second concern, addressed by the Anti-Federalists, was that the national government would have the authority to repeal the bills of rights secured by the several states. This concern which, like the Tenth Amendment, implicates the sovereignty of the people in the several states was remedied by the Ninth Amendment. The Ninth Amendment, no less than the Tenth Amendment, was primarily concerned with the principle of federalism. This issue will be further examined in Chapter Three.

language for the sovereignty of the people in the several states. The unambiguous constitutional language, which the Anti-Federalists sought, was not culled from bills of rights secured by the constitutions of the several states, but Article II of the Articles of Confederation. During the ratification debate, the constitutional language that the Anti-Federalists repeatedly invoked originated in Article II of the Articles of Confederation.

The Anti-Federalists understood that the liberties of the people were contingent on securing the sovereignty of the people of the several states.

When the First Congress convened on March 4, 1789, James Madison assumed the responsibility for introducing amendments, to be ratified by the several states, following approval by the First Congress. Madison pushed the amendments on an unenthusiastic House of Representatives to the displeasure of his colleagues, who were consumed with organizing the government created by the Constitution. For this reason, Madison did not introduce his proposed amendments until June 8, 1789.¹⁶⁸ Among the amendments Madison recommended was a statement providing, “The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.”¹⁶⁹

¹⁶⁸ Bernard Schwartz, “Commentary,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1006-1009.

¹⁶⁹ James Madison, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1028. This provision would be preceded, as Article VII of the Constitution, by an explicit recognition of separation of powers: “The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.” Madison’s reconstructed Article VII was primarily concerned with demarcating the constitutional

For many Anti-Federalists this amendment, proposed by James Madison in the First Congress and ratified as the Tenth Amendment, was effectively an abridged bill of rights.

“It has been said,” Madison recounted, “that in the Federal Government [bill of rights] are unnecessary, because the powers are enumerated,” in Article I, Section 8 of the Constitution.¹⁷⁰ “[I]t follows,” Madison continued, “that all [powers] that are not granted by the constitution are retained,” by the people of the several states. Since the “great residuum” of the Constitution is “the rights of the people,” Madison explained, “a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government.” “I admit,” Madison conceded, “that these arguments are not entirely without foundation. . . .” [B]ut they are not conclusive,” Madison noted, “to the extent which has been supposed.” “It is true,” Madison granted, “the powers of the General

Government are circumscribed, they are directed to particular objects,” delineated in Article I, Section 8 of the Constitution. Madison, like the Anti-Federalist critics of the proposed Constitution counseled that the federal government could potentially, because of its “discretionary powers,” assume general legislative authority not unlike the governments of the several states. “[B]ut even if the Government keeps within those limits,” Madison warned, “it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the

structure, particularly separation of powers and federalism, in more explicit terms. Article VII of the current Constitution would be numbered as Article VIII.

¹⁷⁰ James Madison, “Madison Introduces His Amendments,” 1028.

State Governments under their constitutions may to an indefinite extent”¹⁷¹ Madison cited Article I, Section 8, Clause 18 of the Constitution, the “necessary and proper” clause. “This enables [the federal government] to fulfil every purpose,” Madison explained, “for which the government was established.” “Now, may not the laws be considered necessary and proper by Congress,” Madison speculated, “for it is for them to judge the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws themselves are neither necessary nor proper”

“I will state an instance,” Madison continued, “which I think in point, and proves that this might be the case.” “The General Government has the right,” Madison observed, “to pass all laws which shall be necessary to collect its revenue” “[T]he means for enforcing the collection,” Madison noted, “are within the direction of the Legislature” “[M]ay not general warrants be considered necessary for this purpose,” Madison asked, “as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view?”¹⁷² “If there was reason for restraining the State Governments from exercising this power,” Madison concluded, “there is like reason for restraining the Federal Government?”

¹⁷¹ Madison was almost certainly not concerned that his proposed amendment would alter the allocation of authority between the national government and the several states. This probably explains why Madison did not hesitate to introduce such an amendment. The provision would not weaken the federal government, merely restate in more explicit terms the allocation of authority between the national government and the states, while comforting Anti-Federalists, who were agitating for a second constitutional convention. This argument is set forth in Chapter Four.

¹⁷² James Madison, “Madison Introduces His Amendments,” 1030-31.

“I find, from looking into the amendments proposed by the State conventions,” Madison observed, “that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States.” “Perhaps words which may define this more precisely than the whole of the whole instrument now does,” Madison thought, “may be considered as superfluous.” “I admit they may be deemed unnecessary,” Madison opined, “but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated.” “I am sure I understand it so,” Madison concluded, “and do therefore propose it.”¹⁷³

On August 18, 1789, the Committee of the Whole considered Madison’s proposed amendment. Representative Thomas Tudor Tucker of South Carolina proposed to make changes to Madison’s proposed amendment by prefixing to it “all powers being derived from the people.”¹⁷⁴ Importantly, however, Tucker extended his motion in order to add the word “expressly” to the proposed amendment, so that it would read “the powers not expressly delegated by this constitution.”¹⁷⁵ Strongly objecting, Madison argued, “it was impossible to confine a Government to the exercise of express powers”¹⁷⁶ “[T]here must necessarily be admitted powers by implication,” Madison maintained, “unless the constitution descended to recount every minutia.” Madison recalled that such a proposal

¹⁷³ James Madison, “Madison Introduces His Amendments,” 1030-1033.

¹⁷⁴ Thomas Tudor Tucker, “Select Committee and Committee of the Whole,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1118.

¹⁷⁵ Thomas Tudor Tucker, “Select Committee and Committee of the Whole,” 1118.

¹⁷⁶ James Madison, “Select Committee and Committee of the Whole,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1118.

was supported by the Anti-Federalists, during the Virginia Ratifying Convention, but “after full and fair discussion” they abandoned the effort.¹⁷⁷ Representative Roger

Sherman of Connecticut concurred with Madison, observing that “corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed.”¹⁷⁸ Tucker disagreed, arguing that “every power to be expressly given that could be clearly comprehended within any accurate definition of the general power.”¹⁷⁹ Tucker’s motion was, however, defeated. Representative Daniel Carroll of Maryland, proposed to affix “or to the people” to the end of the proposed amendment, which was agreed to by the Committee of the Whole.¹⁸⁰ The amendment was finally adopted by the First Congress, and ratified by three-fifths of the several states, as the Tenth Amendment to the Constitution.

¹⁷⁷ James Madison, “Select Committee and Committee of the Whole,” 1118.

¹⁷⁸ Roger Sherman, “Select Committee and Committee of the Whole,” 1118.

¹⁷⁹ Thomas Tudor Tucker, “Select Committee and Committee of the Whole,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1118.

¹⁸⁰ Daniel Carroll, “Select Committee and Committee of the Whole,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1118.

CHAPTER THREE

NINTH AMENDMENT AS PROTECTION FOR THE UNWRITTEN CONSTITUTION

The First Congress was sensitive to the concern that the addition of a bill of rights might confer general legislative authority on the federal government. It, therefore, included constitutional language securing, not only the sovereignty of the people in the several states by means of the Tenth Amendment, but also the “rights retained by the people.”¹⁸¹ These rights, “retained by the people,” were secured in the Ninth Amendment which provided that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁸² Unlike the Tenth Amendment, which explicitly refers to powers reserved to the several states, the Ninth Amendment does not explicitly, on its face, identify the origins of those rights “retained by the people.” Although the Tenth Amendment evidently secures the principle of federalism, such is not the case with the Ninth Amendment.

Like the Tenth Amendment, however, the Ninth Amendment has its constitutional origins in Article II of the Articles of Confederation: “Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this

¹⁸¹ James Madison, “Madison Introduces His Amendments,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1027.

¹⁸² U.S. CONST. amend. IX.

confederation expressly delegated to the United States, in Congress assembled.”¹⁸³ The term “rights retained by the people” was not a term of art, but its meaning was understood at the time of the adoption of the Ninth Amendment.¹⁸⁴ The “rights retained by the people,” identified in the Ninth Amendment, originated from two principal sources. The liberties of the people found their origins in natural rights theory, although John Locke’s influence was considerably limited, and the hereditary rights of Englishmen. Natural rights theory posited the existence of natural rights which individuals, in a state of nature, retained when entering political society. The hereditary rights of Englishmen were those historic rights and privileges, embodied in the laws and charters of England, which the colonists received as an entailed inheritance from the English constitutional tradition.¹⁸⁵

The “rights retained by the people” affirmed the principle of federalism because they secured the liberties of the people in the several states, liberties secured by the sovereignty of the several states and, especially, the common law. The combination of state constitutional and statutory protections, along with informal arrangements, including the common law, formed an unwritten constitution. Especially important were the trial by jury in civil and criminal cases, secured by the established maxims of the common law. These rights reinforced the authority of intermediate institutions to preserve

¹⁸³ ART. OF CON. art. II.

¹⁸⁴ Russell L. Caplan, *Virginia Law Review*, 69 VA. L. REV. 223 (1982), 236.

¹⁸⁵ Caplan, *Virginia Law Review*, 227-28.

the well-established beliefs, practices, and customs of these communities without interference from the national government. This structure presupposed highly decentralized society composed of what Robert Nisbet called "autonomous associations."¹⁸⁶

While the Bill of Rights was intended to protect individual rights in several respects, it was largely intended to safeguard the sets of beliefs, practices, and customs comprising the unwritten constitution. These sets of beliefs, practices and, and customs were “retained” by the people because they preexisted the American Constitution, and even, the Articles of Confederation. The Ninth Amendment did not create new rights or alter preexisting rights, but secured the preexisting liberties of the people in the several states from federal encroachment. The Ninth Amendment provided that the liberties of the people in the several states, especially the common law, would continue in force unless modified by the several states or the constitutional amendment process set forth in Article V of the Constitution.

The Ninth Amendment is often cited as a source of federally enforceable rights which, although not enumerated in the Constitution, could be made binding on the states. This interpretation of the Ninth Amendment cannot be supported by the historical record. The nature of the Ninth Amendment makes it awkward to incorporate, to make the Ninth Amendment binding on the several states, by means of the Fourteenth Amendment. To apply the Ninth Amendment to the states is to precisely eliminate its purpose, to secure

¹⁸⁶ Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order & Freedom* (San Francisco: Institute for Contemporary Studies, 1990).

the liberties of the people in the several states; a purpose clearly secured by the Ninth Amendment itself. It would be historically anachronistic for the federal courts to override the authority of the several states by means of an amendment which was intended to secure the authority of the people in the several states. It would be no more possible to incorporate the Ninth Amendment, than the Tenth Amendment.

The Federalists were not content to suggest that a bill of rights was not necessary in a government of limited powers. In Federalist No. 84, Alexander Hamilton further argued that, not only would a bill of rights be unnecessary in a form of government such as that proposed by the Philadelphia Convention, but also dangerous. “I go further, and affirm,” Hamilton argued, “that bill of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous” A bill of rights “would contain various exceptions to powers not granted,” in Article I, Section 8 of the Constitution. “[A]nd on this very account,” Hamilton maintained, “would afford a colourable pretext to claim more than were granted.”

In Hamilton’s view, the national government was a government of limited powers, not general powers. It would not be necessary, in a government of limited powers, to protect the people of the several states against a potentially oppressive federal government by means of a bill of rights. He argued, however, that, with the addition of a bill of rights, the national government could be interpreted as a government of general powers, like the several states. A bill of rights would be “dangerous” because the federal

government could plausibly exercise all authority, except those rights which were expressly protected.

Hamilton did not suppose that a bill of rights would “confer a regulating power” on the national government. He did not believe that the national government could exercise any authority beyond that conveyed in Article I, Section 8 of the Constitution. Hamilton did argue, however, that “it is evident” that the addition of a bill of rights “would furnish, to men disposed to usurp, a plausible pretence for claiming that power,” because such men could argue that the federal government had authority to regulate all matters, unless there was an express prohibition in the form of a bill of rights. Such designing men “might urge with a semblance of reason,” Hamilton argued, “that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a right to prescribe proper regulations concerning it, was intended to be vested in the national government.” Hamilton argued that such a declaration would, in fact, provide a pretext for reasonable regulation of the liberty of the press by the national government. “This may serve,” Hamilton concluded, “as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.”¹⁸⁷

¹⁸⁷ Alexander Hamilton, “Federalist No. 84,” in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 445-446.

During his “State House Speech,” James Wilson also suggested that the addition of a bill of rights would not only be redundant, but dangerous. Speaking to “that sacred palladium of national freedom,” Wilson argued that not only would a formal declaration protecting liberty of the press be “nugatory,” but “that very declaration might have been construed to imply that some degree of power was given [to the national government], since we undertook to define its extent.”¹⁸⁸

Wilson’s argument was more thoroughly developed during the Pennsylvania Ratifying Convention. “What harm,” Wilson asked, “could the addition of a bill of rights do?” “If it can do no good,” Wilson answered, “I think that a sufficient reason to refuse having any thing to do with it.” Wilson repeated his assertion, however, that a bill of rights was not necessary because the Constitution proposed by the Philadelphia Convention contemplated a national government of enumerated powers. Wilson added, however, that a bill of rights, in his “humble judgment,” was not only unnecessary, but “impracticable,” “improper,” “highly imprudent,” even “preposterous and dangerous.” A bill of rights would presuppose, in Wilson’s view, that the national government was a government not of limited powers, but a government of general powers. Such “a proposition to adopt a measure that would have supposed that we were throwing into the general government every power not expressly reserved by the people,” would have been “spurned at” with the “greatest indignation” by the Philadelphia Convention. “[T]he

¹⁸⁸ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 529.

attempt to have thrown into the national scale an instrument in order to evince that any power not mentioned in the constitution was reserved,” Wilson further emphasized, “would have been spurned at as an insult to the common understanding of mankind.”

“A bill of rights annexed to a constitution is an enumeration of the powers reserved,” Wilson observed. Wilson was thoroughly unconvinced that a properly constructed constitution required, in addition to an enumeration of delegated powers, an enumeration of rights reserved to the people. “Is it a maxim in forming government,” Wilson asked, “that not only all the powers which are given, but also that all those which are reserved, should be enumerated?” An enumeration of the powers of the national government would necessarily be inconsistent with an enumeration of rights reserved to the people. If a bill of rights were added to the Constitution, the national government would be presumed to be a government of general powers in the same way the governments of the several states were governments of general powers. Like the state governments, the national government would be presumed to have the authority to exercise *any* power not reserved. Wilson maintained, “If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.” If an enumeration of rights reserved by the people were annexed to the proposed Constitution, it would be reasonable to interpret the

Constitution as a government of general powers which had the authority to encroach upon those rights not specifically enumerated.

Wilson remained thoroughly unconvinced that a complete enumeration of the rights reserved to the people of the several states would be even practicable. “[W]ho will be bold enough,” Wilson asked, “to undertake to enumerate all the rights of the people?” “Enumerate all the rights of men! I am sure,” Wilson stated, “that no gentleman in the late Convention would have attempted such a thing.” If the Philadelphia Convention attempted to enumerate the rights reserved to the people, it would be nothing less than an act of hubris. An enumeration of rights reserved to the people would not only be “impracticable,” but even dangerous. Because a complete enumeration of the rights reserved by the people would be necessarily imperfect, the addition of a bill of rights to the Constitution proposed by the Philadelphia Convention would render those rights not included in the enumeration particularly vulnerable to invasion by the powers of the national government. “[W]hen the attempt to enumerate them is made,” Wilson cautioned, “it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.” “[A] bill of rights would have been improperly annexed to the federal plan,” Wilson explained, “and for this plain reason that it would imply that whatever is not expressed was given, which is not the principle of the proposed constitution.”

A complete enumeration of the rights reserved by the people would be necessarily imperfect. “So it must be with a bill of rights,” Wilson maintained, but “an omission in stating the powers granted to the government, is not so dangerous as an omission in recapitulating the rights reserved by the people.” An enumeration of the powers of

government would render the implied powers of government imperfect. “[A]n imperfect enumeration of the powers of government,” Wilson explained, “reserves all implied power to the people; and by that means the constitution becomes incomplete.” In Wilson's view, the liberty of the people would be better preserved by enumerating the powers of government rather than enumerating the rights reserved by the people. “[I]t is much safer,” Wilson concluded, “to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.”¹⁸⁹

Thomas M’Kean concurred with his colleague’s exegesis of the constitutional text. “[I]t has already been incontrovertible shown that on the present occasion a bill of rights was totally unnecessary,” Thomas M’Kean concurred, “and that it might be accompanied with some inconveniency and danger, if there was any defect in the attempt to enumerate the privileges of the people.”¹⁹⁰ “[I]t would be idle,” M’Kean continued, “to countenance the idea that any other powers were delegated to the general government than those specified in the constitution itself, which, as I have before observed amounts in fact to a bill of rights—a declaration of the people in what manner they choose to be governed.”

During the South Carolina Ratifying Convention, James Lincoln decried the absence of a bill of rights, particularly liberty of the press. Lincoln “would be glad to know why, in this Constitution, there is total silence with regard to liberty of the press.” It was not

¹⁸⁹ James Wilson, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 631-645.

¹⁹⁰ Thomas M’Kean, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 648-49.

forgotten, which Lincoln believed to be “impossible.” “Then it must have been,” Lincoln concluded, “purposely omitted; and with what design, good or bad, he felt the world to judge.” “The liberty of the press was,” in Lincoln’s view,” the tyrant’s scourge—it was the true friend and firmest supporter of civil liberty” “Why,” Lincoln asked, “pass it

by in silence?” “Why was not this Constitution,” Lincoln continued, “ushered in with the bill of rights?” “Are the people,” Lincoln asked,” to have no rights?”¹⁹¹

Charles Cotesworth Pinckney sought to answer Lincoln’s objections concerning the absence of a bill of rights, and, in particular, protection for liberty of the press. “With regards to liberty of the press,” Pinckney answered, “the discussion of the matter was not forgotten by members of the Convention.” “It was fully debated,” Pinckney noted, “and the impropriety of saying any thing about it in the Constitution clearly evidenced.” Like his Federalist colleagues, Pinckney believed protection for liberty of the press was unnecessary in a government of limited powers. “The general government,” Pinckney observed, “has no powers but what are expressly granted to it” “[I]t therefore,” Pinckney concluded, “has no power to take away the liberty of the press.” The greater significance of Pinckney’s argument, however, is his belief that liberty of the press was protected by the several state constitutions. Pinckney identified the right to be protected as one which was in the province of the several states. Pinckney further argued that the addition of a bill of rights could, in due course, convey general authority to the national government. “That invaluable blessing, which deserves all the encomiums the gentlemen

¹⁹¹ James Lincoln, “South Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 744-745.

has justly bestowed upon it,” Pinckney observed, “is secured by all our state constitutions” “[T]o have mentioned it,” Pinckney continued, “in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it.” “For the same reason,” Pinckney further argued, “we had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated” “[B]y delegating express powers,” Pinckney concluded, “we certainly reserve to ourselves every power and right not mentioned in the Constitution.”¹⁹² The context of Pinckney’s remarks to the South Carolina Ratifying Convention suggest that he was concerned that, if a bill of rights were annexed to the Constitution, federal law would supersede the authority of the several states, especially with regard to matters traditionally recognized by the state constitutions—matters such as liberty of the press, religious liberty, and criminal procedure, especially trial by jury.

During the Virginia Ratifying Convention, Edmund Randolph expressed a similar view: the rights which the Anti-Federalists wanted to protect were those rights recognized by state constitutions, state laws, and the common law. Federalists feared that the addition of a bill of rights would give the national government a pretense to invade those rights secured by the several states. Randolph, speaking to the trial by jury in civil and

¹⁹² Charles Cotesworth Pinckney, “South Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 745-746.

criminal cases, noted, “The trial by jury in criminal cases is secured; in civil cases it is not so expressly secured as I should wish it” “[B]ut it does not follow,” Randolph continued, “that Congress has the power of taking away this privilege, which is secured by the constitution of each state, and not given away by this constitution.” Randolph reassured his colleagues, “I have no fear on this subject.”¹⁹³ Because the form of government proposed by the Philadelphia Convention was to be a government of limited powers, it could not encroach on those rights which came within the preview of the several states. The addition of a bill of rights, which was supported by Anti-Federalists may, in fact, give the federal government authority to regulate those very rights secured by the several states.

When the North Carolina Ratifying Convention convened, James Iredell was charged with the responsibility for representing the Federalist position. “Of what use,” Iredell asked, “can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?” “It is a declaration of particular powers by the people to their representatives,” Iredell answered, “for particular purposes.” Iredell compared the power vested in the national government by the people with “a great power of attorney.” “[N]o power,” Iredell contended, “can be exercised [by the national government] but what is expressly given” by the people. “Did any man,” Iredell asked, “ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him?” For

¹⁹³ Edmund Randolph, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 778.

this reason, Iredell argued a bill of rights was not only “unnecessary” and “incongruous,” it was “absurd and dangerous.” A complete enumeration of rights, not surrendered by the Constitution, would be impossible by even a man of the greatest “ingenuity.” “No man,” Iredell insisted, “could enumerate all the individual rights not relinquished by this Constitution.” “What would be the plausible answer of the government,” Iredell asked, if “any of the omitted rights should be invaded . . . ?” Iredell concluded that the response would be:

We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them.

If the Philadelphia Convention “had formed a general legislature, with undefined powers, a bill of rights would not only have been proper,” Iredell conceded, “but necessary” In such a government, a bill of rights “would have then operated as an exception to the legislative authority in such particulars.” “[W]here they are powers of a particular nature, and expressly defined,” Iredell warned, “a bill of rights might operate as a snare rather than a protection.”¹⁹⁴

Samuel Johnston uttered a similar sentiment. “[T]he gentlemen,” Johnston noted, “says that a bill of rights was necessary.” “It appears to me,” Johnston responded, “that it

¹⁹⁴ James Iredell, “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 942.

would have been the highest absurdity to undertake to define what rights the people of the United States were entitled to; for that would be as much as to say they were entitled to nothing else.” “Every right,” Johnston continued, “could not be enumerated, and the omitted rights would be sacrificed, if security arose from an enumeration.” “The

Congress,” Johnston concluded, “cannot assume any other powers than those expressly given them, without palpable violation of the Constitution.”¹⁹⁵

The Anti-Federalist argument was further strengthened, and the Federalist argument further undermined, by the presence in the Constitution of what The Federal Farmer labeled a “partial bill of rights.”¹⁹⁶ Article I, Section 9 of the Constitution placed certain limitations on the power of the national government. Under Article I, Section 9, Congress was prohibited, among other things, from suspending the privilege of the writ of habeas corpus, except in cases of rebellion or invasion, passing bills of attainder and ex post facto laws, and granting titles of nobility.¹⁹⁷ Further limitations on the power of the national government were found scattered throughout the text of the Constitution. Article I, Section 10 prohibited the states, among other things, from passing bills of attainder or

¹⁹⁵ Samuel Johnston, “North Carolina Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 939.

¹⁹⁶ The Federal Farmer, “Letters from The Federal Farmer IV” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 248.

¹⁹⁷ U.S. CONST. art. I, §9.

ex post facto laws, impairing the obligation of contracts, and granting titles of nobility.¹⁹⁸

Article III, Section 2 of the Constitution guaranteed the right to trial by jury, except in

cases of impeachment, in the state where the crime was committed.¹⁹⁹ Article III, Section 3 explicitly defined treason as levying war against the United States, or giving aid and comfort to the enemy. Corruption of blood, an ancient penalty for treason, was unambiguously prohibited, and a person could not be convicted without the testimony of two witnesses.²⁰⁰

Alexander Hamilton, in Federalist No. 84, cited this abridged bill of rights to support his position that a bill of rights was not necessary in the proposed Constitution. “It has been upon different occasions remarked,” Hamilton noted, “that the constitutions of several of the states,” such as the constitution of New York, “are in a similar predicament,” containing no bills of rights. “And yet,” Hamilton continued, “the persons who in this state oppose the new system, while they profess an unlimited admiration for our particular constitution, are among the most intemperate partisans of a bill of rights.” The Anti-Federalists, “to justify their zeal in this matter,” argued that the constitution of New York “contains in the body of it, various provisions in favor of particular privileges and rights, which, in substance, amount to the same thing,” a bill of rights. The Anti-Federalists also argued, according to Hamilton, “that the constitution [of New York]

¹⁹⁸ U.S. CONST. art. I, §10.

¹⁹⁹ U.S. CONST. art. III, §2.

²⁰⁰ U.S. CONST. art. III, §3.

adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed, are equally secured.”

Hamilton’s response was that the Constitution, proposed by the Philadelphia Convention, contained “a number of such provisions,” including those embedded in Article I, Section 9. “It may well be a question,” Hamilton observed, “whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this state.” “The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and TITLES OF NOBILITY, *to which we have no corresponding provisions in our [state] constitution* are,” Hamilton suggested, “perhaps greater securities to liberty than any it contains.”²⁰¹ Hamilton's argument, however, was unpersuasive to Anti-Federalists who believed that the presence of this abridged bill of rights in the Constitution was even more evidence that the proposed national government was too powerful. Why was it necessary, Anti-Federalists asked, to place such protections in the Constitution if it was, in fact, a government of enumerated powers as the Federalists contended?

“By the state constitutions,” The Federal Farmer observed, “certain rights have been reserved to the people; or rather, they have been recognized and established in a such manner, that state legislatures are bound to respect them, and to make no laws infringing on them.” “The state legislatures,” he noted, “are obliged to take notice of the bills of rights of their respective states.” “The bills of rights, and the state constitutions,” The

²⁰¹ Alexander Hamilton, “Federalist No. 84,” 442-443.

Federal Farmer continued, “are fundamental compacts only between those who govern, and the people of the same state.”

“In the year 1788,” he observed, “the people of the United States make a federal constitution, which is a fundamental compact between them and their federal rulers,” who “in the nature of things, cannot be bound to take notice of any other compact.” “It would be absurd,” The Federal Farmer agreed, “for them, in making laws, to look over thirteen, fifteen, or twenty state constitutions, to see what rights are established as fundamental, and must not be infringed upon, in making laws in the society.” “It is true,” The Federal Farmer noted, “they would be bound to do it if the people in their federal compact, should refer to the state constitutions, recognize all parts not inconsistent with the federal constitution, and direct their federal rulers to take notice of them accordingly; but this is not the case, as the plan stands at present” It would be “absurd,” he conceded, that “so unnatural an idea” be considered. “If there are a number of rights established by the state constitutions, and which will remain sacred,” however, “the general government is bound to take notice of them—it must take notice of one as well as another” “If unnecessary to recognize or establish one by the federal constitution,” the Anti-Federalist argued, “it would be unnecessary to recognize or establish another by it.”

“If the federal constitution,” The Federal Farmer continued, “is to be construed so far in connection with the state constitutions, as to leave the trial by jury in civil causes, for instance, secured; on the same principles it would have left the trial by jury in criminal causes, the benefits of the writ of habeas corpus, etc. secured” “[T]hey all stand on

the same footing,” he observed, “they are the common rights of Americans, and have been recognized by the state constitutions: But the convention found it necessary to recognize or re-establish the benefits of that writ, and the jury trial in criminal cases,” in Article I, Section 9 of the Constitution. “As to *ex post facto* laws, the convention has done the same in one case, and gone further in another,” prohibiting the several states from passing *ex post facto* laws in Article I, Section 10.

The Federal Farmer thought Article I, Section 9 of the Constitution, which he christened a “partial bill of rights,” did not provide for the liberties of the people, liberties secured in state constitutions, state statutes, and the common law. Article I, Section 9 of the Constitution “establish[ed] certain principles as part of the compact upon which the federal legislators and officers can never infringe.” Article I, Section 9, prohibited the federal government from, among other things, suspending the privilege of the writ of

habeas corpus, except in cases of rebellion or invasion, passing bills of attainder and *ex post facto* laws, and granting titles of nobility.²⁰² He did not, however, consider these to be the only liberties of the people which were “valuable and sacred.”²⁰³ He repeatedly underscored liberties established by the common law, especially liberty of the press, religious liberty, and criminal procedure, especially trial by jury of the vicinage. The Federal Farmer's skepticism regarding whether the Constitution preserved the right to

²⁰² The Federal Farmer, “Letters from The Federal Farmer IV,” 248.

²⁰³ The Federal Farmer, “Letters from The Federal Farmer XVI” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 327.

jury trial in civil cases, which was recognized in the state constitutions, extended to other rights not specifically singled out for protection in the federal Constitution. He concluded, “On the whole, the position appears to me to be undeniable, that this bill of rights ought to be carried further, and some other principles established, as a part of this fundamental compact between the people of the United States and their federal rulers”

The Federal Farmer later returned to the “partial bill of rights.”²⁰⁴ “The first point urged, is,” he resumed, “that all power is reserved not expressly given, that particular enumerated powers only are given, that all others are not given, but reserved, and that it is needless to attempt to restrain congress in the exercise of powers they possess not.” “This reasoning is logical,” he conceded, “but of very little importance in the common affairs of men; but the constitution does not appear to respect it even in any view.” He proceeded to examine several clauses in the Constitution to illustrate his argument. Article I, Section 9 provided that no title of nobility would be granted by Congress. “Was this clause omitted,” The Federal Farmer asked, “what power would congress have to make titles of nobility?” “[I]n what part of the constitution,” he asked, “would they find it?” “The answer must be,” The Federal Farmer speculated, “that congress would have no such power—that the people, by adopting the constitution will not part with it.” “Why then by a negative clause,” he asked, “restrain congress from doing what it would have no power to do?” “This clause, then,” The Federal Farmer concluded, “must have no meaning, or imply, that were it omitted, congress would have the power in question,

²⁰⁴ The Federal Farmer, “Letters from The Federal Farmer IV,” 245-251.

either upon the principle that some general words in the constitution may be so construed as to give it, or on the principle that congress possess the powers not expressly reserved.” “But this clause,” the leading Anti-Federalist noted, “was in the confederation, and is said to be introduced into the constitution from very great caution.” “Even a cautionary provision,” he continued, “implies a doubt, as least, that it is necessary; and if so in this case, clearly it is also alike necessary in all similar ones.” “The fact appears to be,” The Federal Farmer concluded, “that people in forming the confederation, and the convention, in this instance, acted, naturally, they did not leave the point to be settled by general principles and logical inferences; but they settle the point in a few words, and all who read then at once understand them.”

The Federal Farmer, noted again, “The jury trial in criminal causes, and the benefit of the writ of habeas corpus, are already as effectively established as any of the fundamental or essential rights of the people of the United States. This being the case, why in adopting a federal constitution do we now establish these, and omit all others, at least with a few exceptions, such as agreeing there shall be no ex post facto laws, no titles of nobility, &c.” He remained apprehensive that “the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them.” For this Anti-Federalist, this state of affairs could lead to the conclusion that the people, in establishing a national constitution, only enumerated those rights which they believed were “valuable and sacred.” For this reason, “the people especially having begun, ought

to go through enumerating and establish particularly all the rights of individuals, which can by any possibility come into question in making and executing federal laws.”

The Federal Farmer was aware, however, that there may be advantages to enumerating several particular liberties of the people that were held in high regard. “People, and very wisely too,” he noted, “like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles,” such as a general declaration securing rights retained by the people, “knowing that in any controversy between them and their ruler, concerning those rights, disputes may be endless, and nothing certain” “But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty,” he suggested, “assert their rights on all occasions, and establish them with ease,” through a general statement securing those rights retained by the people. “[S]till,” he noted, “there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.” The Federal Farmer was clear that a declaration, securing the rights retained by the people, did not create new rights, but merely maintained those rights which preexisted the federal Constitution, secured in state constitutions, statutes, and the common law. “We do not by declarations change the nature of things, or create new truths,” The Federal Farmer declared, “but we give

existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot.”

The Federal Farmer proceeded to catalogue those rights, those “truth and principles,” which the people might soon forget. Those rights of the people derived from the English legal and constitutional tradition, including the common law. “[W]e discern certain rights,” he noted, “as the freedom of the press, and the trial by jury, &c. which the people of England and of America of course believe to be sacred, and essential to their political happiness”²⁰⁵ The Federal Farmer catalogued a list of rights derived from state constitutions, statutes and the common law: the trial by jury in criminal and civil cases; that no man shall be held to answer to any offense, till the same be fully described to him; that no man shall furnish evidence against himself; that no person shall be tried for any offense until he is first indicted by a grand jury; that every person shall have the right to face his accusers; that every person shall have the right to produce proof of his innocence; that every person shall have the right to justice without delay; that all persons shall have the right to be secure from all unreasonable searches and seizures of their persons, houses, papers, and effects; that all warrants shall be supported by oath; and that no person shall be exiled except by the judgment of his peers or the law of the land.²⁰⁶ These rights identified by The Federal Farmer, and many other Anti-Federalists, were the rights of Americans inherited from the English constitutional tradition, which were secured in the several states, primarily through the common law.

²⁰⁵ The Federal Farmer, “Letters from The Federal Farmer XVI,” 324-326.

²⁰⁶ The Federal Farmer, “Letters from The Federal Farmer IV,” 249.

The Federal Farmer proceeded with an extended discussion examining the threat to liberty of the press from the national government. The liberty of the press and free speech, was like many other rights of the people in the several states, secured by the maxims of the common law. He argued that the national government may use its Article I, Section 8 authority to lay and collect taxes as a means of regulating liberty of the press:

All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:—true; but the great question is, are not powers given, in the exercise of which this right may be destroyed? The people's of the printers claim to a free press, is founded on the fundamental laws, that is compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. This may be done by giving general powers, as well as by using particular words. No right claimed under a state constitution, will avail against a law of the union, made in pursuance of the federal constitution: therefore the question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. 1, sect. 8. congress will have power to lay and collect all kinds of taxes whatever . . . Printing, like, all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.

In the context of this study, the importance of The Federal Farmer's argument concerning the dangers to liberty of the press lies not in its emphasis on individual rights as such, but its emphasis on the danger that the liberty of the press, secured by the several states, could be infringed by the federal government. For The Federal Farmer, the liberty of the press was a right which could be annihilated or limited and, presumably, expanded by the people through their state constitutions. The power of the national government under the proposed Constitution threatened the autonomy the states exercised over liberty

of the press. The laws of the national government could be manipulated in such a way as to threaten the liberty of the press, which was secured by the several state constitutions, state statutes, and common law. Like the broader Anti-Federalist argument as to the necessity of a bill of rights, The Federal Farmer was concerned with the relative powers of the national government and its impact on the sovereignty of the people in the several states.

The Federal Farmer did believe that “in construing the federal constitution, it would not be only impracticable, but improper to refer to the state constitutions.”²⁰⁷ The state constitutions, in The Federal Farmer’s view “are entirely distinct instruments and inferior acts” “Besides,” he continued, “by the people’s now establishing certain fundamental rights, it is strongly implied, that they are of opinion that they would not otherwise be secured as part of the federal system, or be regarded in the federal system as fundamental.” “Further,” he continued, “these same rights, being established by the state constitutions, and secured to the people, by recognizing them now, implies, that the people thought them insecure by the state establishments, and extinguished and put afloat by the new arrangement of the social system, unless reestablished.” The Federal Farmer continued, “the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or feel different about them.” It will be concluded that if the people

²⁰⁷ The Federal Farmer, “Letters from The Federal Farmer XVI,” 326-27.

of the several states, in establishing the Constitution, “proceed to enumerate and establish some of them,” “they have established all which they esteem valuable and sacred.” “On

every principle, then, the people especially having began,” he argued, “ought to go through enumerating, and establish particularly all the rights of individuals, which can possible come in question in making and executing federal laws.”

“General powers,” The Federal Farmer concluded, “carry with them incidental ones, and the means necessary to the end.” The proposed Constitution, for example, gives the national government the authority to raise and support an army. “In the exercise of these powers,” he asked, “is there any provision in the constitution to prevent quartering of soldiers on the inhabitants?” “Perhaps,” The Federal Farmer speculated, “the provisions in some of the state constitutions might provide a barrier between the individual and the national government.” “But,” he warned, “the state constitutions, which are local, and inferior in their operation, and can have no control over the federal government—had noticed several rights, but had been totally silent about this exemption—that they had given general powers relative to the subject, which, in their operation, regularly destroyed the claim.” “[I]t is fit and proper to establish,” The Federal Farmer concluded, “beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government.” The Federal Farmer believed that the safest manner to secure the liberties of the people was to particularly enumerate those rights which may be infringed to by the authority of the federal government, and include a residuary clause, not unlike Article II of the Articles of Confederation, securing the

rights retained by the people of the several states included in state constitutions, statutes, and common law.²⁰⁸

Other Anti-Federalists echoed The Federal Farmer's theme. Why, they asked, over and over, is an abridged bill of rights necessary in a constitution of enumerated powers? "Besides, it is evident," Brutus exclaimed, "that the reason here assigned was not the true one, why the framers of this constitution omitted a bill of rights" "[I]f it had been," Brutus argued, "they would not have made certain reservations, while they totally omitted others of more importance." "We find they have," Brutus commenting on Article I, Section 9, "declared, that the writ of habeas corpus shall not be suspended, unless in cases of rebellion—that no bill of attainder, or ex post facto law, shall be passed—that no title of nobility shall be granted by the United States, &c." "If every thing which is not given is reserved," Brutus asked, "what propriety is there in these exceptions [in Article I, Section 9]?" "Does this constitution," Brutus wondered, "any where grant the power of suspending the habeas corpus, to make ex post fact laws, pass bills of attainder, or grant titles of nobility?" "It certainly does not," Brutus noted, "in express terms." "The only answer that can be given is," Brutus reacted, "that these are implied in the general powers granted. With equal truth it may be said, that all the powers, which bills of right, guard against the abuse of, are contained or implied in the general ones granted by this constitution." "So far it is from being true, that a bill of rights is less necessary in the

²⁰⁸ The Federal Farmer, "Letters from The Federal Farmer XVI," 327-330.

general constitution than in those of the states,” Brutus concluded, “the contrary is evidently the truth.”

“Brutus believed “the most express and full declaration of rights” should have been admitted to the proposed Constitution. “But on this subject,” Brutus observed, “there is almost a complete silence.” “From these observations,” Brutus reiterated, “it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are necessary to be parted with.”

Although Brutus spoke of “essential natural rights,” he specifically, when identifying particular rights, gave examples from the English constitutional and legal tradition, the hereditary rights of Englishmen. “Those who have governed,” Brutus writes, “have been found in all ages ever active to enlarge their powers and abridge the public liberty.” “This,” Brutus continues, “has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers. The country from which we derived our origin, is an eminent example of this. Their Magna Carta and bill of rights have long been the boast, as well as the security, of that nation.” Brutus continues his historical account by observing that these liberties of the people are secured by state constitutions and bills of rights. “I need say no more,” Brutus observes, “I presume, to an American, than, that this principle is a fundamental one, in all constitutions of our own states” “[T]here is not one of them,” Brutus concluded,

“but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them.” For Brutus, those rights which he deemed “essential natural rights” were liberties, derived from the English constitutional and legal tradition, which were embodied in state constitutions and bills of rights.²⁰⁹ Such liberties of the people could only be secured if the national government did not have the authority to disparage the sovereignty of the people in the several states.

A Democratic Federalist proffered one of the common objections to the proposed Constitution, that the national government would disparage the unwritten maxims established at common law. Like many other Anti-Federalists, A Democratic Federalist was primarily concerned with trial by jury. A Democratic Federalist took notice that Article III, Section 2 of the Constitution provided that, “The judicial power shall extend to ALL CASES in *law* and *equity*, arising under this constitution.” “It is very clear,” A Democratic Federalist observed, “that under this clause, the tribunal of the United States, may claim a right to the cognizance of all offenses against the *general government*, and *libels* will not be properly excluded.” “Nay, those offences may be by them construed, or by law declared,” A Democratic Federalist warned, “*misprision of treason*, an offense which comes literally under their express jurisdiction.” “Where is then,” A Democratic Federalist asked, “the safety of our boasted liberty of the press?” “And in the case of a *conflict of jurisdiction* between the courts of the United States, and those of the several

²⁰⁹ Brutus, “Essays of Brutus II” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 372-376.

Commonwealths, is it not east to foresee,” A Democratic Federalist asked, “which of the two will obtain advantage?”

A Democratic Federalist proceeded to “the most important objection to the federal plan,” that the proposed Constitution would abolish the trial by jury in civil cases. James Wilson, A Democratic Federalist noted, supposes that this objection is “made *in a disingenuous form . . .*” “It seems to me that Mr. Wilson’s pretended answer,” A Democratic Federalist replied, “is much more *disingenuous* than the objection itself, which I maintain to be strictly founded in fact.” Wilson argued that those cases which are tried by a civil jury vary among the several states. It would have been impracticable, in

Wilson’s view, to provide a general rule for trial by jury in civil cases for the several states. A Democratic Federalist believed Wilson’s argument was “futile.” “[A] reference might easily have been made to the *common law of England*,” A Democratic Federalist argued, “which obtains through every State”

A Democratic Federalist further charged, “I have it in my power to prove that under the proposed Federal Constitution, *the trial of facts in civil cases by a jury of the Vicinage* is entirely and effectually abolished, and will be absolutely impracticable.” It was a common maxim of the law that questions of fact were referred to the jury of the vicinage. A Democratic Federalist asked for an explanation, “[W]hat is meant by *appellate* jurisdiction as to law and *fact* which is vested in the superior court of the United States?”

A Democratic Federalist explained that the term *appeal* includes the fact as well as the law. This interpretation, if correct, would preclude trial by jury in civil cases. “An *appeal*,” A Democratic Federalist noted, “is a thing unknown to the common law.”²¹⁰

During the state ratifying conventions, the Anti-Federalists sought to exploit this weakness in the Federalist argument. During the Pennsylvania Ratifying Convention, John Smilie introduced the Anti-Federalist argument, asking why a partial bill of rights was necessary if the national government was, as the Federalists argued, a government of limited powers. “It seems,” Smilie observed, “that the members of the federal convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of habeas corpus and the trial by jury in criminal cases shall not be suspended or infringed.” “How does this indeed agree,” Smilie asked, “with the maxim that whatever is not given is reserved?” “Does it not rather appear from the reservation of these two articles,” Smilie continued, “that everything else, which is not specified, is included in the powers delegated to the government?” Smilie maintained that the protection afforded the writ of habeas corpus and trial by jury in criminal cases “must prove the necessity of a full and explicit declaration of rights,” without which the federal government would have an indeterminate measure of authority, save only those rights expressly reserved.²¹¹

²¹⁰ A Democratic Federalist, “Essay of a Democratic Federalist,” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 3, *Pennsylvania*, (Chicago: University of Chicago Press, 1981), 59-60.

²¹¹ John Smilie, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 645.

Robert Whitehill remained equally unconvinced: “[N]o satisfactory reason has yet been offered for the omission of a bill of rights,” despite the argument propounded by the Federalists that a declaration of rights was not necessary in a government of enumerated powers, such as that proposed by the Philadelphia Convention. “[O]n the contrary,” Whitehill rejoined, “the honorable members are defeated in the only pretext which they have been able to assign, that everything which is not given is excepted, for we have shown that there are two articles expressly reserved, the writ of habeas corpus and the trial by jury in criminal cases, and we have called upon them in vain to reconcile this reservation with the tenor of their favorite proposition.” “[T]hose exceptions,” Whitehill argued, “prove a contrary sentiment to have been entertained by the very framers of the proposed Constitution.” [A]ccording to their principle,” Whitehill suggested, “the reservation of the habeas corpus, and trial by jury in criminal cases, may here after be construed to be the only privileges reserved by the people.” “[I]t will not,” Whitehill hoped, “any longer be alleged that no security is requisite” because the Constitution is a government of limited powers. “For if there was danger,” Whitehill asked, “in the attempt to enumerate the liberties of the people, lest it should prove imperfect and destructive, how happens it that in the instances I have mentioned, that danger has been incurred?” Whitehill maintained that the reservation of rights, such as the privilege of the writ of habeas corpus and trial by jury in criminal cases, “effectively destroyed” the Federalist argument. “[T]he argument of difficulty which has been drawn from the attempt to enumerate every right,” Whitehill maintained, “cannot not be urged against the

enumeration of more rights than this instrument contains.” “Have the people no other rights worth their attention,” Whitehill continued, “or is it to be inferred, agreeably to the maxim of our opponents, that every other right is abandoned?”

“I acknowledge,” Whitehill agreed, “if our liberties are secured by the frame of government itself, the supplementary instrument of a declaration of rights may well be dispensed with.” Whitehill was unconvinced, however, that the powers of the national government were sufficiently limited. “I wish it to be seriously considered,” Whitehill urged, “whether we have a right to leave the liberties of the people to such future constructions and expositions as may possible be made upon this system,” particularly since the Federalists conceded “that it would be dangerous to omit anything in the enumeration of a bill of rights” “A bill of rights,” Whitehill continued, “it has been said, would not only be unnecessary, but dangerous, and for this special reason, that it is not practicable to enumerate all the rights of the people, therefore it would be hazardous to secure such of the rights as we can enumerate!” “Surely, Sir, our language was competent to declare the sentiments of the people,” Whitehill opined, “and to establish a bar against the intrusion of the general government in other respects as well as these” That language, of which Whitehill spoke, would come to be embodied in the Ninth Amendment’s guarantee of rights “retained by the people.” “Truly, Sir, I agree that

a bill of rights may be a dangerous instrument,” Whitehill concluded, “but it is to the views and projects of the aspiring ruler, and not the liberties of the citizen.”²¹²

Some of the Anti-Federalists in attendance during the Virginia Ratifying Convention, including Patrick Henry and George Mason, were among the most erudite opponents of the Constitution in the nation. When New Hampshire became the ninth state to ratify, on June 21, 1788, the Constitution became legally binding between the states so ratifying. Both Federalists and Anti-Federalists understood, however, that the Constitution would not be effective without the assent of Virginia, one of the most influential states.²¹³

Patrick Henry, the principal spokesman for the Anti-Federalists, repeatedly insisted on prior constitutional amendments as a condition for ratification. Principally concerned with protecting the liberties of the people against the power of a potentially oppressive federal government, Henry unapologetically sought unambiguous constitutional protection for the sovereignty of the several states. Although these two objectives—protecting the liberties of the people and preserving the sovereignty of the several states—may have seemed irreconcilable, Henry identified the liberty of the people with the preservation of local prerogatives pertaining to such matters as freedom of speech, liberty of the press, religious liberty, and criminal procedure, especially the trial by jury in criminal and civil proceedings. For many Anti-Federalists, like Patrick Henry, the

²¹² Robert Whitehill, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 648-652.

²¹³ Bernard Schwartz, “Commentary,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 762.

sovereignty of the people in the several states was inextricably linked to the liberties of the people inherited from the English legal and constitutional tradition, although Henry invariably invoked the language of natural rights theory when characterizing the nature of these rights.

During the Virginia Ratifying Convention, Patrick Henry made an impassioned argument, seeking to secure the liberties of the people, liberties secured in state constitutions, state statutes, and the common law. Henry adopted the language of “rights retained by the people,” language which eventually migrated to the Ninth Amendment. The proposed Constitution, Henry charged, “is not a democracy wherein the people retain all their rights securely.” Henry’s concern for the rights retained by the people, was tied to his concern that the proposed plan of government would create one consolidated government. “Had these principles been adhered to,” Henry continued, “we should not have been brought to this alarming transition, from a confederacy to a consolidated government.” “[O]ur rights and privileges are endangered,” Henry warned, “and the sovereignty of the states will be relinquished” “[A]nd cannot we plainly see,” Henry asked, “that this is actually the case?”

What were these liberties of the people, which Patrick Henry believed were endangered by the proposed government? Henry cited “all pretensions to human rights and privileges,” but his concrete examples of liberty were derived from the English legal and constitutional system including the unwritten maxims of the common law. These hereditary rights of Englishmen included: the rights of conscience, trial by jury, and the

liberty of the press. Again, Henry warned, the proposed plan of government “has produced those horrors which distress many of our best citizens.” Henry was especially alarmed that the proposed Constitution would disparage the rights, rights he continually identified with the historic liberties enjoyed by Englishmen, which were secured by the Commonwealth of Virginia. “We are come hither to preserve the poor commonwealth of Virginia,” Henry despaired, “if it can possibly be done, something must be done to preserve your liberty and mine.” “There are sufficient guards placed against sedition and licentiousness,” Henry argued, “for, when power is given to this government to suppress these, or for any other purpose, the language it assumes is clear, express, and unequivocal; but when this Constitution speaks of privileges, there is an ambiguity, sir, a fatal ambiguity—an ambiguity which is very astonishing.” Once again, Henry cited “the great rights of freeman” which were endangered by the proposed plan of government, especially the trial by jury in civil cases.

Henry then turned his attention to Article I, Section 9 of the proposed Constitution. Henry mindful “that there is a bill of rights in that government,” was concerned about the import of Article I, Section 9 in the proposed Constitution. Henry maintained that those “express restrictions” in Article I, Section 9, of the proposed Constitution, “which are in the shape of a bill of rights,” were “the sole bounds intended by the American government.” “The design of the negative expressions in this section,” Henry argued, “is to prescribe limits beyond which the powers of Congress shall not go.” “Whereabouts do we stand,” Henry asked, “with respect to a bill of rights?” “Examine it,” Henry implored,

“and compare it to the idea manifested by the Virginian bill of rights, or that of the other states.” Henry was not persuaded that Article I, Section 9 afforded adequate protection for the liberties of the people in the several states from a potentially oppressive national government. “The restraints in this congressional bill of rights are so feeble and few,” Henry lamented, “that it would have been infinitely better to have said nothing about it.” “The fair implication is,” Henry warned, “that they can do every thing they are not forbidden to do.”

“What will be the result,” Henry asked, “if Congress, in the course of their legislation, should do a thing not restrained by” Article I, Section 9 of the Constitution? “It will fall,” Henry forewarned, “as an incidental power to Congress, not being prohibited expressly in the Constitution.” Article I, Section 9 of the Constitution, for example, provides that the privilege of the writ of habeas corpus shall not be suspended except, in cases of rebellion or invasion, when the public safety may require it. “It results clearly,” Henry asserted, “that if it had not said so, they could suspend it in all cases whatsoever.” Article I, Section 9 “reverses the position of the friends of this Constitution, that every thing is retained which is not given up,” Henry argued, “for, instead of this, every thing is given up which is not expressly reserved.” “It does not speak affirmatively,” Henry noted, “and say that it shall be suspended but in certain cases; going on a supposition that every thing which is not negated shall remain with Congress.” “If the power remains with the people,” Henry asked, “how can Congress supply the want of an affirmative grant?” “They cannot do it but by implication,” Henry argued, “which destroys their doctrine.”

The Virginia Bill of Rights, Henry reminded his fellow delegates, “secures the great and principal rights of mankind,” but “this bill of rights,” Article I, Section 9, “extends to but very few cases, and is destructive of the doctrine advanced by the friends of that paper”

Henry once more emphasized the liberties of the people, such as liberty of the press, religious liberty, and criminal procedure, especially trial by jury. Henry was apprehensive, however, that the only liberties secured by the Constitution were enumerated in Article I, Section 9. “You are told,” Henry exclaimed, “that your rights are secured in this new government.” The liberties of the people, however, were only secured in Article I, Section 9. “The few restrictions in that section,” Henry emphasized, “are your only safeguards.” The federal government had, in Henry’s estimation, unlimited authority to infringe on the liberties of people, save those few immunities secured in Article I, Section 9 of the Constitution. “They may control your actions, and your very words,” Henry despaired, “without being repugnant to that paper.” The liberties of the people, “the existence of your dearest privileges,” would be subject to the consent of the federal government.

“If gentlemen think that securing the slave trade is a capital object; that the privilege of the habeas corpus is sufficiently secured; that the exclusion of ex post facto laws will produce no inconvenience; that the publication from time to time will secure their property; in one word, that this section alone will secure their liberties,” Henry lamented, “I have spoken in vain.” “Every word of mine, and of my worthy coadjutor,” Henry

feared, “is lost.” Henry identified those liberties of the people, secured by the several states, which were not secured by the proposed Constitution. “I trust that gentlemen, on this occasion,” Henry exclaimed, “will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right, secured, before they agree to that paper.” The most essential liberties of the people, liberty of the press, religious liberty, and criminal procedure, which were concomitant with the hereditary rights of Englishmen, were not retained by the people of the several states under Article I, Section 9. “These most important human rights,” Henry emphasized, “are not protected by that section, which is the only safeguard in the Constitution.” “My mind,” Henry concluded, “will not be quieted till I see something substantial come forth in the shape of a bill of rights.”

Henry sought to secure the liberties of the people by means of a bill of rights which provided greater clarity concerning the allocation of power between the national government and the several states. Henry commenced with a charge that the Federalists wanted to eliminate the sovereignty and independence of the several states. “When I wished for an appointment to this Convention,” Henry stated, “my mind was extremely agitated for the situation of public affairs.” “I conceived,” Henry warned, “the republic to be in extreme danger.” “If our situation be thus uneasy,” Henry asked, “whence has arisen this fearful jeopardy?” “It arises “[I]t arises from a proposal,” “a fatal system,” Henry answered, “to change our government,” “a proposal that goes to the utter annihilation of the most solemn engagements of the states” On another occasion,

Henry charged, “I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking.”

Henry believed the remedy was a bill of rights, which he repeatedly associated with explicit constitutional language guaranteeing that powers not delegated to the government are reserved to the several states. Henry’s argument for a bill of rights was coupled with placing express limitations on the power of the federal government. “We are giving power; they are getting power,” Henry maintained, “judge, then, on which side the implication will be used! When we once put it in their option to assume constructive power, danger will follow.” Those rights inherited from the English tradition, “[t]rial by jury, and liberty of the press,” Henry warned, “are also on this foundation of implication.” “If they encroach on these rights, and you give your implication for a plea,” Henry continued, “you are cast; for they will be justified by the last part of it, which gives them full power ‘to make all laws which shall be necessary and proper to carry their power into execution.’ ” Implication is dangerous,” in Henry’s view, “because it is unbounded: if it be admitted at all, and no limits be prescribed, it admits of the utmost extension.” “They say that every thing that is not given is retained. The reverse of the proposition,” in fact, “is true.” Henry completed his argument by noting, “They do not carry their implication so far when they speak of the general welfare—no implication when the sweeping clause comes. Implication is only necessary when the existence of

privileges is on dispute. The existence of powers is sufficiently established. If we trust our dearest rights to implication, we shall be in a very unhappy situation.” Henry sought a bill of rights modeled on Article II of the Articles of Confederation. Henry “declared a bill of rights indispensably necessary” “[A] general positive provision should be inserted in the new system,” Henry believed, “securing to the states and the people every right which was not conceded to the general government; and that every implication should be done away with.”

Patrick Henry continually emphasized, citing Article II of the Articles of Confederation, the importance of securing the liberties of the people in the several states. Henry readily invoked the sovereignty of the several states through which liberty of the press, religious liberty, and criminal procedure were secured by secured by the several state constitutions, state statutes, and common law. “[T]he necessity of a bill of rights,” Henry observed, “appears to me to be greater in this government than ever it was in any government before.” “I have observed already,” Henry continued, “that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished.” “I repeat,” Henry emphasized, “that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers.” “It is so,” Henry noted, “in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king’s prerogative.”

“When fortified with full, adequate, and abundant representation, was she” Henry asked, “satisfied with that representation?” “She most cautiously and guardedly reserved and secured those invaluable, inestimable rights and privileges,” Henry answered, “which no people, inspired with the least glow of patriotic liberty, ever did, or ever can, abandon.” “She is now called upon to abandon them,” Henry lamented, “and dissolve that compact which secured them to her.”

George Mason was concerned that the authority of the federal government would undermine the liberties of the people, liberties secured by the several states. Mason was not impressed with the “artful sophistry and evasions” of the Federalists. “[T]here ought to be some express declaration in the Constitution,” Mason insisted, “asserting that rights not given to the general government were retained by the states.” “[U]nless this was done,” Mason worried, “many valuable and important rights would be concluded to be given up by implication.” These liberties were conserved in state constitutions, state statutes, and the common law which, Mason feared, would be supplanted by the authority of the federal government.

“All governments,” Mason asserted, “were drawn from the people, though many were perverted to their oppression.” The governments of the several states, such as Virginia, were based on the consent of the people. “[Y]et there were certain great and important rights,” Mason observed, “which the people, by their bill of rights, declared to be paramount to the legislature.” “Why should it not be so,” Mason asked, “in this Constitution?” “Was it because,” Mason wondered, “we were more substantially

represented in it than in the state government?” In the state governments, “the people were substantially and fully represented.” “Unless there were a bill of rights,” Mason concluded, “implication might swallow up all our rights.”²¹⁴

William Grayson, who “thought it questionable whether rights not given up were reserved,” sought unambiguous constitutional protection for the liberties of the people in the several states. “A majority of the states,” Grayson observed, “had expressly reserved important rights by a bill of rights, and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states,” that is Article II of the Articles of Confederation. “It was the general sense of

America,” Grayson submitted, “that such a clause was necessary” in the Articles of Confederation. “Otherwise,” Grayson asked, “why did they introduce a clause which was totally unnecessary?” “It had been insisted” Grayson observed, “in many parts of

America, that a bill of rights was only necessary between a prince and people, and not in such a government as this, which was a compact between the people themselves.”²¹⁵ This argument, however, did not satisfy Grayson’s mind. “[T]here were,” in Grayson’s view, “great reasons to apprehend great dangers,” such as “an indefinite power to provide

²¹⁴ Patrick Henry, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 771-97

²¹⁵ Many Federalists, such as Alexander Hamilton in Federalist No. 84, argued that a bill of rights does not properly belong in a constitution founded on the consent of the people. Historically, such bill of rights, are stipulations between kings and their subjects, “reservations of rights not surrendered to the prince.” “[T]hey have no application,” Hamilton argued, “to constitutions professedly founded upon the power of the people” because “in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations.” This argument will be examined in Chapter 5. Alexander Hamilton, “Federalist No. 84,” 442.

for the general welfare.”²¹⁶ “For so extensive was the power of legislation,” in Grayson’s estimation, “he doubted whether, when it was once given up, any thing was retained.” Grayson thought, therefore, that there should be a bill of rights which, in his own estimation, would affirm that those powers not expressly delegated to the national government are reserved to the states.

Grayson was concerned that “the doctrine contended for by the other side” was refuted by “some negative clauses” in Article I, Section 9 of the proposed Constitution. Article

I, Section 9, Grayson observed, provided that “the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it,” and that “no title of nobility shall be granted by the United States.” “If these restrictions had not been here inserted,” Grayson questioned, “whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility.” If the Constitution was, in effect, a government of limited powers, it would not be necessary to include such protections in Article I, Section 9. Grayson, therefore, sought to secure the liberties of the people in the several states by means of a bill of rights.²¹⁷

The Virginia Ratifying Convention addressed the concern that the addition of a bill of rights would be dangerous. Among other recommendatory amendments, The Virginia

²¹⁶ The national government has the authority to provide for the “general Welfare of the United States” U.S. CONST. art. I, §8, cl. 1

²¹⁷ William Grayson, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 800-801.

Ratifying Convention proposed: “17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.”²¹⁸

During the New York Ratifying Convention, Thomas Tredwell regarded the Federalist argument, “whatever powers are not expressly granted or given the government, are reserved to the people,” or “rulers cannot exercise any powers but those expressly given to them by the Constitution,” as “totally indefensible.” “The absurdity of this principle will evidently appear,” Tredwell maintained, “when we consider the great variety of objects to which the powers of the government must necessarily extend,” which the Anti-Federalist’s maintained were considerable. “But we may reason with sufficient certainty on the subject,” Tredwell argued, “from the sense of all the public bodies in the United States, who had occasion to form new constitutions,” particularly the constitutions of the several states and the Articles of Confederation. The framers of these constitutions “have uniformly acted upon a direct and contrary principle” It was Article II of the Articles of Confederation, securing the prerogatives of the several states which were not expressly delegated to the national government, that Anti-Federalists continually likened to a bill of rights. “[I]t is clear,” Tredwell maintained, “that the late Convention at Philadelphia, whatever may have been the sentiments of some of its

²¹⁸ “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 844.

members, did not adopt the principle,” that whatever powers are not expressly delegated to the federal government are reserved to the people of the several states. “They have made certain reservations and restrictions,” Tredwell contended, “which, upon that principle, would have been totally useless and unnecessary,” those limitations on national power located in Article I, Section 9 of the proposed Constitution. “[C]an it be supposed,” Tredwell wondered, “that that wise body, whose only apology for the great ambiguity of many parts of that performance, and the total omission of some things which many esteem essential to the security of liberty, was a great desire of brevity, should so far sacrifice that great and important object, as to insert a number of provisions which they esteemed totally useless?”

The privilege of the writ of habeas corpus, which could be suspended by the federal government, save in circumstances when the public safety may require it, such as rebellion or invasion, was one such prerogative retained by the several states. Concerned that the powers delegated to the national government could imperil this venerated liberty, secured by the constitutions of the several states, Tredwell sought unambiguous protection in the form of a bill of rights. “What clause in the Constitution,” Tredwell inquired, “except in this clause itself, gives the general government a power to derive us of that great privilege, so sacredly secured to us by our state constitutions?” Observing that Article I, Section 9 of the proposed Constitution further prohibited the national government from passing bills of attainder or titles of nobility, Tredwell asked, “Are

there any clauses in the Constitution extending the powers of the general government to these objects?” “Some gentlemen,” Tredwell stated, “say that these, though not necessary, were inserted for greater caution.” Tredwell was apprehensive, however, that those prerogatives historically reserved to the several states, prerogatives such as “freedom of election,” “a sufficient and responsible representation,” “freedom of the press,” and “trial by jury in both civil and criminal cases,” were not sufficiently secured without a bill of rights.²¹⁹

The Federalists were not troubled by the “partial bill of rights,” which was of particular concern to Federal Farmer.²²⁰ An inconsiderable number Federalists sought to answer Anti-Federalist concerns over Article I, Section 9 of the Constitution. Their response to the Anti-Federalist argument was thoughtful, but thoroughly unconvincing, at least to those Anti-Federalists who campaigned for a bill of rights. The Federalists argued that the limitations imposed on the national government in Article I, Section 9 were limitations on those powers previously enumerated in Article I, Section 8 of the Constitution. The addition of a “partial bill of rights” did not, in the Federalist view, change the essential nature of the federal government as a government of limited powers.

During the Pennsylvania Ratifying Convention, Jasper Yeates reiterated the familiar Federalist refrain that a bill of rights is unnecessary in a form of government expressly

²¹⁹ Thomas Tredwell, “New York Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 863-864

²²⁰ The Federal Farmer, “Letters from The Federal Farmer IV” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 248.

founded on the consent of the people. In a form of government such as that of England, a bill of rights was “useful and necessary” because a power was instituted “paramount to that of the people.” “[T]he only way which they had to secure the remnant of their liberties,” Yeates maintained, “was, on every opportunity, to stipulate with that power for the uninterrupted enjoyment of certain enumerated privileges.” In a form of government such as that inaugurated by the Philadelphia Convention, a bill of rights was not “useful and necessary,” but “useless and unnecessary.” “Nothing, indeed, seems more clear to my judgment than this,” Yeates declaimed, “that in our circumstances, every power which is not expressly given [in Article I, Section 8 of the Constitution] is in fact reserved.” “But it is asked,” Yeates continued, “as some rights are here expressly provided for, why should not more?” The writ of habeas corpus and the trial by jury in criminal cases are, for instance, “a reservation on the part of the people, and a restriction on the part of their rulers.” Yeates agreed that a bill of rights “would be accompanied with considerable difficulty and danger” “[I]t might be argued at a future day by the persons in power,” Yeates contended, “You undertook to enumerate the rights which you meant to reserve; the pretension which you now make is not comprised in that enumeration, and consequently our jurisdiction is not circumscribed.”²²¹

During the Virginia Ratifying Convention, Edmund Randolph was unabashed in his defense of the Federalist position, “[T]he insertion of the negative *restrictions* [in Article I, Section 9 of the Constitution] has given cause of triumph, it seems, to gentlemen. They

²²¹ Jasper Yeates, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Swartz, vol. 3 (New York: Chelsea House, 1980), 656-57.

suppose that it demonstrates that Congress are to have powers by implication. I will meet them on that ground.” “I persuade myself,” Randolph argued, “that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested [in Article I, Section 8 of the Constitution].”

“To what power in the general government,” Randolph asked, “is the exception made respecting the importation of negroes?” “Not from a general power,” Randolph answered, “but from a particular power expressly enumerated.”²²² Pursuant to Article I, Section 9 of the Constitution, Congress did not have the authority to prohibit the importation of slaves prior to 1808.²²³ This prohibition, Randolph argued, was a limitation on the power of Congress to regulate commerce, a power particularly enumerated in Article I, Section 8.²²⁴ James Wilson had made a similar argument, during his “State House Speech,” concerning the power of Congress to regulate commerce among the several states. “[I]t would have been as necessary to stipulate that the liberty of the press should be preserved inviolate,” Wilson argued, “if a delegation of power to regulate ‘literary publications’ was conferred on Congress similar in scope to the interstate commerce power.” Because the national government had the authority to regulate commerce among the several states, it was necessary to place limits on that authority by stipulating in Article I, Section 9 that

²²² Edmund Randolph, “Virginia Ratifying Convention,” in *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, *Major Themes* (Chicago: University of Chicago Press, 1987; Indianapolis: Liberty Fund, 2000), 471.

²²³ U.S. CONST. art. I, §9, cl. 1.

²²⁴ U.S. CONST. art. I, §8, cl. 3.

“the impost should be general in its operation.”²²⁵ It was not necessary to include such a limitation in Article I, Section 9, protecting freedom of the press, because the national government did not possess such authority to regulate “literary publications” under Article I, Section 8.²²⁶

Article I, Section 9 further secured those ancient rights and privileges inherited from the English common law tradition. The writ of habeas corpus may not be suspended unless, in circumstances such as rebellion or invasion, it is necessary for public safety. “Where is the power,” Randolph asks, “to which the prohibition of suspending *habeas corpus* is an exception?” “I contend that,” Randolph answers, “by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*. This is therefore an exception to that power.” Article I, Section 9 placed limitations on federal legislative authority by prohibiting bills of attainder and ex post facto laws. “This is a manifest exception,” Randolph argued, “to another power.” “We know well that attainders and *ex post facto* laws have always been the engines of criminal jurisprudence. This is, therefore, an exception,” Randolph concluded, “to the criminal jurisdiction vested in that body.”²²⁷

²²⁵ The Constitution provides, “No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” U.S. CONST. art. I, §9, cl. 6.

²²⁶ James Wilson, “An Address to a Meeting of the Citizens of Philadelphia, 529.

²²⁷ Edmund Randolph, “Virginia Ratifying Convention,” *The Founders’ Constitution*, 471.

“[I]n forming a government on its true principles,” Brutus observed, “the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.” “This principle, which seems so evidently founded in the reason and nature of things,” Brutus maintained,

“is confirmed by universal experience.” “Those who have governed,” for instance, “have been found in all ages ever active to enlarge their powers and abridge the public liberty.”²²⁸ “This has induced the people in all countries, where any sense of freedom remained,” for that reason, “to fix barriers against the encroachments of their ruler.”

When he assumed the responsibility for proposing amendments in the First Congress, James Madison, proposed to insert the following provision into Article I, Section 9 of the Constitution, between Clauses 3 and 4: “The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for caution.” Madison proceeded to offer an explanation for his proposed amendment. “It may be said, indeed it has been said,” Madison declared, “that a bill of rights is not necessary, because the establishment of this Government has not repealed those declarations of rights which are added to the several State constitutions”

“[T]hat those rights of the people, which had been established by the most solemn act,

²²⁸ Brutus, “Essays of Brutus II” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset* (Chicago: University of Chicago Press, 1981), 373.

could not be annihilated by a subsequent act of that people,” Madison continued, “who meant and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.”

“I admit the force of this observation,” Madison conceded, “but I do not look upon it to be conclusive.” “In the first place, it is too uncertain ground to leave this provision upon,” Madison maintained, “if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution.” “Besides, some States have no bills of rights,” Madison observed, “there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper” “Instead of securing some in the full extent which republican principles would require,” Madison continued, “they limit them too much to agree with the common ideas of liberty.”

Madison did think that the argument, proffered by Federalists, was “plausible.” With the addition of a bill of rights, the national government could be interpreted as a government of general powers, with the authority to infringe on those rights not expressly singled out for constitutional protection. “It is objected also against a bill of rights,”

Madison observed, “that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in the enumeration” “[I]t might follow by implication,” Madison continued, “that those rights which were not

singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.” “This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system,” Madison conceded, “but, I conceive, that it may be guarded against.” “I have attempted it,” Madison noted, “as gentlemen may see by turning to the last clause of the fourth resolution,” the archetype Ninth Amendment.²²⁹ Madison’s proposed amendment was to allay the fears of those who argued that a bill of rights would not only be unnecessary, but dangerous.

After Madison’s proposed amendment was approved by the First Congress, it was sent to the several states for ratification, modified to read: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²³⁰ From the historical context surrounding the constitutional debate over the need for a bill of rights, and from the argument made in this study, it is evident that what emerged from the First Congress as the Ninth Amendment, was not an open ended warrant for federal courts to identify and enforce unenumerated federal rights. The Ninth Amendment, like the Tenth Amendment, reaffirmed the principle of federalism, securing the written and unwritten liberties of the people in the several states from federal intrusion. Like the Tenth Amendment, the Ninth Amendment was an abridged bill of rights.

²²⁹ James Madison, “Madison Introduces His Amendments,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1027-1031.

²³⁰ U.S. CONST. amend. IX.

CHAPTER FOUR

CONSTRUCTING THE BILL OF RIGHTS: CIVIL LIBERTIES IN THE FIRST CONGRESS

The ratification debate over the Constitution suggested that one of the primary grievances of the Anti-Federalists was the absence of a bill of rights which would preserve the prerogatives of the several states, prerogatives which included the authority of the states to order their own separate political, legal, and social arrangements. These arrangements included not only declarations of rights contained within the text of the state constitutions or attached to the state constitutions as a prefix, but unwritten practices, constituted since time immemorial, and adapted to fit the unique historical circumstances of the American colonies. Such political, legal, and social arrangements found concrete expression in the myriad beliefs, practices, and customs which, based on their concrete experience, many eighteenth-century Americans believed constituted the rights they inherited as Englishmen.

Although the Federalists assured its opponents that the Constitution proposed a government of limited, enumerated powers, the Anti-Federalists remained unconvinced. The Anti-Federalists continued to insist that the constitutional scheme of federalism, agreed to at the Philadelphia Convention, was not an effective means of preserving state prerogatives. The Philadelphia Convention, the Anti-Federalists argued, allocated powers among the states and the federal government in a manner which potentially threatened these state prerogatives. The Anti-Federalists were concerned that state authority over such matters as religious liberty, freedom of speech, freedom of the press, and especially

the trial by jury, were especially vulnerable because of the power vested in the national government under Article I, Section 8. These liberties were protected in state constitutions, state statutes, and the common law. The Anti-Federalists were apprehensive that the states would be impotent if the national government sought to dismantle such political, legal, and social arrangements. Prominent Anti-Federalists, including Patrick Henry, sought additional “auxiliary precautions” because they did not believe that the constitutional scheme of federalism, agreed to at the Philadelphia Convention, provided sufficient protection against a potentially oppressive national government.²³¹ The Anti-Federalists wanted an explicit statement, such as Article II of the Articles of Confederation, securing the liberties of the people in the several states. The Anti-Federalists also wanted to further weaken the authority of the federal government.

Despite Anti-Federalist concerns, however, the Bill of Rights, which was framed by the First Congress and ratified by the several states, did not alter the constitutional arrangements agreed to by the Philadelphia Convention. The Bill of Rights served in part to make explicit what is already known by inference from Article I, Section 8 of the Constitution: the federal government must not encroach upon the powers retained by the states or the people such as the authority to protect the free exercise of religion or freedom of speech. “What is little known, and less understood or appreciated,” Walter Berns observes, “is that, while taking the form of amendments, they did not in fact

²³¹ Quoted in Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: The AEI Press, 1997), 90.

amend—by which I mean change or even modify—the Constitution.”²³² An examination of the constitutional and legal history surrounding the framing and ratification of the Bill of Rights suggests that the purpose of the first ten amendments was to strengthen the existing constitutional edifice, agreed to by the Philadelphia Convention, by reaffirming the original commitment to the principle of federalism. The First Congress evinced a commitment to the principles of federalism, which, Federalists argued, provided for a more powerful national government, while preserving the prerogatives of the states. Madison sought to stave off Anti-Federalist efforts to dismantle the constitutional edifice by proposing amendments which would placate Anti-Federalist opponents of the Constitution, while not significantly altering the commitment to federalism which was agreed by the Philadelphia Convention. Although Madison was successful in maintaining the constitutional status quo, he failed in his effort to strengthen the authority of the national government over the several states.²³³

The Federalists and Anti-Federalists were in essential agreement that the most effective way to preserve liberty was to avert a concentration of political power. The

Federalists, especially Madison, thought more authority should be vested in the national government, at the expense of the several states. The Anti-Federalists were in

²³² Robert A. Goldwin, *From Parchment to Power*, xi.

²³³ Madison proposed to insert into Article I, Section 10 of the Constitution, among the other limitations on the authority of the states, a clause which avowed that “[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” James Madison, “Madison Introduces His Amendments,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1027. Madison’s proposed amendment, limiting the authority of the several states, will be discussed further in Chapter Five.

agreement with many Federalists, such as Madison, that liberty was contingent on the constitutional structure of government, not substantive protections for individual rights. The Anti-Federalists believed, however, that the constitutional structure should provide for decentralization of authority. This kind of decentralization would preserve the prerogatives of the several states. The Anti-Federalists, however, did not believe that the constitutional scheme of federalism, agreed to at the Philadelphia Convention, effectively preserved liberty. They remained stubbornly committed to the familiar constitutional structures which sought to avert a concentration of political power, such as those structures provided for in the Articles of Confederation. The proposed amendments, which were eventually ratified by the First Congress as the Bill of Rights, were not substantive guarantees of individual rights so much as they further clarified the constitutional structure, especially the principle of federalism.

James Madison was content with a bill of rights so long as it did not significantly alter the distribution of power agreed to at the Philadelphia Convention, at least not by weakening the authority of the federal government. The correspondence between Thomas Jefferson and James Madison is significant. The exchange has been considered significant because Jefferson's "unfailing emphasis" on the need for a bill of rights purportedly swayed Madison, "converting Madison's original lukewarm attitude to one of support." But there is little reason to believe that Madison's support of a bill of rights was anything but "lukewarm."²³⁴ Madison was agnostic on the need for a bill of rights.

²³⁴ Bernard Schwartz, "Commentary," in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 592-93.

Madison opposed any amendments to the Constitution which weakened the authority of the federal government. Madison, however, was not completely opposed to a bill of rights so long as it did not significantly alter the distribution of power between the national government and the states. Madison, in fact, believed that a bill of rights might have a salutary effect, satisfying those who were not incorrigibly opposed the Constitution. In a letter to George Washington on February 15, 1788, Madison stated his views on the amendments proposed by the Massachusetts Ratifying Convention. "The amendments are a blemish," Madison opined, "but are in the least offensive form."²³⁵ The amendments proposed by the Massachusetts Ratifying Convention were, in fact, not designed to appease the Anti-Federalists in attendance, but those who would be conciliated by moderate amendments. "The amendments as recommended by the Convention," Madison wrote to Thomas Jefferson on February 19, 1788, "were as I am well informed not so much calculated for the minority in the Convention, on whom they had little effect, as for the people of the state."²³⁶ Madison later expressed the same view in a letter to Edmund Randolph on April 10, 1788. "I view the amendments of Massachusetts," Madison states, "pretty nearly in the same light that you do. They were meant for the people at large, not for the minority in the Convention. The latter were not affected by them; their objections being leveled against the very essence of the proposed Government."²³⁷

²³⁵ James Madison to George Washington, February 15, 1788, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 724.

²³⁶ James Madison to Thomas Jefferson, February 19, 1788, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 725-26.

²³⁷ James Madison to Edmund Randolph, April 10, 1788, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 726-27.

Although the Virginia Ratifying Convention is credited with providing the foundation for the amendments Madison proposed in the First Congress, Madison was anything but supportive of Virginia's efforts. During the Virginia Ratifying Convention, Madison repeatedly opposed amendments as a condition for ratification. Madison was also opposed to recommendatory amendments, if they weakened the frame of the national government. "There are in this state, and in every state in the Union," Madison observed, "many who are decided enemies of the Union." "They will bring amendments," Madison charged, "which are local in their nature, and which they know will not be accepted." "They will never propose such amendments," Madison continued, "as they think would be obtained." Madison concluded, "Disunion will be their object. This will be attained by the proposal of unreasonable amendments."

Madison later, during the Virginia Ratifying Convention, expressed his disapproval of the amendment proposed by that body. "The gentlemen who, within this house, have thought proper to propose previous amendments," Madison noted, "have brought less than forty amendments, a bill of rights which contains twenty amendments, and twenty other alterations, some of which are improper and inadmissible." "With respect to the amendments proposed by the honorable gentleman," Madison opined, "it ought to be considered how far they are good. As far as they are palpably and insuperably objectionable, they ought to be opposed." Madison was not opposed, at least in principle, to amendments which did not alter the allocation of authority in the proposed Constitution. Madison, in fact, thought such amendments would appease those opposed to the proposed Constitution. "As far as his amendments are not objectionable, or

unsafe,” Madison continued, “so far they may be subsequently recommended—not because they are necessary, but because they can produce no possible danger, and may gratify some gentlemen’s wishes.” “But I never can consent to his previous amendments,” Madison concluded, “because they are pregnant with dreadful dangers.”²³⁸

The Virginia Ratifying Convention recommended amendments which substantially weakened the authority of the national government. Among those amendments, the Virginia Ratifying Convention recommended:

[1] When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census therein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.

[2] That no navigation law, or law regulating commerce, shall be passed without the consent of two thirds of the members present, in both houses.

[3] That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present in both houses.²³⁹

Madison would not support such amendments.

Following the adoption of the Constitution, the Anti-Federalists were becoming increasingly impatient that the First Congress was not directing its efforts toward the adoption of amendments recommended by many of the state ratifying conventions. The proposed amendments which, in due course, became the Bill of Rights were not enthusiastically embraced by the First Congress. James Madison pushed the amendments

²³⁸ James Madison, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 789, 824-827.

²³⁹ “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 842-45.

on a reluctant House of Representatives to the displeasure of his colleagues, who were consumed with other matters such as organizing the government created by the Constitution. Madison's sense of urgency, and his willingness to incur the enmity of his House colleagues, may have been due to fear that the requisite two-thirds of the states would present applications requiring Congress to call a constitutional convention pursuant to Article V of the Constitution. Madison hoped to circumvent the possibility of a second constitutional convention by proposing amendments in the First Congress which would not substantially alter the basic division of power between the national government and the several states, agreed to at the Philadelphia Convention. Madison may have been apprehensive that a second constitutional convention would propose structural changes in the federal scheme, which would reverse some of the concessions in favor of national power in the original Constitution. Although the Bill of Rights, as it emerged from the First Congress, did not meet the expectations of ardent Anti-Federalists, it effectively preserved the status quo, dividing authority between the national government and the several states.

In his first address to Congress, President Washington was reluctant to make “particular recommendations on this subject,” instead deferring to the judgment of the legislative branch “to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution, is rendered expedient at the present juncture.” Washington was confident, however, that Congress, in its “discernment and pursuit of the public good,” would “carefully avoid every alteration which might endanger the benefits of a united and effective Government” consistent with “a reverence for the characteristic

rights of freeman, and a regard for the public harmony”²⁴⁰ The House of Representatives, in an address prepared by James Madison, responded, “The question arising out of the fifth article of the Constitution will receive all the attention demanded by its importance”²⁴¹

On May 4, 1789, in the middle of an extended debate regarding import and tonnage duties, James Madison “gave notice” to the House of Representatives “that he intended to bring on the subject of amendments to the constitution,” which they reluctantly agreed to debate on May 25.²⁴² Madison's decision to proceed at this time may have been motivated by a resolution originating with the Virginia and New York state legislatures. On May 5, the following day, Representative Theodoric Bland of Virginia presented to the House of

Representatives an application from the Virginia legislature calling for a second constitutional convention pursuant to the procedures set forth in Article V of the Constitution. The state legislature noted that the Commonwealth of Virginia, in convention assembled, ratified the Constitution in the “full expectation of its imperfections being speedily amended,” imperfections which implicate “all the great and unalienable rights of freemen,” and which are “necessary to secure from danger the unalienable rights of human nature.” Article V of the Constitution provides that Congress may propose amendments to the Constitution with the concurrence of two-thirds of both

²⁴⁰ George Washington, “First Annual Message of President Washington, 1789” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1011-12.

²⁴¹ “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1013.

²⁴² James Madison, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1012.

the House of Representatives and the Senate. The Virginia legislature was apprehensive, however, that “[t]he slow forms of Congressional discussion and recommendation, if, indeed, they should ever agree to any change, would, we fear, be less certain of success. Happily for [the wishes of our countrymen], the Constitution hath presented an alternative” Article V requires Congress to call a constitutional convention, for the purpose of proposing amendments, on the application of two-thirds of the several states. For this reason, the Virginia legislature resolved,

We so, therefore, in behalf of our constituents, in the most earnest and solemn manner, make this application to Congress, that a convention be immediately called, of deputies from the several States, with full power to take into their consideration the defects of this constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind.²⁴³

Representative Bland moved that the Virginia application be referred to a committee of the whole. The motion was followed by a discussion among several members as to how the House of Representatives should proceed when it receives an application from one of the several states calling for a constitutional convention. Representative Elias Boudinot of New Jersey protested that “the business cannot be taken up until a certain number of States have concurred in similar applications.”²⁴⁴ Representative Bland, believing that “there could be no impropriety in referring any subject to a committee,” especially a matter such as “this [which] deserved the serious and solemn consideration of Congress,” hoped that “no gentleman would oppose the compliment of referring it to a

²⁴³ “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1013-14.

²⁴⁴ Elias Boudinot, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1015.

Committee of the whole; beside, it would be a guide to the deliberations of the committee on the subject of amendments, which would shortly come before the House.”²⁴⁵

Although he “had no doubt but the House was inclined to treat the present application with respect,” Madison had grave doubts about referring the application to a committee because this action would imply that the House of Representatives had the prerogative of deliberating about the subject matter. In Madison's view, the words of Article V of the Constitution, “being express and positive relative to the agency Congress may have in case of applications of this nature,” required Congress to call a constitutional convention only when the requisite number of state legislatures concurred in the application. Once the requisite two-thirds of the states called for a constitutional convention, “it is out of the power of Congress to decline complying.” Until such time, Madison argued, “The most respectful and constitutional mode of performing our duty will be, to let it be entered on the minutes, and remain upon the files of the House until similar applications come to hand from two-thirds of the States.”²⁴⁶ Representative Boudinot, who opposed the commitment of the application to a committee of the whole, agreed that “there is nothing left for us to do, but to call [a constitutional convention] when two-thirds of the State Legislatures apply for that purpose.”²⁴⁷

Representative Bland was insistent, however, that “the application now before the committee contains a number of reasons why it is necessary to call a convention. By the

²⁴⁵ Theodoric Bland, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1015.

²⁴⁶ James Madison, “Madison Introduces His Amendments,” 1015.

²⁴⁷ Elias Boudinot, “Madison Introduces His Amendments,” 1015.

fifth article of the Constitution, Congress are obliged to order this convention when two-thirds of the Legislatures apply for it”²⁴⁸ “[H]ow can these reasons be properly weighed,” Representative Bland asked, “unless it be done in committee?” Representative Benjamin Huntington of Connecticut, responded that “[t]here would be an evident impropriety in committing, because it would argue a right in the House to deliberate, and, consequently, a power to procrastinate the measure applied for.” Like Madison, Representative Huntington believed that there was no basis for congressional action until such time as two-thirds of the states submitted applications calling for a constitutional convention. Once the requisite number of states submitted applications, Congress, not having any discretion in the matter, would be required to call a constitutional convention.²⁴⁹ Representative Thomas Tudor Tucker of South Carolina, hoping that “the present application would be properly noticed,” suggested that the House of Representatives was within its discretion to take into consideration every application for a constitutional convention. If the requisite number of states presented applications, however, “it precluded deliberation on the part of the House.”²⁵⁰ Representative Elbridge Gerry of Massachusetts and Representative John Page of Virginia both opposed referring the application to a committee of the whole, leading Representative Bland to finally acquiesce and withdraw his motion. The application was entered into the *Journal* of the House of Representatives and the original copy was placed on file. On May 6, Representative John Lawrence of New York presented to the House of Representatives

²⁴⁸ Theodoric Bland, “Madison Introduces His Amendments,” 1015-16.

²⁴⁹ Benjamin Huntington, “Madison Introduces His Amendments,” 1016.

²⁵⁰ Thomas Tudor Tucker, “Madison Introduces His Amendments,” 1016.

an application from the New York state legislature calling for a second constitutional convention. The application from the New York Assembly was disposed of in a similar manner as the application from Virginia; it was read to the House of Representatives and ordered to be filed.²⁵¹

Madison's announcement on May 4 of his intention to introduce in the First Congress proposed amendments to the Constitution, may have been calculated greatly to diminish the political significance of the applications from the Virginia and New York state legislatures. The congressional debates, which were widely circulated in the newspapers, did not mention any progress with regard to constitutional amendments, undoubtedly a continuing source of consternation for many Anti-Federalists. Madison may have been concerned that the applications from Virginia and New York, two of the most important and influential states in early republic, would get considerable attention from the press. Such attention would aggravate those who, in good faith, supported ratification of the Constitution in the belief that amendments would be introduced to remedy its supposed defects. With the threat of a second constitutional convention looming, Madison had to take a course of action which would contain the momentum generated by the proceedings of the Virginia and New York state legislatures.

By announcing on May 4 that he planned to introduce proposed amendments to the Constitution, Madison may have hoped to diminish the importance of the Virginia and New York applications by reassuring those who ratified the Constitution in the belief that Congress would act on the subject of amendments. Madison might have been aware that

²⁵¹ "Madison Introduces His Amendments," 1016.

the amendments he planned to introduce in the House of Representatives would not be satisfactory to those Anti-Federalists who wanted considerable changes to the newly ratified Constitution. Madison, however, may have believed that he could placate those who were already disposed to accepting the new government with some reasonable amendments which would not substantially alter the structure of the Constitution.

Madison was fully aware that Congress would be required to call a second constitutional convention if the requisite number of states submitted applications, a prospect he wanted to avoid because it would take the process for proposing amendments out of the purview of the significant Federalist majorities in both the House of Representatives and the Senate. By reassuring those who ratified the Constitution in the belief that it would be amended accordingly, Madison made certain that the process for proposing amendments would be managed by the First Congress, and by James

Madison.²⁵² Madison's strategy to seize the advantage on the matter of constitutional amendments was successful. Some of the more politically astute Anti-Federalists, who were hoping the First Congress would not propose any constitutional amendments, understood the importance of Madison's reassurances. In a letter to Madison on June 1, Benjamin Hawkins reported that Madison's motion "on that great and delicate subject

²⁵² Madison appeared confident as early as April 12, 1789, that the matter of constitutional amendments would be managed in the First Congress. In a letter to Edmund Randolph, he wrote, "Whatever the amendments may be it is clear that they will be attempted in no other way than through Congress. Many of the warmest opponents of the Govt. disavow the mode contended for by Virga." His reassurances to Randolph notwithstanding, Madison's motion on May 4 may have betrayed an unwillingness to be overconfident that the constitutional amendment process would be managed by the First Congress. James Madison to Edmund Randolph, April 12, 1789, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1043-44.

directly contradicts” Anti-Federalist predictions “that Congress being once possessed with power, the friends of the new Government would never consent to make any amendments.” Anti-Federalists bitterly complained that they would not forget their partisans in Congress “for suffering any business however important to be done in Congress prior to the subject of amendments, and moreover for suffering this important prophecy [that the First Congress would not act on the matter of amendments] by their tardiness to be contradicted.” Hawkins predicted that if Madison could “do something by way of amendment without any material injury to the system,” not only would he “be much pleased,” it would be agreeable to his countrymen.²⁵³

The House of Representatives continued to be preoccupied with the revenue bill on May 25, and a motion was seemingly approved to defer consideration of constitutional amendments until June 8.²⁵⁴ When the June 8 day arrived, Madison rose and “reminded the House that this was the day that he had heretofore named for bringing forward amendments to the constitution, as contemplated in the fifth article of the constitution.” Considering himself “bound in honor and duty,” Madison pledged that he would “advocate them until they shall be finally adopted or rejected by a constitutional majority

²⁵³ Benjamin Hawkins to James Madison, June 1, 1789, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1046.

²⁵⁴ The motion is not mentioned in the *Annals of Congress*. In his June 8 speech to the House of Representatives, however, Madison stated, “When I first hinted to the House my intentions of begging their deliberations to this object [on May 4, 1789], I found the pressure of other important matters had submitted the propriety of postponing this till the more urgent business was despatched; but finding that business not despatched, when the order of the day for considering amendments arrived [May 25, 1789], I thought it a good reason for a farther delay; I moved the postponement accordingly [until June 8, 1789].” “Madison Introduces His Amendments,” 1016.

of this House.”²⁵⁵ Madison then moved to refer them to a committee of the whole.

Madison's motion, however, was received with less than enthusiastic support from other members of the House of Representatives who were preoccupied with the onerous task of organizing the new government, including placing it on a sound financial footing.

Describing the matter as “premature,” Representative Smith was concerned that “it must appear extremely impolitic to go into the consideration of amending the Government,

before it is organized,” especially when the revenue bill remains in an unfinished state.”²⁵⁶

Representative James Jackson of Georgia was of the opinion that “we ought not to be in a hurry with respect to altering the constitution.”²⁵⁷ Representative Jackson asked, “What experience have we had of the good or bad qualities of this constitution?” It was his belief that the House of Representatives should attend to “more important business,” such as the revenue bill. It would not be possible to examine what sections of the Constitution were in need of amendment until such time as the government was operating with a sound basis of revenue. For this reason, Representative Jackson considered any proposed changes “imprudent.” Although he declared, “I am against taking up the subject at present, and shall be totally against the amendments, if the Government is not organized, that I may see whether it is grievous or not,” Representative Jackson was not

²⁵⁵ James Madison, “Madison Introduces His Amendments,” 1016-17.

²⁵⁶ Smith, “Madison Introduces His Amendments,” 1017. It is not clear from the record if this is Representative William Smith of Maryland or Representative William L. Smith of South Carolina.

²⁵⁷ James Jackson, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1017-18.

opposed to amending the Constitution at some future time.²⁵⁸ He concluded, “When the propriety of making amendments shall be obvious from experience, I trust there will be virtue enough in my country to make them.”²⁵⁹

Although he was not opposed to considering proposed amendments to the Constitution “because it is the wish of many of our constituents, that something should be added to the constitution, to secure in a stronger manner their liberties from the inroads of power,” Representative Benjamin Goodhue of Massachusetts thought “the present time premature” in light of other matters before the House of Representatives, matters which were “essential to the public interest.”²⁶⁰ Representative Aedanus Burke of South Carolina thought amendments to the Constitution were “necessary,” but believed “this was not the proper time to bring them forward.”²⁶¹ Representative Burke, believing that “the law for collecting the revenue is immediately necessary,” thought the matter of constitutional amendments should be deferred until the government was completely organized.²⁶²

Madison cautioned that “if we continue to postpone from time to time, and refuse to let the subject come into view, it may occasion suspicions, which, though not well founded, may tend to inflame or prejudice the public mind against our decisions. They

²⁵⁸ Representative Jackson wanted the matter of constitutional amendments deferred until March 1, 1790.

²⁵⁹ James Jackson, “Madison Introduces His Amendments,” 1017-18.

²⁶⁰ Benjamin Goodhue, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1019.

²⁶¹ Aedanus Burke, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1019.

²⁶² Aedanus Burke, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1019.

may think we are not sincere in our desire to incorporate such amendments in the constitution as will secure those rights, which they consider as not sufficiently guarded.” It was his belief that if the First Congress had attended to the matter of constitutional amendments earlier, “it would have stifled the voice of complaint, and made friends of many who doubted the merits of the constitution.” Madison thought it was important that “[o]ur constituents may see we pay a proper attention to a subject they have much at heart.” Despite Madison's reassurances that “I only wish to introduce the great work,” rather than “enter into a full and minute discussion of every part of the subject,” his colleagues in the House of Representatives remained obstinate.²⁶³ Unlike Madison, who saw the pressing need to neutralize those who were agitating for a second constitutional convention, many other members of the House of Representatives saw the constitutional amendments as a distraction from the more important matter of organizing the new government.

Madison's request instigated another lengthy debate among his colleagues on the propriety of considering constitutional amendments at this time. Representative Roger Sherman of Connecticut, who was willing to refer the matter to a committee of the whole for the sole purpose of receiving the amendments, restated the more urgent need to approve a revenue bill, and organize the executive and judicial branches of government. Representative Sherman agreed with “[o]ther gentlemen [who] may be disposed to let the subject rest until the more important objects of government are attended to,” and concluded “that the people expect the latter from us in preference to altering the

²⁶³ Madison, “Madison Introduces His Amendments,” 1019-20.

constitution; because they have ratified that instrument, in order that the Government may begin to operate.”²⁶⁴ Representative Alexander White of Virginia, who was also disposed to referring the matter to a committee of the whole for the purpose of receiving amendments, understood, however, that a “majority of the people who have ratified the constitution, did it under the expectation that Congress would, at some convenient time, examine its texture and point out where it was defective, in order that it might be judiciously amended.” Although he wanted the “more pressing” business of organizing the new government to be completed, Representative White was hoping the matter of amendments would be “considered with all convenient speed” because it would “tranquillize the public mind.” If Congress refused to consider the matter, however, Representative White predicted that it would “irritate many of our constituents”²⁶⁵ Representative William L. Smith of South Carolina was also agreeable to referring the matter to a committee of the whole for the purpose of receiving Madison's proposed amendments, but suggested that the House of Representatives approve a motion stating “[t]hat, however desirous this House may be to go into the consideration of amendments to the constitution, in order to establish the liberties of the people of America on the securest foundation, yet the important and pressing business of the Government prevents their entering upon that subject at present.”²⁶⁶

²⁶⁴ Roger Sherman, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1020.

²⁶⁵ Alexander White, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1021.

²⁶⁶ William Smith, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1023.

Representative John Page of Virginia, who in a moment of apparent exasperation complained, “[i]f no objection had been made to his motion, the whole business might have been finished before this,” understood why Madison was so persistent. Page explained

Putting myself into the place of those who favor amendments, I should suspect Congress did not mean seriously to enter upon the subject; that it was vain to expect redress from them. I should begin to turn my attention to the alternative contained in the fifth article, and think of joining the Legislatures of those States which have applied for calling a new convention. How dangerous such an expedient would be I need not mention; but I venture to affirm, that unless you take early notice of this subject, you will not have power to deliberate. The people will clamor for a new convention; they will not trust the House any longer. Those, therefore, who dread the assembling of a convention, will do well to acquiesce in the present motion, and lay the foundation of a most important work.²⁶⁷

Representative Page, however, was unable to persuade one of his colleagues on the importance of attending to the matter of constitutional amendments.

Madison apologized for being an “accessary to the loss of a single moment of time by the House,” and withdrew his earlier motion to refer the proposed amendments to a committee of the whole, only after admonishing his colleagues that [i]f I had been indulged in my motion, and we had gone into a Committee of the whole, I think we might have rose and resumed the consideration of other business before this time.”²⁶⁸ Madison moved that a select committee be appointed to consider amendments which are proper for Congress to propose. Before any further procedural considerations were debated by the

²⁶⁷ John Page, “Madison Introduces His Amendments,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1023-24.

²⁶⁸ James Madison, “Madison Introduces His Amendments,” 1023-24.

members of the House of Representatives, Madison presented those amendments which he considered “proper” in “one of the greatest addresses in our history.”²⁶⁹

Madison’s address to the First Congress on June 8, 1789, serves to illustrate the relationship between the Constitution and the Bill of Rights. It is important to note that

James Madison did not originally propose to affix his proposals to the Constitution as amendments, but to interweave them into the text of the document. Madison anticipated that his proposed changes would be interweaved into the structure of the original Constitution. On May 27, 1789, Madison informed Thomas Jefferson that he intended to propose a bill of rights, “incorporated perhaps into the text of the Constitution”²⁷⁰ The First Congress resolved, however, not to incorporate Madison’s proposed articles of amendment into the structure of the original Constitution. This seemingly insignificant decision by the First Congress has obscured more about our understanding of the Bill of Rights than it has disclosed.

If the proposed amendments were incorporated directly into the Constitution by the First Congress, the manner in which the Bill of Rights actually accommodates the original constitutional structure would not be obscured by the conventional understanding. “If the House of Representatives had gone along with Madison’s proposal to insert the new articles in the body of the Constitution,” Robert A. Goldwin argues, “it would have been difficult of think of them collectively as a body to be called the Bill of

²⁶⁹ Bernard Schwartz, “Commentary,” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1007.

²⁷⁰ James Madison to Thomas Jefferson, May 27, 1789, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1044-45.

Rights, or any other collective name.” “They would more likely have been seen as integrally part of the Constitution,” Goldwin continues, “in no way unlike the rest of the text, and this less likely to be considered as some sort of corrective of a defective original, or of a different character, or as pointing in a different direction.” “With no substantive difference from what we have now,” Goldwin concludes, “they would nevertheless have blended in and become part and parcel of the original text, instead of seeming to stand apart and separate.”²⁷¹ Although the Virginia Ratifying Convention is often credited with providing the foundation for Madison’s proposed amendments, Madison avoided those amendments which would significantly alter the structure of the Constitution. Those amendments which Madison proposed only made explicit what was implicit in the constitutional structure. Madison’s proposed amendments, in fact, track the structure of the original Constitution.

Madison proposed that the Constitution be prefaced with a declaration that all power is derived from the people:

[1] That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

[2] That the people have an indubitable, unalienable, and inalienable right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.²⁷²

Madison proposed to insert the following provisions, into Article I, Section 9, between clauses 3 and 4:

²⁷¹ Robert A. Goldwin, *From Parchment to Power* (Washington, D.C.: The AEI Press, 1997), 84.

²⁷² James Madison, “Madison Introduces His Amendments,” 1026.

[1] The civil rights of none shall be abridged on account of religious belief and worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

[2] The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

[3] The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.

[4] The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

[5] No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.

[6] No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

[7] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[8] The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all reasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

[9] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

[10] The exceptions granted here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.²⁷³

Madison's decision to interweave these provisions into Article I, Section 9, that section of the Constitution which Federal Farmer christened a "partial bill of rights," may

²⁷³ James Madison, "Madison Introduces His Amendments," 1026-28.

be understood by recalling the exchange between Federalists and Anti-Federalists, during the ratification debates, over the necessity of a bill of rights.²⁷⁴ Article I, Section 9 of the Constitution placed limitations on the power of Congress which included:

[1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.²⁷⁵

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.²⁷⁶

In a government of enumerated powers, the Federalists argued, a bill of rights would be unnecessary, even dangerous. The national government could only exercise those powers enumerated in Article I, Section 8: powers which included the authority to lay and collect taxes for the general welfare of the United States, regulate commerce among the several states, raise and maintain an army, and declare war. Since the national

²⁷⁴ The Federal Farmer, “Letters from The Federal Farmer IV” in *The Complete Anti-Federalist*, ed. Herbert J. Storing, vol. 2, *Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset*, (Chicago: University of Chicago Press, 1981), 248.

²⁷⁵ Madison’s proposed amendments would be inserted between clauses three and four.

²⁷⁶ U.S. CONST. art. I, § 9.

government did not have the authority, under Article I, Section 8, to regulate matters pertaining to free speech and religious liberty, for example, a bill of rights would be superfluous. The Federalists further contended that the inclusion of a bill of right might provide a pretext for interpreting the government proposed by the Philadelphia Convention as a government of general powers, like those of the several states, with extensive authority to regulate in all matters, except those included in the enumeration of rights reserved to the states or the people. Alexander Hamilton observed in Federalist No. 84 that a bill of rights “would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted.”²⁷⁷

The Anti-Federalists sought to exploit weaknesses in the Federalist argument against the necessity of a bill of rights. The powers delegated to the national government under Article I, Section 8, the Anti-Federalists argued were not as unambiguous as the Federalists contended. Combined with the authority vested in the national government by the necessary and proper clause, the national government could exercise considerable power, which might infringe on the authority reserved to the states or the people. Of equal, or even greater concern, was the presence in Article I, Section 9 of a “partial bill of rights.” If a bill of rights was not necessary in a government of enumerated powers, the Anti-Federalists responded, it would not be necessary to include a “partial bill of rights” in Article I, Section 9. The Federalists rejoined that the limitation imposed on the national government in Article I, Section 9, such as limitations on the authority of the national

²⁷⁷ Alexander Hamilton, “Federalist No. 84,” in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 445.

government to suspend the privilege of the writ of *habeas corpus*, and pass bills of attainder and *ex post facto* laws, were limitations on those powers enumerated in Article I, Section 8. The Anti-Federalists remained incredulous.

When Madison's decision to insert his proposed changes into Article I, Section 9 is placed in historical context, the meaning of the Bill of Rights becomes more transparent.

Madison's proposals concerning freedom of speech and religious liberty were eventually ratified as the First Amendment to the Constitution. The authority to regulate freedom of speech and religious liberty were viewed as being beyond the power of Congress in Article I, Section 8. The introductory words of the First Amendment, "Congress shall make no law . . . , " explicate "the Article I, Section 8 catalogue of enumerated powers by suggesting that Congress lacked enumerated power to censor expression or regulate state religious policy" In this view, the First Amendment is "a kind of reverse 'necessary and proper clause.' " ²⁷⁸ Not only was the authority to regulate freedom of speech and religious liberty beyond the power of Congress in Article I, Section 8, such liberties of the people must be examined in light of the Ninth Amendment. The Ninth Amendment was intended as a "residuary clause" for those liberties of the people of the several states, not specifically enumerated in a bill of rights. The specific enumeration of rights such as freedom of speech and religious liberty does not change the essential nature of the rights upon which Congress may not infringe, the rights of the people in the several states. Like the Ninth Amendment, it is difficult, if not

²⁷⁸ Akhil Amar. Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press), 36-37.

impossible to incorporate, to make the Bill of Rights, binding on the several states, by means of the Fourteenth Amendment. To apply the First Amendment's guarantee of freedom of speech to the states would be to precisely eliminate its purpose, to secure the liberties of the people in the several states, by prohibiting the federal government from overriding state guarantees of freedom of speech. It would be no more possible to incorporate the first eight amendments than the Ninth and Tenth Amendments.

Madison further proposed that Article III, Section 2, would be amended to include following provision as a codicil to clause 2, a provision which would preserve the venerable fact-finding authority of the jury:

[1] But no appeal of such court shall be allowed where the value in controversy shall not amount to-dollars: nor shall any fact triable by jury, according to the course of the common law, be otherwise re-examinable than may consist with the principles of common law.²⁷⁹

Article III, Section 2, clause 3,²⁸⁰ would be replaced with the following provision securing local prerogatives over criminal procedure, including a guarantee that the trial of all crimes shall be by a jury of the *vicinage*:²⁸¹

²⁷⁹ Article III, Section 2, clause 2 of the Constitution provides that "In all Cases affecting Ambassadors, other public Ministers, and Consuls, and those, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."

²⁸⁰ Article III, Section 2, clause 2 of the Constitution provides that "The Trial of all Crimes, except in cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but, when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

²⁸¹ James Madison, "Madison Introduces His Amendments," 1027-28. Article III of the Constitution only provides for a criminal trial in the state where the crime was

[1] The trial of all crimes (except in cases of impeachments, and cases arising in the land of naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in all cases committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offense.²⁸²

The essential debate, in the First Congress, discloses that James Madison proposed “amendments” which did not alter the basic nature of the constitutional structure, but served, in part, to make explicit what is already known by inference from Article I, Section 8 of the Constitution: the federal government must not encroach upon the powers retained by the states or the people. Madison’s purpose was not to amend the Constitution by providing for individual rights, but to reaffirm the basic constitutional structure, especially the principle of federalism, which reserved such matters to the states.

committed. Madison’s proposed change to Article III is a concession to local prerogatives, securing a criminal trial in the local vicinage where the crime was committed. The text of Madison’s proposed change is agnostic as to whether trial by jury is a right vested in the accused, securing a right to a trial by jury, or a right vested in the local community to participate in the judicial process through jury service.

²⁸² James Madison, “Madison Introduces His Amendments,” 1027.

CHAPTER FIVE

JAMES MADISON'S FOURTEENTH AMENDMENT

In addition to preventing the prospect of a second constitutional convention, which may have proposed significant changes in the allocation of authority power between the national government and the several states, James Madison was further motivated by an objective which he initially proposed at the Philadelphia Convention. On May 29, 1787, Edmund Randolph, the governor of Virginia, introduced a plan of government on behalf of the delegates from Virginia. Written principally by James Madison, the Virginia Plan proposed a plan of government giving the national legislature considerable authority, including the power to invalidate state legislation and execute its decisions by means of force. The national government inherited those powers exercised by the Congress of the Confederation which were “vested” in the national legislature under the Articles of Confederation. The Virginia Plan further provided that the national government had legislative authority “in all cases to which the Separate States are incompetent” or “in which the harmony of the United States may be interrupted” by the exercise of individual state lawmaking authority. The national legislature would also be authorized to “negative” all legislation passed by the several states which, in the view of the national legislature, came into conflict with the national government. The authority of the national government to invalidate state legislation would be supported by the power to “call forth

the force of the Union” against those states which did not comply with their obligations to the national government.²⁸³

Although Madison's proposal was defeated at the constitutional convention, he hoped to resurrect it in the First Congress as an amendment, which would have placed significant limitations on the authority of the states. Madison's proposed amendments, which came to be celebrated as the Bill of Rights, did not alter the manner in which the Philadelphia Convention allocated authority between the national government and the several states. The purpose of Madison's amendments was to restate, in more explicit terms, the structure of government under the newly ratified Constitution. The proposed amendments would effectively assuage the fears of those who were apprehensive about the powers delegated to the national government, while maintaining the distribution of power agreed to at the Philadelphia Convention. Madison did, however, propose an amendment which would have placed significant limitations on the authority of the states. Madison proposed to insert into Article I, Section 10 of the Constitution, among the other limitations on the authority of the states, a clause which avowed that “[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”²⁸⁴ Madison's proposed amendment would have placed significant

²⁸³ James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, 3rd ed. (Indianapolis: Liberty Fund, 2000), 257-58.

²⁸⁴ James Madison, “Madison Introduces His Amendments,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1027.

limitations on the powers of the states, in the areas of freedom of speech, religious liberty, and criminal procedure, limitations which were potentially subject to enforcement by the national government.

The proposed amendment, limiting the authority of the states, was not without philosophical foundation. Madison understood that a republican form of government presented a unique problem in political theory and practice. This concern was most vividly conveyed in Federalist No. 51, “It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.”²⁸⁵ Madison certainly understood the need to ensure that government officials, to whom the people delegated authority, did not rule in their own self-interest. It was especially important to protect the liberties of the people against an indifferent, even oppressive, government. Madison, however, was troubled by an equally vexing problem. In a republican form of government, where all power was professedly founded on the consent of the people, it was vitally important not only to protect the liberties of the people against a potentially oppressive government, but also to protect the liberties of the people, especially the rights of the minority, against the injustice of a potentially oppressive democratic majority. It was the potential for tyranny arising from a democratic majority which Madison’s proposed amendment sought to remedy.

²⁸⁵ James Madison, “Federalist No. 51,” in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 270.

Many Anti-Federalists were struggling with Madison's initial concern of how to secure the rights of the people against a potentially oppressive government. In a monarchical form of government, the primary threat to liberty originated with a self-interested king or prince. In a monarchy such as that in England, it was necessary to balance claims of royal prerogative against the liberties of the people. Limitations on royal prerogative were extracted from the king by the people, not uncommonly at the point of a sword, and memorialized in a written document such as a bill of rights. In the English constitutional and legal tradition, a bill of rights was the means by which the people preserved their liberties at the expense of royal prerogative. Such, for example, were the circumstances leading to the adoption of the English Bill of Rights during the Glorious Revolution of 1688-89. The English Bill of Rights denoted the conditions under which William and Mary, at the invitation of Parliament, ascended to the throne following the flight and abdication of James II. The English Bill of Rights redefined the relationship between the monarch and his subjects by placing considerable limitations on the power of the king to exercise authority by means of royal prerogative. These limitations on the authority of the crown were deemed necessary in order to protect and vindicate the ancient rights and liberties of Englishmen. These ancient rights and liberties included the prerogative of Englishmen to order their own legal, social, and political institutions without undue interference from the crown. The English Bill of Rights represented a landmark in the seventeenth-century struggle between the Stuart monarchs

and Parliament, a struggle which culminated in the dominance of Parliament over claims of royal prerogative.²⁸⁶

The debate which erupted between Federalists and Anti-Federalists over ratification of the proposed Constitution was evocative of the English constitutional experience. Anti-Federalists were still struggling with the problem which confounded seventeenth-century Englishmen, how to protect the people against a potentially despotic government. They believed that the form of government proposed by the Philadelphia Convention presented dangers to the liberties of the people similar to those dangers faced by seventeenth-century Englishmen. For Anti-Federalists, the frame of reference was the American colonial experience. The American colonies, believing their inherited rights as Englishmen were threatened by the central government in England, sought independence. Not unexpectedly, one of the primary grievances of the Anti-Federalists to the proposed Constitution was the absence of a bill of rights. Like the seventeenth-century Englishmen who preceded them, the Anti-Federalists believed that a bill of rights would reduce any threats to the liberties of the people from a potentially despotic government. Like the Englishmen who were concerned about preserving the liberties of the people against the royal prerogatives asserted by a potentially despotic king, those eighteenth-century Americans who supported a bill of rights did so in the belief that it was necessary to preserve the liberties of the people against a potentially oppressive national government.

²⁸⁶ McClellan, *Liberty, Order, and Justice*, 26-28.

These liberties included the myriad political, social, and legal arrangements which developed over a considerable period of time at the colonial and state level.

The Federalists were concerned, like the Anti-Federalists, with the same vexing problem: how to protect the people against a potentially despotic government. The Federalists, however, argued that a bill of rights was not necessary in a form of government, such as that proposed by the Philadelphia Convention. This argument, that a bill of rights was not necessary in a form of government based on the consent of the people, was proffered by Alexander Hamilton in Federalist No. 84. “It has been several times truly remarked,” Hamilton explained, “that bills of rights are, in their origins, stipulations between kings and their subjects, abridgments of prerogative in favour privilege, reservations of rights nor surrendered to the prince.” “Such was the MAGNA CHARTA,” Hamilton noted, “obtained by the Barons, sword in hand, from king John.” “Such were the subsequent confirmations of that charter,” Hamilton continued, “by succeeding princes.” “Such was the *petition of right*,” Hamilton again noted, “assented to by Charles the First, in the beginning of his reign.” And, Hamilton concluded, “Such also, was the declaration of right presented by the lords and commons to the prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights.”

“It is evident,” Hamilton maintained, “that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.” In the English

constitutional tradition, bill of rights placed limitations of the authority of the monarch. “Here,” Hamilton argued, “in strictness, the people surrender nothing; and as that retain every thing, they have no need of particular reservations.” Hamilton then proceeded to cite the preamble to the proposed constitution. “[T]his is a better recognition of popular rights,” Hamilton explained, “than volumes of those aphorisms, which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government.”²⁸⁷

During the Pennsylvania Ratifying Convention, which preceded Hamilton’s Federalist No. 84, the Federalists argued that a bill of rights was not appropriate in a government based on the consent of the people. “The doctrine and practice of declarations of rights,” James Wilson explained, “have been borrowed from the conduct of the people of England on some remarkable occasions” “[B]ut the principles and maxims, on which their government is constituted,” Wilson added, “are widely different from those of ours.” “After repeated confirmations of [the Magna Charta], and after violations of it repeated equally often,” Wilson explained, “the next step taken in this business was, when the petition of rights was presented to Charles I.” “[W]hen the whole transaction is considered,” Wilson continued, “we shall find that those rights and liberties claimed only on the foundation of an original contract, supposed to have been made, at some former period, between the king and the people.” “But, in this Constitution,”

²⁸⁷ Alexander Hamilton, “Federalist No. 84,” in Alexander Hamilton, John Jay, and James Madison, *The Federalist (The Gideon Edition)*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 442-451.

Wilson explained, “the citizens of the United States appear dispensing a part of their original power in what proportion they think fit.” “They never part with the whole,” Wilson noted, “and they retain the right of recalling what they part with.” Wilson compared the authority of the people to a “fee-simple.” Wilson’s analogy of the authority of the people to a fee-simple was apt. The fee-simple was at common law an estate in land, a kind of freehold ownership, conveying absolute ownership of real property. Like fee-simple ownership, the people of the several states had absolute, and ultimate, authority over the federal government. “[W]hy should they have recourse to the minute and subordinate remedies,” Wilson asked, “which can be necessary only to those who pass the fee, and reserve only a rent-charge?”

“We have already seen the origin of magna charta,” Wilson noted, “revisiting the matter, and tracing the subject still further we find the petition of rights claiming the liberties of the people, according to the laws and statutes of the realm, of which the great charter was the most material” “[H]ere gain,” Wilson affirmed, “recourse is had to the old source from which their liberties are derived, the grant of the king.” “It was not until the revolution that the subject was placed upon a different footing,” Wilson noted, “and even then the people did not claim their liberties as an inherent right, but as the result of an original contract between them and the sovereign.” [A]n attention to the situation of England will show,” Wilson concluded, “that the conduct of that country in respect to bills of rights, cannot furnish an example to the inhabitants of the United

States, who by the revolution have regained their natural rights, and possess their liberty neither by grant nor contract.” Wilson’s appeal to the language of natural rights theory, however, is a veiled reference to the historic rights of Englishmen, preserved by the colonists as a result of the American War of Independence. Wilson’s view, that a bill of rights was not suitable for a government based on the consent of the people, was almost universally accepted by his Federalist colleagues who addressed the concern.²⁸⁸

Foremost in Madison’s mind, however, was protecting a minority against the injustice of an oppressive democratic majority. Madison remained skeptical that a bill of rights would be an efficacious means of protecting the liberties of the people against democratic strife, dismissing a bill of rights as a “parchment barrier.”²⁸⁹ The correspondence between Jefferson and Madison reveals that Madison remained primarily concerned with the need to protect individuals and minorities against a potentially oppressive democratic majority. Although Madison was preoccupied with the need to protect individuals and minorities against a potentially oppressive democratic majority, he never remained consistent in his belief that the rights of the minority would be protected through a stronger, more powerful, federal government. Madison wanted to empower the federal legislature in an extended republic. It was this theme to which Madison continually returned. Madison’s view, that an extended republic would prevent tyranny of the majority, received full expression in Federalist No. 10. The examples of history persuaded Anti-Federalists that

²⁸⁸ James Wilson, “Pennsylvania Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 632.

²⁸⁹ James Madison to Thomas Jefferson, October 17, 1788, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 616.

free republican governments could only exist in small territories with homogenous populations sharing the same opinions, beliefs, and passions. James Madison observed in Federalist No. 10, however, that such governments were “spectacles of turbulence and contention” which were “as short in their lives, as they have been violent in their deaths.”²⁹⁰ Madison suggested that an extended republic, like that proposed by the Philadelphia Convention, would control the violence of factions because it allowed for an elaborate system of separation of powers and checks and balances, distributing power between the national government and the states and among the three branches of the national government.

On October 24, 1787, Madison wrote a letter to Thomas Jefferson, then Minister to France, in which he took “the liberty of making some observations” on the deliberations at the Philadelphia Convention. The Philadelphia Convention seemed to be “sincere and unanimous” in its conviction that a confederation of sovereign states would be unable to secure those important national objectives which eluded the general government under the Articles of Confederation. “A voluntary observance of the federal law by all the members,” Madison observed, “could never be hoped for,” and “[a] compulsive one could evidently never be reduced to practice,” at least in the absence of “military force” which would engender “a scene resembling much more a civil war than the administration of a regular government.” The Philadelphia Convention, therefore, adopted a form of government in which the people of the several states would delegate

²⁹⁰ Madison, “Federalist No. 10,” 46.

enumerated authority to the national government, while retaining those residual powers not ceded to the national government.

Among the “great objects which presented themselves,” one was the proper allocation of authority among the states and the federal government. The Philadelphia Convention needed “to draw a line of demarkation,” an exceedingly difficult undertaking, dividing political sovereignty between the national government and the several states. Such a “demarcation,” Madison hoped, “would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them.” The “due partition of power between the General & local Governments” was, in fact, one of the most vexing issues, “perhaps of all, the most nice and difficult,” which concerned the Philadelphia Convention. “[I]t is impossible to consider,” Madison observed, “the degree of concord which ultimately prevailed as less than a miracle.”

Madison was almost certainly disappointed that the Philadelphia Convention did not adopt the measure, written principally by Madison, which gave the national legislature authority to enact laws “in all cases to which the Separate States are incompetent; or in which the harmony of the United States may be interrupted, by the exercise of individual Legislation” and also gave the national legislature power to “negative all Laws passed by the several States, contravening, in the opinion of the National Legislature, the articles of Union.” “As I formerly intimated to you my opinion in favor of this ingredient,” Madison wrote, “I will take this occasion of explaining myself on the subject.” The

national legislature would be empowered under this proposal to abolish all state laws which, in its own judgment, came into conflict with the newly proposed plan of government, and even use force against any state that failed to fulfill the duties imposed by the articles of union. Madison believed that a “constitutional negative on the laws of the States” was necessary not only to prevent intrusion on the authority of the national government by the states, which raised the “evil of imperia in imperio,” but also “to prevent instability and injustice in the legislation of the States.”

Madison argued that, although a complete supremacy was not necessary, a controlling power was necessary in every society so that the general government could be defended against from infringement by the subordinate governments. A controlling power was further necessary to prevent the subordinate governments from intruding on the respective prerogatives of each other. The federal system of government under the proposed Constitution was not a confederacy of independent states, but the aspect of a “feudal system of republics.” “And what has been the progress and event,” Madison asked, “of the feudal Constitutions?” “In all of them,” Madison observed, “a continual struggle between the head and the inferior members, until a final victory has been gained in some instances by one, in others, by the other of them.” Madison noted, however, that in the feudal system the sovereign was independent, having no interests with the subordinate authorities. “In the American Constitution,” Madison noted, “[t]he general authority will be derived entirely from the subordinate authorities.” Madison referenced themes that would be more thoroughly articulated in Federalist No. 45 and Federalist No.

46. The several states would be represented in the Senate, the state legislatures having the authority to appoint senators. The House of Representatives would represent the people in their individual capacity. Because the president is elected by the electoral college, the state legislatures having plenary authority to select the manner in which electors will be chosen, he would be accountable to the electors, and the several states. The dependence of the federal government on the several states would, in Madison's view, effectively secure the several states from undue intrusion.

Madison further believed that a "constitutional negative on the laws of the States" was necessary because of the injustice repeatedly inflicted upon individuals at the hands of democratic majorities through capricious state laws. The "mutability" of the laws of the states placed the security of private rights in an especially precarious position. Any proposed plan of government that did not make adequate provision for containing this "serious evil" was "materially defective." "The injustice of them," Madison noted, "has been so frequent and so flagrant," Madison worried, "as to alarm the most stedfast friends of Republicanism." "I am persuaded I do not err in saying," Madison continued, "that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the Public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation in its immediate objects." Madison was not content that the limitations placed on the several states in Article I, Section 10 of the proposed Constitution were "sufficient" to secure private rights, describing them "short of the mark." Although Article I, Section 10 of the

proposed Constitution prohibited the states from emitting bills of credit and violating the obligation of contracts, these provisions did not extend to all cases where injustice may be inflicted by state laws. The “infinite of legislative expedients” through which the states could infringe on the private rights of individuals required a constitutional provision which protected against all potential cases of injustice. The “partial provision” provided for in Article I, Section 10 of the proposed Constitution, limiting the authority of the several states would not restrain the “disposition” towards injustice. Madison thought that it was necessary to give the national government more extensive authority over the prerogatives of the states in order to secure individual rights. It remained to be seen, however, why private rights would be any more secure under the national government than the governments of the several states. Because the national government, like the governments of the several states, was based on the republican principle of majority rule, there was no reason to believe that individual rights would be any more secure under the national government than under the state governments. The national government was not distinct from those of the several states with regard to “any material difference in their structure,” but “the extent within which they will operate.”

Madison believed, however, that a powerful national government was not only consistent with, but also necessary prerequisite for the protection of individual rights. A comprehensive examination of this question would reveal that, in Madison’s view, in order to preserve private rights, a republican form of government, contrary to the view accepted by “theoretical writers,” must operate in an “extended sphere.” Those

“theoretical writers” who supposed that the state governments were more likely to protect individual rights were assuming that these governments were simple democracies or pure republics actuated by the will of the majority, a notion Madison thought was thoroughly fictitious. It was assumed that in a simple democracy or pure republic, the people composing the society, in addition to an equality of political rights, had the same interests and feelings. In such a society, where the citizens shared common interests and passions, the interest of the majority would be consistent with the interest of the minority. The affairs of the public could be effectively administered because the good of the whole would depend on the “mere opinion” of the majority, “the safest criterion,” which could be readily ascertained in a simple democracy by gathering the people together. The reasoning supporting the conviction that individual rights were best preserved in a simple democracy, composed of a homogenous mass of citizens, was conclusive if such a democracy ever existed.

Madison doubted that such a democracy existed or ever did exist. Such a condition may have existed in the “savage state,” but under such conditions government may not even be necessary. It is important to recognize that in civilized societies, various distinctions are inevitable. Inequality of property necessarily is a consequence of that protection government gives individuals to develop his faculties to their greatest potential. The capacity some individuals to acquire property more capably than others will result in different classes such as rich and poor, creditors and debtors, and myriad economic interests—monied, mercantile, agricultural, and manufacturing. In addition to

these natural distinctions will be differences, the product of historical accident, based on political and religious viewpoints. However erroneous or irrational these differences may appear to “the enlightened Statesman or benevolent philosopher,” they were a manifest part of reality in a civilized society. The challenge was to provide the majority, having common interests and passions, with sufficient motives for respecting the rights of the minority.

Madison's resolution to this difficult problem was the creation of an extended republic, characterized by many competing interests, and with sufficient power to restrain the impulses of potentially oppressive majorities which may appear in the several states. In a simple democracy, the majority would have sufficient reason, motivated by common interests and passions, to infringe on the liberty of the minority. In an extended republic, the large number of factions and conflicting interests would make it improbable that a majority could unite for the purpose of oppressing the minority. In a republican form of government, the remedy for tyranny of the majority was to extend the sphere so that “no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit.” Madison believed that “[i]n a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole.” He was mindful, however, that if the republic were too extensive, the large number of competing interests may make it difficult to defend against those who would usurp the authority of the government for their own private interests, not the good of the whole. As in a

monarchical form of government, where the prince might act in a manner contrary to the public good, it was still necessary in a republic to guard against those who would seek personal gain over the will of the majority. Madison believed that, on the whole, the national government under the proposed Constitution was large enough to protect the rights of the minority against tyranny of the majority, while maintaining a sufficient reliance on the will of the majority to defend against those who could potentially usurp the government for their own private pursuits. “In the extended Republic of the United States,” Madison observed, “the General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.”²⁹¹

Jefferson responded on December 20, 1787, explaining that he was concerned about “the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations.” Jefferson dismissed as “gratis dictum,” James Wilson's argument that a bill of rights was not necessary in a government of enumerated powers where every power which is not delegated to the national government is reserved to the states. Jefferson believed that Wilson's conclusion was contradicted by “strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation

²⁹¹ James Madison to Thomas Jefferson, October 24, 1787, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 594-600.

which had declared . . . in express terms” that each state retains every power which is not delegated to the United States. Jefferson's view “that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference” is documented in his correspondence.²⁹²

On October 17, 1788, Madison responded to Jefferson's argument in favor of a bill of rights. Although he was “in favor of a bill of rights; provided it be so framed as not to

imply powers not meant to be included in the enumeration,” Madison did not believe the omission of a bill of rights was a “material defect.” Madison's primary reason for supporting a bill of rights was because it was “anxiously desired by others,” who might otherwise agitate for a second constitutional convention. Madison, however, did not support a bill of rights because he believed it was a necessary precondition for securing the liberties of the people. He identified several reasons why a bill of rights was not too important in a government such as that created by the Constitution. The reason which

Madison found most compelling was that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed.” During those times of disorder when the government was prone to infringe on the liberties of the people, a bill of rights proved only to be a mere “parchment barrier,” particularly in a republican form of government.

Madison believed that the greatest threat to liberty originates with the power of government, which, in the instance of a republic, is with a majority of the community.

²⁹² Thomas Jefferson to James Madison, December 20, 1787, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 606-07.

For Madison, “[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.”²⁹³ This was a sentiment echoed in Federalist No. 51, “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”²⁹⁴ A bill of rights was efficacious in a monarchy where “the latent force of the nation is superior to that of the Sovereign, and a solemn charter of popular rights might have a great effect, as a standard for trying the validity of public acts, and a signal for rousing the & uniting the superior force of the community” Madison asked, “What use then . . . can a bill of rights serve in popular governments?” He conceded that in a republican form of government, “[t]he 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” “[Although] it may be generally true,” Madison continued, “that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.” Madison continued to believe, however, that although these reasons “sufficiently recommend the

²⁹³ James Madison to Thomas Jefferson, October 17, 1788, in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 3 (New York: Chelsea House, 1980), 615-16.

²⁹⁴ James Madison, “Federalist No. 51,” 270.

precaution” of a bill of rights, they were “less essential” in a republican form of government than in other governments.²⁹⁵

During the Virginia Ratifying Convention, Madison, echoing a similar theme, responded to Patrick Henry’s charge that the proposed Constitution endangered the liberties of the people.²⁹⁶ “Give me leave to make one answer to that observation,” Madison retorted, “[I]et the dangers which this system is supposed to be replete with be clearly pointed out” “If any dangerous and unnecessary powers be given to the general legislature,” Madison continued, “let them be plainly demonstrated, and let us not rest satisfied with the general assertions of danger, without examination.” “If the powers be necessary,” Madison maintained, “apparent danger is not a sufficient reason against conceding them.” Madison sought to rebut Henry’s argument that “licentiousness has seldom produced the loss of liberty; but that the tyranny of rulers has almost always effected it.” “Since the general civilization of mankind,” Madison conceded, “I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations” “But, on a candid examination of history,” Madison argued, “we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced faction and commotions, which, in republics, have, more frequently than any other cause, produced despotism.” “If we go over the whole history

²⁹⁵ James Madison to Thomas Jefferson, October 17, 1788, 615-617.

²⁹⁶ James Madison, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 779.

of ancient and modern republics,” Madison noted, “we shall find their destruction to have generally resulted from those causes.” “If we consider the peculiar situation of the United States, and what are the sources of that diversity of sentiment which pervades its inhabitants,” Madison continued, “we shall find great danger to fear that the same causes may terminate here in the same fatal effects which they produced in those republics.”

“This danger,” Madison warned, “ought to be guarded against.” “Perhaps in the progress of this discussion,” Madison concluded, “it will appear that the only possible remedy for those evils, and means of preserving and protecting the principles of republicanism, will be found in that very system which is now exclaimed against as the parent of oppression.”²⁹⁷

When Madison introduced his proposed amendments on June 8, 1789, he included an amendment which would have placed significant limitations on the authority of the several states. Madison proposed to insert the following provision into Article I, Section

10 of the Constitution, between Clauses 1 and 2: “[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”

Since Madison did not consider the limitations placed on the several states in Article I, Section 10 of the proposed Constitution as “sufficient” to secure private rights, it was not remarkable that he would seek to further expand the “partial provision” provided for in Article I, Section 10 of the proposed Constitution, by placing additional limitations on the authority of the several states. Madison sought to minimize the “disposition” towards

²⁹⁷ James Madison, “Virginia Ratifying Convention” in *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 4 (New York: Chelsea House, 1980), 779.

injustice in the several states and the “infinite of legislative expedients,” by which the several states could infringe on the private rights of individuals. Madison's proposed amendment would have placed significant limitations on the powers of the states, in the areas of freedom of speech, religious liberty, and criminal procedure. The rationale for Madison's proposed amendment was articulated in Federalist No. 10. This amendment, which Madison described as “the most valuable amendment in the whole list,” was intended to protect the minority against the danger of a potentially oppressive democratic majority. Madison sought to attain in the First Congress, what he failed to attain with the Virginia Plan at the Philadelphia Convention, a significant limitation on the authority of the several states.

After introducing his proposed amendments, Madison almost immediately proceeded to defend the rationale of Federalist No. 10. “In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other,” Madison observed, “because it is not the stronger branch of the system, but the weaker.”

“It therefore must be leveled against the legislature,” Madison observed, “for it is the most powerful, and most likely to be abused, because it is under the least control.” “[S]o far as a declaration of rights can tend to prevent the exercise of undue power,” Madison continued, “it cannot be doubted but such a declaration is proper.” “But I must confess that I do conceive,” Madison explained, “that in a Government modified like this of the United States,” the great danger lies rather in the abuse of the community than in the legislative body.” Madison was preoccupied, not with the danger to the liberties of the

people from a potentially oppressive government, but with the danger to the liberties of the minority from a potentially oppressive democratic majority. “The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies,” Madison argued, “namely, that which possesses the highest prerogative of power.” “But it is not found in either the executive or legislative departments of government,” Madison warned, “but in the body of the people, operating by the majority against the minority.”

Turning to his specific proposal, limiting the authority of the several states, Madison commenced, “I wish also, in revising the constitution, we may throw into that section, which interdict the abuse of certain powers in the State Legislatures, some other provisions of equal, if not greater importance than those already made.”²⁹⁸ Madison cited the provisions of Article I, Section 10 of the Constitution, which placed limitations on the power of the several states, among other limitations, to enact bills of attainder and ex post facto laws. These restrictions on the several states, in Article I, Section 10, “were wise and proper restrictions in the constitution.” But, as Madison’s correspondence with Thomas Jefferson revealed, he did not consider them “sufficient.” “I think there is more danger,” Madison argued, “of those powers being abuse by the State Governments than

²⁹⁸ Madison’s view, that his proposed amendment, limiting the authority of the several states, was “the most valuable amendment in the whole list,” and “of equal, if not greater importance of those already made,” may have been, among other reasons, because he did not believe his other proposed amendments altered the structure of the constitution, but merely restated, in more explicit terms, the principle of federalism. Madison did not propose any constitutional amendments which significantly limited the authority of the federal government, effectively defeating Anti-Federalist attempts to weaken the national government. Madison’s proposed amendment did, however, significantly alter the constitution by placing significant limitations on the several states.

by the Government of the United States.” “The same may be said of other powers which they possess,” Madison continued, “if not controlled by the general principle, that laws are unconstitutional which infringe on the rights of the community.” “I should therefore wish to extend this interdiction, and add,” Madison proposed, “as I have stated in the 5th resolution, that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases” “[I]t is proper that every Government,” Madison explained, “should be disarmed of powers which trench upon those particular rights.” “I know, in some of the State constitutions,” Madison noted, “the power of the Government is controlled by such a declaration; but others are not.” “I cannot see any reason against obtaining even a double security on those points,” Madison continued, “and nothing can give a more sincere proof of the attachment of those who opposed this constitution to these great and important rights, than to see them joining in obtaining the security I have now proposed” “[I]t must be admitted, on all hands,” Madison concluded, “that the State Governments are as liable to attack the invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against.”²⁹⁹

When the House of Representatives considered Madison’s proposed amendment in Committee of the Whole, Representative Thomas Tudor Tucker interjected, “This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alteration of the constitutions of the particular States.” “It will be much better,” Tucker maintained, “to leave the State governments to themselves, and not to

²⁹⁹ James Madison, “Madison Introduces His Amendments,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1027-1033.

interfere with them more than we already do” “[T]hat is thought,” Tucker noted, “by many to be rather too much.” Representative Tucker then moved to defeat the amendment.³⁰⁰ Madison, describing it as “the most valuable amendment in the whole list,” added, “If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments.” “[I]f they provided against the one,” Madison argued, “it was also necessary to provide against the other, and was satisfied that it would be equally grateful to the people.”³⁰¹ Representative Tucker’s motion was rejected by the Committee of the Whole.³⁰²

Although Madison’s proposed amendment was reported out of the House of Representatives as the Fourteenth Amendment, the amendment was defeated in the

Senate, and was not forwarded to the several states for ratification. Although there are no records detailing its deliberations, it is not implausible that the amendment was eliminated because the Senators, being selected by the state legislatures, wanted to maintain the prerogatives of the several states. The Senate, being composed of legislators who answered to the state legislatures, would not place their imprimatur on an amendment which placed significant limitations on the authority of the several states.³⁰³

³⁰⁰ Thomas Tudor Tucker, “Select Committee and Committee of the Whole,” *The Roots of the Bill of Rights*, ed. Bernard Schwartz, vol. 5 (New York: Chelsea House, 1980), 1112-113.

³⁰¹ James Madison, “Select Committee and Committee of the Whole,” 1112-1113.

³⁰² “Select Committee and Committee of the Whole,” 1112-1113.

³⁰³ This is the view of Akhil Amar. Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 22-3.

Following the Civil War, the Thirty-Ninth Congress framed the Fourteenth Amendment, which, in addition to enhancing the power of the federal government, placed significant limitations on the authority of the several states for the purpose of protecting civil liberties. James Madison's worldview, regardless of its merits, was simply not foremost in the minds of eighteenth-century Americans who thought about the matter.

CONCLUSION

The Fourteenth Amendment, which transferred significant authority to the national government, substantially altered this allocation of power between the national government and the states. This state of affairs has been instigated by an extremely important development in constitutional law and interpretation, the application of the Bill of Rights to the states. Beginning in the twentieth century, the Supreme Court has adopted the view, called “selective incorporation,” that the Fourteenth Amendment applies specific provisions of the Bill of Rights to the states. The Court has provided for the protection of individual rights against actions by state governments by selectively incorporating those provisions of the Bill of Rights deemed *fundamental* into the due process clause of the Fourteenth Amendment. The emphasis the Court has placed on individual rights has substantially eclipsed the more traditional deference to the beliefs, practices, and customs of local communities, intermediate institutions, and autonomous associations. The emphasis the Court has placed on individual rights has also the prerogatives of the people in the several states. Incorporation has stirred a great deal of controversy among judges and legal scholars because, in part, the Supreme Court has never adequately explained the contours or limitations of the doctrine. In general, however, incorporation has empowered the national government to enforce individual rights against the authority of the states. The doctrine of substantive due process cannot be justified by the text or history of the due process clause of the Fourteenth Amendment.

While the Fourteenth Amendment was intended to empower the federal government at the expense of the states, it was not intended to dismantle the existing constitutional edifice and the original commitment to a decentralized society. Because certain provisions of the Bill of Rights allocate authority in a manner which recognizes the prerogatives of the states, these provisions cannot be applied to the states by the due process clause of the Fourteenth Amendment any more than it would be possible to make the Tenth Amendment binding on the states. This leaves open the possibility for a federalism based model of incorporation. If, as this study suggests, the Bill of Rights was intended to prevent the national government from intruding on the liberties of the people, established in state constitutions, state statutes, and the common law, these local rights would define the contours of federal power. This leave open an intriguing possibility for further examination. The power of the national government could not be used in such a manner as to infringe or do away with the liberties of the people in the several states.

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