

Madison, Henry, and the Protection of Liberty

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by

Mitchell Krumm

The Ohio State University
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Project Advisor: Professor Eric MacGilvray, Department of Political Science

I. Introduction to the Debate Over Liberty¹

Shortly after the Constitutional Convention of 1787 disbanded, George Washington sent a letter to Patrick Henry. In this letter, Washington wrote of his wish that the Constitution “had been made more perfect...” but said that adoption of the Constitution was “desirable.”² Despite this, Henry soon became known as an opponent of the proposed Constitution. Henry feared that the new Constitution undermined the principles of government fought for in the Revolution, particularly, in failing to protect liberty with a Bill of Rights. The task of defeating Henry’s desire to stop ratification of the Constitution fell to several Federalists, but James Madison was the primary intellectual defender of the document, which was to a great extent the result of his work.³ Madison maintained that the Constitution did protect liberty through a system of enumerated powers, and that a Bill of Rights would destroy this method of protecting liberty.

In this essay, the arguments, concepts and methods of protecting liberty will be analyzed through the debate between Henry and Madison at the Virginia Ratification Convention. It will be argued that the enumerated powers doctrine was the superior method of protection for liberty.

Madison’s method of protecting liberty was, instead of protecting certain rights, to give the government a specific set of powers, thus protecting peoples' liberty in every case not strictly enumerated. According to Madison “the powers of the Federal Government are enumerated; it can only operate in certain cases; It has Legislative powers on defined and limited objects,

¹ I would like to thank Professor MacGilvray for taking on a student he did not know and for the many hours of discussion, help and direction over the last year. I also want to thank my parents for reviewing drafts and being constant sources of encouragement. Finally, I give thanks for all my success and for everything I know to the One “In whom are hid all the treasures of wisdom and knowledge.” Colossians 2:3

² George Washington, *Washington Writings*, ed. John Rhodehamel. (New York: Literary Classics of the United States, 1997), 622

³ Garrett Ward Sheldon, *The Political Philosophy of James Madison*, (Baltimore: John Hopkins University Press, 2001), 75

beyond which it cannot extend its jurisdiction.”⁴ Thus, Madison believed that the Constitution protected liberty by allowing the government a highly restricted and (as will be examined later) checked set of power.⁵ In this way, no arbitrary power could be exercised by the national government.

Henry, on the other hand, rejected the notion of securing liberty through well-defined enumerated powers. He held that liberties that were not strictly defined were not really held by the people. He feared that without the protection of certain “essential” rights, liberty could not exist.⁶ Thus, his definition of liberty required enumerated limits on government through a list of rights that the legislature could never violate.⁷ He argued that in England when rights were undefined the result was “usurpations upon the rights of the people.” Prior to 1688, English rights were not well defined and expressed, leaving them protected only by “implication and logical discussion.”⁸ It was not until after 1688, when the English Bill of Rights was enacted and forced on the king, that liberty came to England. “Before this, sir, the situation of the public liberty of England was dreadful.”⁹ Thus, using schemes other than a complete definition of rights as Madison was arguing for left the people without liberty, and the only way to secure liberty was to have a Bill of Rights.

Underlying Henry’s desire for a Bill of Rights was his belief that even if Madison’s enumerated powers would protect liberty in theory, the men who would gain power would

⁴ James Madison, *The Debate on the Constitution: Part Two*, ed. Bernard Bailyn (New York: Literary Classics of the United States, 1993), 620. Madison’s speech at the Virginia Convention on June 6, 1788.

⁵ James Madison, *Madison Writings*, ed. Jack N. Rakove (New York: Literary Classics of the United States, 1999), 355. Here Madison notes that only a few necessary powers have been given to the national government.

⁶ Michael Lienesch, “Reinterpreting Rights: Antifederalists and the Bill of Rights,” in *The Bill of Rights: Government Proscribed*, edited Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia, 1997), 255

⁷ Lienesch, 265.

⁸ Patrick Henry, *Patrick Henry: Life, Correspondence and Speeches*, ed. William Wirt Henry (Harrisonburg: Sprinkle, 1993), 3: 507. Henry’s speech at the Virginia convention on June 12, 1788.

⁹ Henry, 508. Henry’s speech at the Virginia convention on June 12, 1788.

destroy liberty. Although he claimed to hold those from the Philadelphia convention in high esteem, his suspicion of their motives came through clearly.¹⁰ This suspicion seems to have been justified when Hamilton and other Federalists later abandoned the position they stated in the Constitutional debates and began to argue for the extension of powers Henry feared. However, it must be noted that Madison remained loyal to his position on express powers and opposed Hamilton's expansion of power beyond the defined limits.¹¹ Thus, Madison was sincere in his debate with Henry, but perhaps Henry's smelling of a rat extended beyond the walls of the Virginia debate.¹² Madison's relationship with Hamilton will be examined in subsequent sections but it is important to note that Madison did not change his interpretation of the Constitution in any radical way through the rest of his life.¹³

Ultimately these two statesmen espoused mutually exclusive ideas on how a government should protect liberty. The conclusion of this essay will examine how the compromise they reached embraced neither philosophy completely, and left the Constitution without a consistent strategy for protecting the liberty both men had pursued. However, Henry and Madison shared many ideas and beliefs despite their fundamental disagreement on the issue of how liberty should be protected by a Constitution. The basic assumption shared by each man during the debate was a concern for liberty. The sense in which they shared this concern was that each wanted to stop

¹⁰ Henry, 433. See also Lance Banning, "Republican Ideology and the Triumph of the Constitution, 1789 to 1793." *William and Mary Quarterly*, 3rd Ser., Vol. 31, No. 2. (1974): 171.

¹¹ Banning, "Republican Ideology and the Triumph of the Constitution, 1789 to 1793," 184-185. See also Madison, *Madison Writings*, 480-490. Note especially pages 4486-489. This speech (given on Feb. 2, 1791) opposing the National Bank in the first Congress shows that Madison stood by his original position on enumerated powers after ratification while Hamilton, who favored the bank, abandoned it.

¹² Gordon S. Wood, *The American Revolution*, (New York: Modern Library, 2003), 154.

¹³ Madison, *Madison Writings*, 843. In this letter from August 28, 1830, Madison still maintained an enumeration of powers to the national government. Drew McCoy also notes this original intent focus. Drew R McCoy, *The Last of the Fathers: James Madison and the Republican Legacy*, (New York: Cambridge University Press, 1989), 82-83.

arbitrary power from being available to rulers. This gave them common ground upon which the debate over liberty rested.

Early in the debate, Henry stated that “the first thing I have at heart is American *liberty*; the second thing is American *union*...”¹⁴ Madison in Federalist 10 noted that “Liberty is to faction, what air is to fire...”¹⁵ showing that liberty was the object to be pursued by government, even though that liberty was a danger in itself. The issue of liberty figured prominently and centrally in the debate between these two men. During the struggle for American independence, the colonists believed that they had inherited the liberty that England had abandoned.¹⁶ This liberty had been a protection of every person in society from the arbitrary will of another part of their society through each branch in the government representing a different set of interests. These separate interests were the competing social classes. The separation of powers between the branches was critical to this scheme, as Montesquieu pointed out.¹⁷ Separation involved giving powers to each branch, such as the power to control funding in the House of Commons, thus forcing each group to work together with the others to accomplish goals in governing.

However, Britain’s legislature may have fallen to the danger described by Montesquieu when “legislative power is more corrupt than executive power”, leading to the end of liberty.¹⁸ The issues of British liberty and their use by Henry and Madison will be examined in detail in the following section. Since the separation from Britain hinged on keeping liberty, and liberty was a primary concern for both Henry and Madison, one might think that the concept and ideas

¹⁴ Henry, 449. Henry’s speech to the Virginia convention on June 5, 1788.

¹⁵ Madison, *Madison Writings*, 161. Federalist Paper 10.

¹⁶ Gordon S. Wood, *The Creation of the American Republic: 1776-1787*, 1998 ed. (Chapel Hill: University of North Carolina, 1998), 43.

¹⁷ Montesquieu, *The Spirit of the Laws*, ed. Anne Cohler, Basia Carolyn and Harold Stone (New York: Cambridge UP, 1989), 157.

¹⁸ Montesquieu, 166.

behind liberty were settled prior to the debates over new governments. However, as will be seen, this was not the case.

First, it must be noted that, according to Gordon Wood, the ideas “that constituted popular liberty were not frozen in 1776. Indeed...they were constantly in flux...”¹⁹ Thus, no one theory of liberty was universally accepted. On the one hand, some in the colonies (like Thomas Paine) defended liberty as a lack of controls on people’s actions.²⁰ This definition embraced the idea that liberty meant a lack of government.²¹ This definition may be the common view of liberty today. I have liberty when I lack restrictions on my actions. This definition led, according to some, to licentiousness. In this case, liberty was abused and turned into the freedom to harm fellow citizens. When people were able to harm others without consequence, many theorists of the time believed that no one was free since no actions could be safely taken. Thus, license from a lack of government led to the loss of liberty.²²

It was this situation that the Federalists, those who were in favor of the Constitution, feared. They were concerned with a loss of liberty from anarchy because it would lead to license and tyranny that ended freedom.²³ Although some have called their arguments “lame” and unsound for believing a bill of rights was unnecessary,²⁴ others believe them to be quite strong. The Federalists sought a government that would be strong or energetic enough to maintain order and yet not by tyrannical itself.²⁵ Henry also feared anarchy but he felt that the best control on

¹⁹ Wood, *The Creation of the American Republic: 1776-1787*, 438

²⁰ Thomas Paine, *Common Sense*, 1776 (New York: Penguin Classics, 1986), 65.

²¹ John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution*, (Chicago: University of Chicago, 1988), 27.

²² Reid, 35.

²³ Paul Finkelman, “Between Scylla and Charybdis: Anarchy, Tyranny, and the Debate over Rights,” in *The Bill of Rights: Government Proscribed*, edited Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia, 1997), 109 and 139.

²⁴ Leonard W. Levy, *Origins of the Bill of Rights*, (New Haven: Yale UP, 1999), 26. and Finkelman, 123.

²⁵ Wood, *The Creation of the American Republic: 1776-1787*, 474.

the actions of people without a loss of liberty was at a local level, not through a consolidated national state.²⁶ His reasons revolved, as will be seen, around the fear that a powerful central government, realizing its own power, would sacrifice the liberty of the people who were far away for its own might and glory. However, despite these differences, according to Reid, the definition of liberty could be stated as “freedom from arbitrary power, from government by will and pleasure, from government by a sovereign, unchecked monarch or form of government by a sovereign, unchecked parliament.”²⁷ This desire to stop arbitrary power gave Madison and Henry common ground and became the starting point upon which their debate rested.²⁸

With a lack of arbitrary power established as the goal and definition of liberty, the next section will analyze the British protections for liberty.

II. The English Roots of Liberty

“When American spirit was in its youth, the language of America was different: liberty, sir, was the primary object. We are descended from a people whose government was founded on liberty: our glorious forefathers of Great Britain, made liberty the foundation of every thing.”²⁹ Patrick Henry

The English system of government was the basic framework from which the Founders of America operated. According to the Americans, the British had the “most free” government in the world.³⁰ This high amount of liberty was achieved through several sources in English

²⁶ Henry, 446. and see Montesquieu, 159.

²⁷ Reid, 120.

²⁸ Phillip Pettit has described the restriction of government to prevent arbitrary power as non-domination. This theory seems to accurately capture much of the unstated and assumed ideas about liberty that both Madison and Henry shared. See Philip Pettit, “Freedom as Antipower,” *Ethics* vol. 106, No. 3 (1996). See also Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, (New York: Oxford UP, 1997). These writings reveal what Lance Banning would describe as the “intellectual universe” from which both men operated. Lance Banning, “Republican Ideology and the Triumph of the Constitution, 1789 to 1793,” 178-179.

²⁹ Henry, 445-446.

³⁰ Wood, *The Creation of the American Republic: 1776-1787*, 11, 44. See also Bernard Bailyn, *The Ideological Origins of the American Revolution*, (Cambridge: Belknap of Harvard UP, 1967), 79.

government. Ideas like checks and balances, bills of rights, retained powers, sovereignty of the people, and many lessons on the sources of tyranny and the loss of liberty all came from England to America. Henry and Madison had dramatically different interpretations on the strengths and weaknesses in this system and in their interpretation of British political history. These differences were a source of their divergent views on the protection of liberty in the Constitution.

To properly understand the differences of interpretation, it is important to consider the nature and complexity of the British government. According to English lore, the British Constitution began in “the dark ages of antiquity” with “a Saxon golden age of liberty and equality with a pristine gothic constitution” which had been ruthlessly invaded by “that barbarous system of despotism imposed by the Norman tyrant.” Since this time, a struggle had existed between the crown and the liberty of the people.³¹

A major contributor to the constant struggle over liberty was the fact that the British Constitution was unwritten. Instead, the British defined a constitution as the “arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them.”³² Thus, unlike the modern conception of a constitution, the British constitution was never completely defined and could be interpreted in different ways.³³ Despite the unwritten state of the constitution, John Adams (according to David Lieberman) when commenting on definitions of the British constitution said, “even though neither definition seemed ‘satisfactory’, ‘yet I cannot say that I am at any loss about any man’s meaning when he speaks of the British

³¹ Wood, *The Creation of the American Republic: 1776-1787*, 31.

³² Bailyn, 68.

³³ Bailyn, 71.

constitution...”³⁴ Thus, even though different interpretations of the constitution were common, the British still had a sense of its meaning.

Additionally, the British did have a great deal of stability within their constitution. Montesquieu used the English constitution as an example of a model government. The reason for his admiration was the separation of powers found within the British government. He identified three different kinds of powers and noted that if any of them were ever combined, beyond a few small exceptions, tyranny (the loss of liberty) would be the result.³⁵ Within the government, these powers were expressed by the separation of the executive power, legislative power, and judicial power.

While these became the basic divisions in the American Constitution, the British government was traditionally divided based on three classes. The British placed the power of ruling into the hands of a monarch, the lords, and the commoners through the division of power. Each of these put a check on the power of the other sections.³⁶ This kept each class or group from holding arbitrary power over the others, thus protecting liberty. When Montesquieu analyzed the British constitution he focused on the institutional separation of power into legislative, executive and judicial. This institutional analysis was “layered” on top of the traditional class based view. According to Lieberman, “The blending of the two theses followed readily, given their [the two kinds of division] shared concern with the manner in which complex structures and balances helped produce political liberty.”³⁷

This class and institution blending took on a unique form. First, the monarchy took on the mantle of the executive. Second, part of the legislature represented the nobility as the House

³⁴ David Lieberman, “The Mixed Constitution and the Common Law,” *The Cambridge History of Eighteenth-Century Political Thought*, edited Mark Goldie and Robert Wokler (New York: Cambridge UP, 2006), 346.

³⁵ Montesquieu, 156-157.

³⁶ Lieberman, 318.

³⁷ Lieberman, 336.

of Lords. Third, the rest of the people were represented in the House of Commons. These three different parts of society were believed to balance each other within the government by each holding a part of the power so that no one segment could control the entire government.³⁸ The monarchy was to govern the realm, the Commons kept the king from taking the peoples' liberty, and the nobles mediated between these two different interests. Liberty was bound up in the stability of this system.³⁹

So long as the power of each segment remained intact, liberty remained. Thus, the mixing of powers of the Parliament in legislating and the powers of the monarch in executing the government represented a loss of liberty, except in cases where the mixing represented a check on the others power.⁴⁰ An example of such a mixing check was the king's ability to convene and dismiss parliament. This legislative power was exercised by the executive as a check upon the power of Parliament.

The mixed nature of the British government along with the checks each part had upon the other produced "a political order best equipped to sustain public liberty..."⁴¹ This mixed system was to some extent written after the Glorious Revolution of 1688 explicitly stated the conditions within which the king would rule. Prior to the civil war in that year, the kings had claimed to rule with only the restrictions imposed by earlier agreements and the powers in Parliament. Thus, Britain had been freer only in the sense that her monarchy was limited by the previously mentioned checks and not absolute. After 1688 though, the House of Commons and the House of Lords took a much more equal place with the king. This was reflected in that the system was

³⁸ Bailyn, 70-71, 76.

³⁹ Wood, *The Creation of the American Republic: 1776-1787*, 18-19. See also Joyce Appleby, *Capitalism and a new Social Order: The Republican Vision of the 1790s*, (New York: New York UP, 1984), 16.

⁴⁰ Bernard Manin, "Checks, balances and boundaries: the separation of powers in the constitutional debate of 1787," in *The Invention of the Modern Republic*, edited Biancamaria Fontana (New York: Cambridge UP, 1994), 30-31.

⁴¹ Lieberman, 318.

no longer seen as a monarchy, but a mixed government.⁴² Thus, although the struggle was not over, the settlement of 1688 was a turning point in the way the English viewed their government and liberty.⁴³

The turning point was a final repudiation of the absolute nature of the monarch. This meant that the kings ruled under rather than over the law. According to Locke, “the difference betwixt a king and a tyrant” is simply “that one makes the laws the bounds of his power, and the good of the public the end of his government; the other makes all give way to his own will and appetite.” Ruling under law was the critical element in this mixed monarchical system for, as Locke pointed out “Wherever law ends, tyranny begins...” Thus, when a magistrate failed to rule under law then he “ceases in that to be a magistrate; and, acting without authority, may be opposed as any other man who by force invades the rights of another.”⁴⁴ This view of the king meant that he ruled through Parliament, the lawmakers since the king had “no power, but that of the law.”⁴⁵ This prevention of tyranny was, at its base, the prevention of arbitrary power.

However, despite removing the king as the supreme power, the British set up Parliament as the supreme power in Britain.⁴⁶ It was thought that every state needed a final supreme authority.⁴⁷ Since the Parliament was seen as the protector of the people, theorists believed that liberty could be equated with a free Parliament. Thus, another important part of the constitution, along with the need for balance, was a free and final authority in the people’s representatives in

⁴² Lieberman, 319.

⁴³ Wood, *The Creation of the American Republic: 1776-1787*, 30-31.

⁴⁴ John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, (New Haven: Yale UP, 2003), 189.

⁴⁵ Locke, 167.

⁴⁶ Lieberman, 320-21, 329.

⁴⁷ Mark Goldie, “The English System of Liberty,” *The Cambridge History of Eighteenth-Century Political Thought*, edited Mark Goldie and Robert Wokler (New York: Cambridge UP, 2006), 42.

Parliament in order to secure liberty.⁴⁸ In order to maintain balance along with the supreme nature of Parliament, the British developed the idea of the king ruling through Parliament. Because of the transfer from power being centered in the monarch to power being centered in the Parliament (instead of some kind of mixed balance), some critics believed the balance within the constitution was lost shortly after the king was kept from nearly complete power.⁴⁹ However, the ideal of balance and checks was still the prevailing theory in America during the late 1700s.

Possibly the most famous English restriction on an encroaching monarch was the Magna Charta. This, as some have described most of the written sections of the British Constitution, was simply an attempt to return to the balance originally established by the three factions of power in Britain.⁵⁰ The difference was that this was the first written part of the British Constitution. An addition to the written parts of the English Constitution came in 1689 after the Glorious Revolution when the monarchs were placed under the English Bill of Rights.⁵¹ After noting the invitation to the new king, the bill then stated that the nation was “asserting their ancient rights and liberties...” in the document. These included the right of petition, free election of representatives, the right to bear arms in self-defense, rights against standing armies, trial rights, and rights against cruel punishments.⁵² This bill was a critical part of the debate between Henry and Madison.

⁴⁸ Lieberman, 327.

⁴⁹ Goldie, 64-65.

⁵⁰ Bailyn, 78. See also Lois G. Schworer, “British Lineages and American Choices,” in *The Bill of Rights: Government Proscribed*, edited Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia, 1997), 7.

⁵¹ Lieberman, 341.

⁵² “The Bill of Rights, 1689.” [The National Archives: UK Government Records and Information Management](http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/bill_rights.htm). <
www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/bill_rights.htm>

Some believed that with the creation of the English Bill of Rights liberty was more secure than it ever had been in Britain.⁵³ Unfortunately these hopes proved vain when Parliament itself began to encroach upon the people's liberty, thus countering the theory that a free parliament equated with a free people. The branch that was supposed to protect the rights of the people in the later part of the 1700s began to enact arbitrary laws.⁵⁴ For example, the Parliament voted for and allowed the crown to send a standing army to America, prepared to set up the Anglican Church in every colony, and enacted the harsh regulations known as the Coercive Acts. These, contrary to the British Bill of Rights, included the attempt to assert the authority of the Anglican Church, the sending of troops to America, and the establishment of Admiralty courts which would substitute for jury trials in some cases.⁵⁵

Three things need to be noted about this British Bill of Rights. First, it was part of the settlement when the country was receiving its new monarchs after the war. When the English Parliament came to William and Mary to offer them the throne, they were presented with a bill of rights as a condition of being allowed to rule. Second, it was a list of limitations on the extent of the king's prerogative to act without permission of Parliament.⁵⁶ Third and most importantly for this essay, the declarations were not supposed to represent the sum of the rights held by the English people. In fact, it was considered impossible to "wholly exhaust the great treasury of human rights."⁵⁷

American's adopted and changed the ideas behind bills of rights prior to the Revolution in 1776 and even before the British bill of 1689. It should be noted that Bills of Rights appeared

⁵³ Wood, *The Creation of the American Republic: 1776-1787*, 31.

⁵⁴ Schwoerer, 29.

⁵⁵ Wood, *The Creation of the American Republic: 1776-1787*, 42.

⁵⁶ Schwoerer, 13-14.

⁵⁷ Bailyn, 78.

early in American history when the Pilgrims in Massachusetts adopted a “rudimentary” one in 1636. Additionally, the colonists attempted to “abstract from the deep entanglements of English law and custom certain essentials – obligations, rights, and prohibitions – by which liberty...might be preserved.”⁵⁸ However, after the Revolution, America’s situation changed. A king was no longer a constant force to be feared with encroachments on liberty. Instead the people, through their state governments, directly controlled much of their own governing. Thus, there seemed to be a contradiction since a Bill of Rights on the peoples’ representatives was “guaranteeing the rights of the people against the people.”⁵⁹ This shows a shift in purpose for bills of rights. In Britain, these declarations were made to restrict the king and return balance to the government.⁶⁰ In America, they served as a simple restriction on the government in general.⁶¹

This shift in purpose showed that many feared any rulers and felt that those in government must always be restricted by bills of rights.⁶² This fear of all rulers led to the adoption of bills of rights in seven of the thirteen colonies, including Virginia.⁶³ Once again, the colonies feared the potential for any arbitrary power, even from rulers they selected. Thus, despite the change in philosophy of government, bills of rights became important parts of the newly formed American governments.

⁵⁸ Bailyn, 194, 197.

⁵⁹ Forrest McDonald, “The Bill of Rights: Unnecessary and Pernicious,” in *The Bill of Rights: Government Proscribed*, edited Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia, 1997), 388.

⁶⁰ Lieberman, 341.

⁶¹ John Stuart Mill notes this progression from thinking of liberty in terms of restricting or checking rulers to thinking of liberty in terms of restricting interference upon people’s actions from *any* source, including the people. John Stuart Mill, *On Liberty*, 1859 (New York: Barnes and Nobel, 2004), 2-5.

⁶² Wood, *The Creation of the American Republic: 1776-1787*, 538.

⁶³ Donald S Lutz, “The Pedigree of the Bill of Rights,” in *The Bill of Rights: Government Proscribed*, edited Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia, 1997), 52, 56-59.

The Americans believed that the principles of liberty were to be found in the British constitution.⁶⁴ With this in mind, they transported two great traditions to America: the concept of separation and balance of power and the restrictions on government through written bills of rights. These two traditions and the interpretation of English history became the key principles over which Madison and Henry divided, as will be seen in the next section.

III. The Defense of Liberty in America

It was in this context of constitutions, law and liberty that Henry and Madison debated how best to preserve liberty through a written constitution. It is important to remember that the original Constitution proposed by the Philadelphia convention in 1787 did not contain a Bill of Rights.⁶⁵ Early in the debate at the Virginia ratification convention Henry pointed to English history. He pointed to the time prior to the Glorious Revolution of 1688 and the enactment of the Bill of Rights (1689) in Britain. As noted in the last section, most of the English Constitution was unwritten, thus, the addition of the written Bill of Rights changed the character of those rights. Rather than being drawn out from tradition and implications from the Common Law, these rights were clearly spelled out. Henry believed that this signaled a profound shift in the liberty of Britain.

“Implication in England has been a source of dissention. There has been a war of implication between the King and people. For 100 years did the mother country struggle under the uncertainty of implication. The people insisted that their rights were implied: The Monarch denied the doctrine. Their Bill of Rights in some degree terminated the dispute. By a bold implication, they [the British of the 1770s] said they had a right to bind us [the Americans] in all cases whatsoever. This constructive power we opposed, and successfully. Thirteen or fourteen years ago, the most important thing that could be thought of, was to

⁶⁴ Wood, *The Creation of the American Republic: 1776-1787*, 44-45.

⁶⁵ Wood, *The Creation of the American Republic: 1776-1787*, 536.

exclude the possibility of contraction and implication. These, Sir, were then deemed perilous. The first thing that was thought of was a Bill of Rights. We were not satisfied with our constructive, argumentative rights.”⁶⁶

With this statement Henry challenged the defenders of the new American Constitution to explain their break with English tradition and the advances made in the mother country toward liberty. Henry argued that the British had moved from a system that lacked a primary ingredient for liberty, a written set of rights, to one that had such a bill after 1689. The Constitution’s lack of such a bill showed a regress back to the less free time before the Glorious Revolution and forgot the final element that had secured liberty for Britain.

This powerful argument from British history assumed several things, which Madison took advantage of in his responses. Henry assumed that the Bill of Rights in England had been effective and that rulers were always the executors of tyranny. Henry’s argument for written rights depended on the idea that a system of enumerated powers was synonymous with the situation of implied, common law, rights in Britain prior to 1689. Madison responded by saying,

“Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people, by gradual and silent encroachments of the those in power, than by violent and sudden usurpations: but on a candid examination of history, we shall find that turbulence and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics have more frequently than any other cause, produced despotism. If we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes.”⁶⁷

This statement attacked Henry’s assumption concerning the nature of rulers and tyranny. Madison argued that it was not the rulers oppressing the common people that destroyed liberty. Instead, it was the actions of an unrestrained ruling majority that posed the greatest danger to

⁶⁶ Henry, 473. Henry’s speech to the Virginia Convention on June 7.

⁶⁷ Madison, *Madison Writings*, 355. Madison’s speech to the Virginia Convention on June 6.

liberty. This argument reflected his statements in Federalist 10 when he said, “When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.”⁶⁸

In other words, if a majority of the people in a democratic government wanted to exercise arbitrary power over a minority of the people, nothing about democratic government in general prevented this. Thus, in order to prevent the potential loss of liberty for minorities, restrictions would need to be placed on the power that the *people* could exercise, not just the power of the rulers. His argument may have been drawing on the experience of the colonists after the Declaration of Independence when paper “money rages” (the government’s rampant printing of money to pay its expenses, thus destroying the savings of the people through inflation) and other injustices were enacted by lawfully elected majorities of representatives.⁶⁹

Madison also argued, in response to Henry’s first assumption (that true liberty in Britain was achieved only after the enactment of the English bill of rights), that when a determined majority was in power, bills of rights were nothing except “parchment” guarantees of rights.⁷⁰ To illustrate the ineffectiveness of such bills, Madison gave an example about the protection of the freedom of religion.

“Is a bill of rights a security for religion? Would the bill of rights in this state exempt the people from paying for the support of one particular sect, if such a sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty.”⁷¹

Thus, Madison’s response to Henry’s first assumption was the observation that a bill of rights is an ineffective way to protect liberty from a determined majority. This part of the

⁶⁸ Madison, *Madison Writings*, 163. Federalist 10

⁶⁹ , Jack N. Rakove, *James Madison and the Creation of the American Republic*, 3rd ed. (New York: Pearson Longman, 2007), 59.

⁷⁰ McDonald, 391.

⁷¹ Madison, *Madison Writings*, 381. Madison’s speech to the Virginia Convention on June 12.

debate over liberty between Henry and Madison rested upon whether they believed that the English Bill of Rights was the source of British liberty or whether the construction of the British government conferred liberty on the people. The question they were wrestling over involved which aspect of British government truly had stopped the exercise of arbitrary power.

It is important to note that throughout the debate, both men agreed with the conventional wisdom that the British government's liberty relied on the separation of powers, the balance and checks of each on the other. Madison noted in Federalist 51 that the balances of institutions in the Constitution were sufficient to check the government. However, Madison did not believe that the checks from institutions were enough to guard liberty. On this point both men agreed. They disagreed on two points. First, they disagreed on which government had real checks and balances and second, what the additional ingredient to secure liberty needed to be. The Americans used the lessons from the English as a benchmark to measure liberty but, again, the parts that were emphasized depended on the perspective of the statesman.

Madison, in Federalist 51, discussed how the Constitution would protect the people from unrestrained power and thus protect liberty. It is important to note that Madison identified as one of the concerns in protecting liberty the separation and checking of powers. However, Madison knew that he could not do so in the same way that the British had. In America, there were no separate classes for the government officials to represent and protect interests from and for.⁷² Thus, in order to keep the powers separate and power checked, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."⁷³ In order to accomplish this, Madison believed the Constitution was set up to "divide and arrange the several offices in such a manner as that each may be a check on the

⁷² Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution*, (Chicago: University of Chicago Press, 1981), 58-59.

⁷³ Madison, *Madison Writings*, 295. Federalist 51

other; that the private interests of every individual, may be a centinel over the public rights.”

This kind of protection through ambition was necessary because of “the defect of better motives...”⁷⁴ Thus, rather than pitting different social class interests against each other, Madison sought to use individuals’ human ambition as the check against power in the national government.

In recognizing the need to cause men to check each other in order to protect liberty, Henry agreed.

“Here is a consideration which prevails in my mind, to pronounce the British government superior in this respect to any government that ever was in any country. Compare this with your congressional checks. I beseech gentlemen to consider, whether they can say, when trusting power, that a mere patriotic profession will be equally operative and efficacious, as the check of self-love...The real rock of political salvation is *self-love* perpetuated from age to age in every human breast, and manifest in every human action...Without real checks it will not suffice that some of them [Representatives, Senators, and Presidents] are good.”⁷⁵

Henry found Madison’s method of protection to be highly inadequate. Henry believed that Madison’s individual interests were a poor replacement for what the British tradition taught was needed for liberty. In Britain, the King and Lords had a real interest to preserve the government apart from the passions of the people. This real separate interest could not be present in the Constitution. Henry noted that, ““You have no hereditary nobility – an order of men to whom human eyes can be cast up for relief: for, says the Constitution, there is not title of nobility to be granted...”⁷⁶ Henry concluded, no real separate interests and balances would be present by British standards. Later in the same speech before the Virginia Convention, he said,

“In the British government there are real balances and checks-in this system, there are only ideal balances.

Till I am convinced that there are actual efficient checks, I will not give my assent to its establishment. The

⁷⁴ Madison, *Madison Writings*, 295. Federalist 51

⁷⁵ Henry, 490. Henry’s speech on June 9th to the Virginia Convention.

⁷⁶ Henry, 490. Henry’s speech on June 9th to the Virginia Convention.

President and Senators have nothing to lose. They have not that interest in the preservation of the government that the king and lords have in England. They will therefore be regardless of the interests of the people.”⁷⁷

In these statements, Henry made clear his lack of confidence in the Constitution’s checks and balances. Henry was relying on the idea that the British balances were not simply separate institutions or branches checking each other, the balances required actual social interests to be balanced in the government. The monarch, aristocracy and commons all had to have a balanced place in the government to have real self-love, generated by their place in society.

In response to Henry’s accusations, Richard Henry Lee took it upon himself the next day to comment, “In all his [Henry’s] rage for democracy, and zeal for the rights of the people, how often does he express his admiration of the King and Parliament over the Atlantic? But we republicans are contemned and despised. Here, Sir, I conceive that *implication* might operate against himself.” Henry Lee’s point was to take Patrick Henry’s opening attack and turn it upon him. The British government that he had criticized earlier as being grounded on “implication,” thus lacking liberty, used the very systems he was now praising as the key to liberty! Lee went on to point out that Henry was degrading a republican system (the Constitution) and favoring a monarchy. Lee then delivered a harsh criticism to Henry on which kind of government he favored.⁷⁸

This glaring contradiction moved the debate about liberty on to the key question for this thesis. Henry could not defeat the Constitution on its republican institutions despite his attempts throughout the debate, which was exemplified by the Virginia Convention’s final vote. Thus, the aspect of the debate upon which he had the most impact turned back to his other point on what

⁷⁷ Henry, 491. Henry’s speech on June 9th to the Virginia Convention.

⁷⁸ Richard Henry Lee, *The Debate on the Constitution: Part Two*, edited Bernard Bailyn (New York: Literary Classics of the United States, 1993), 638. Lee’s Speech on June 9 at the Virginia Convention.

the British government had which he saw a superior, the Bill of Rights. It was on this point that much of the rest of the debate over liberty hinged. Both agreed that balances were needed for liberty and both agreed that something else beyond balances was needed for liberty. The nature and debate over the added ingredients of both men and their debate over which was superior will occupy the next two sections.

IV. The Debate Over Liberty: The Constitution as a Central Government or one of Enumerated Powers

With the historical and ideological mindset established, it is important to see the differences in Madison and Henry's thought clearly. Lance Banning has noted, both Madison and Henry had as their goal "liberty and comfort, not riches or the might to rival European powers..."⁷⁹ As noted before, both believed in separation of powers into different branches with each branch having checks to balance the others. This placed them both in opposition to the views of Hamilton who reversed his limited government stances of Federalist 33 and 75 to the position of arguing for extensive powers in the national government shortly after the new government began.⁸⁰ Madison and Henry also agreed that there must be an ingredient for the protection of the peoples' liberty beyond republican institutions. The disagreement analyzed here hinged on what this extra ingredient should be.

⁷⁹ Banning, "To Secure These Rights: Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution," *To Secure The Blessings Of Liberty: First Principles of the Constitution*, edited Sarah B. Thurow (New York: UP of America, 1988), 292.

⁸⁰ See Federalist 33 and 75. In these papers Hamilton argues that seemingly open and broad ranging clauses are in the constitution such as the "Necessary and Proper clause" are meaningless. Alexander Hamilton, *The Federalist Papers*, (New York: Bantam Dell, 2003), 186-187. Additionally, as Morton Frisch points out, "Hamilton appeared to be much more a spokesman of limited government in Federalist 75, where he was discussing the participation of the Senate in treaty making, than in Pacificus 1, where he was defending the president's exclusive authority to issue a neutrality proclamation." Morton J. Frisch, Introduction. *The Pacificus – Helvidius Debates of 1793-1794*, by Alexander Hamilton and James Madison (Indianapolis: The Liberty Fund, 2007), xi.

Henry, as noted in his interpretation of British history, believed that the ingredient was a bill of rights. Early in the debate Henry noted in reference to the Constitution that,

“Here is a revolution as radical as that which separated us from Great Britain. It is as radical, if in this transition [from the Articles of Confederation to the Constitution], our rights and privileges are endangered, and the sovereignty of the states be relinquished: and cannot we plainly see, that this is actually the case? The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change so loudly talked of by some, and inconsiderately by others.”⁸¹

Henry’s reasoning began with the belief that the Constitution represented a “consolidated government.”⁸² By this he meant that the proposed government was not a compact between the states, but was a scheme to remove the powers of government from the state governments and place them in a single national government. The great danger in this action of consolidation to liberty was made clear by Henry when he stated that, “this constitution can counteract and suspend any of our laws, that contravene its oppressive operation; for they have the power of direct taxation; which suspends our bill of rights; and it is expressly provided, that they can make all laws necessary for carrying their powers into execution; and it is declared paramount to the laws and constitutions of the states.”⁸³ Thus, with consolidation came the loss of the protection from the bill of rights in Virginia. Henry saw this loss as unacceptable and felt that the lack of a bill of rights on the government that was to replace Virginia’s proved that liberty would be compromised if the Constitution were adopted.

⁸¹ Henry, 435. Henry’s speech to the ratification convention in Virginia on June 5, 1788

⁸² Henry, 434. Henry’s speech to the ratification convention in Virginia on June 5, 1788. This speech restated and expanded his arguments from his first speech at the convention on June 4th. George Mason, who gave a speech on the same day, expressed the same fears of consolidated government. George Mason, *The Debate on the Constitution: Part Two*, edited Bernard Bailyn (New York: Literary Classics of the United States, 1993), 605.

⁸³ Henry, 448. Henry’s speech to the ratification convention in Virginia on June 5, 1788

With these powers and the lack of a bill of rights, Henry stated that the national government would have “very extensive powers;- the powers of a king.”⁸⁴ Henry’s beliefs about the extensive powers being placed in the national government seem reasonable given his premises. Since the national government would be supreme and he believed that extensive powers had been given to it, the conclusion of unrestrained power seems clear.

Henry also feared a change in focus, which some of the Federalists embraced, away from liberty and toward national glory and riches.⁸⁵ “If we admit this consolidated government, it will be because we like a great and splendid one. Some way or other we must be a great and mighty empire...”⁸⁶ Henry feared that the Federalists were attempting to change the United States away from liberty and toward these lesser, unworthy, goals. However, it is also important to note that the Federalists who had changed focus were not abandoning liberty for completely bankrupt reasons. National strength and glory are not inherently evil goals in themselves, but Henry argued that they were not sufficiently valuable enough to be worthy of the cost of liberty.

As noted in the last section, on June 7 Henry stated that, “Thirteen or fourteen years ago, the most important thing that could be thought of, was to exclude the possibility of contraction and implication. These, Sir, were then deemed perilous. The first thing that was thought of was a Bill of Rights. We were not satisfied with our constructive, argumentative rights.”⁸⁷ After this statement, Henry “declared, a bill of rights indispensably necessary...”⁸⁸ Thus, rather than leave a government with the same kingly powers Britain had possessed in the years prior to 1688,

⁸⁴ Henry, 448. Henry’s speech to the ratification convention in Virginia on June 5, 1788

⁸⁵ Bailyn, 330.

⁸⁶ Henry, 445. Henry’s speech to the ratification convention in Virginia on June 5, 1788

⁸⁷ Henry, 473. Henry’s speech to the ratification convention in Virginia on June 7, 1788

⁸⁸ Henry, 473. Henry’s speech to the ratification convention in Virginia on June 7, 1788

Henry stated that in order to secure liberty, a bill of rights which stated the rights of the people was needed.

Madison had already addressed the accusation that Henry raised concerning the Constitution representing a threat to liberty on grounds that it gave unlimited power to a consolidated government on June 6th. He argued that, rather than spelling out rights, the powers that the national government would be able to exercise should be spelled out. This strict enumerated powers only doctrine was what Madison believed would secure liberty. Thus, under the Constitution, the extra ingredient to be added to republican forms was a strict enumeration of powers that would restrict the government.

“In like manner, were all powers vested in the General Government, it would be a consolidated Government: But the powers of the Federal Government are enumerated; it can only operate in certain cases: it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction.”⁸⁹

Madison accepted that if Henry’s beliefs about the consolidated nature and limitless powers given in the Constitution were true premises, then his conclusion about the loss of liberty would be logical. However, Madison, by explaining that the Constitution only gave certain specific powers, showed that this belief was false and the Constitution did not endanger liberty.⁹⁰

With this important and vast distinction between Henry desiring to restrict the national government with a bill of rights and Madison’s opposite proposal of only granting certain

⁸⁹ Madison, *The Debate on the Constitution: Part Two*, edited Bernard Bailyn (New York: Literary Classics of the United States, 1993), 620. Madison’s speech at the Virginia convention on June 6th.

⁹⁰ Wood discusses the Federalist development of the theory that a bill of rights would not be necessary by primarily focusing on the idea that the powers were granted by the people and were thus safe since the people could reclaim them. However, unlike the argument against such bills that Wood engages, Madison did not place such a high priority of the people being over the republican institutions as he did on the *restrictions* that the enumerated powers did in fact impose on the national government. Wood, *The Creation of the American Republic: 1776-1787*, 536-543.

enumerated powers, the debate over the added ingredient can be appreciated. In the opening to his rebuttal to Henry's first attacks, Madison stated,

“He [Henry] told us [the convention], that this constitution ought to be rejected, because it endangered the public liberty, in his opinion, in many instances. Give me leave to make one answer to that observation – let 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, let them be plainly demonstrated, and let us not rest satisfied with general assertions of dangers, without examination.”⁹¹

With this statement, Madison challenged Henry and the opponents of the Constitution to argue against it in terms of the enumerated powers doctrine. Madison's challenge revolved around the notion that the issue in question was on what powers had been granted, not what was withheld. Rather than debate whether a national government should be a confederation or a government acting directly on the people, Madison tried to focus the debate on the fact that (according to him) the Constitution was not a grant of every power. As he articulated in Federalist 14,

“In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provision of any. The subordinate governments which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity.”⁹²

Using this Madison's argument at the convention becomes clear. While the national government was to be superior to the states in its dealings and would act directly on the people, it was not a replacement or consolidation of the government in any area except those enumerated. This complex relation of the government being both national and yet not taking powers that were unnecessary for the preservation of the union as a whole was laid out in detail by Madison in Federalist 39. His conclusion was that the Philadelphia convention had created

⁹¹ Madison, *Madison Writings*, 355. Madison's speech to the Virginia convention on June 6, 1788

⁹² Madison, *Madison Writings*, 170. Federalist 14

“Neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; *in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national;* and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, not wholly national.”⁹³

The italicized part of the above quote emphasizes the way in which Madison saw the Constitution. The government he proposed was a government that was not consolidated except in the areas where it had been granted enumerated powers. Those areas, he believed, were a bare minimum and consisted in only what was absolutely necessary, as noted in his quote on dangerous powers from the convention. Every protection for liberty at the state level would remain intact while the enumeration of power would keep the national government in a restricted sphere where it could not endanger liberty, since all of its enumerated powers were needed to secure the union and protect liberty.

Thus, the only danger to liberty from the national government was from unnecessary or arbitrary powers being given to the government. Madison therefore believed that the debate should focus on the validity or necessity of the offending powers. This shows the radically different interpretation of the nature of the power given in the Constitution than that articulated by Henry.

It is important to realize that Madison, unlike the claims made by Wood and others, was not in favor of an extremely powerful central government.⁹⁴ These authors, using issues such as

⁹³ Madison, *Madison Writings*, 217. Italics added. Federalist 39

⁹⁴ Wood, *The Creation of the American Republic: 1776-1787*, 473. Also see Charles F. Hobson, “The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government,” *William and Mary Quarterly*, 3rd Ser., vol. 36, No. 2. April, 1979: 215-235. Also, Rakove believed that Madison “doubted whether any line between state and national jurisdictions could ever be accurately drawn.” Jack N. Rakove, “The Madisonian Moment,” *The University of Chicago Law Review*, Vol. 55, No. 2, Spring, 1988: 496. Also, Zvesper made the case that Madison’s design was “not far short of Hamilton’s plan...” John Zvesper, “The Madisonian Systems,” *The Western Political Quarterly*, Vol. 37, No. 2, June 1984: 241.

Madison's desire to give the national government a veto on state laws and to give the national government energy, interpret Madison as desiring a nearly all-powerful national government. These interpretations of Madison's intentions are also used to lay the charge of inconsistency at Madison's feet since, shortly after the convention he sided with most of the other Anti-Federalists in opposing the expansion of national power in areas such as the national bank.⁹⁵ Were Madison for an expansive national government, Henry would have been correct about Madison's intentions to consolidate the states into one government.

However, while he may have wanted more powers granted to the Legislative branch at the Constitutional Convention (such as the power to veto abusive state laws),⁹⁶ he also clearly saw the need to have a limited government at the national level. Examples of such abuses that concerned Madison were paper money and ex post facto laws. According to Lance Banning and Alan Gibson, Madison was different than the other Federalists, particularly Hamilton, in his vision of the kind of power and goals the national government should pursue.⁹⁷ In fact, Gibson has noted that "Madison's disagreements with Jefferson were significant, however, his differences with Hamilton were vast."⁹⁸ Banning concludes that Madison was consistent when he "heartily denied that he approved of a consolidated system, placed increasing emphasis on federal dimensions of the structure, and properly insisted that he had no other object than the peoples' liberty and comfort."⁹⁹ Additionally, Gibson notes that what past scholars had regarded

⁹⁵ See Madison's speech to congress on Feb. 2, 1791 where he opposes the bank on the grounds that it expands the national power. This speech will be analyzed closely later. Madison, *Madison Writings*, 480-490.

⁹⁶ Jack N. Rakove, *James Madison and the Creation of the American Republic*, 3rd ed. (New York: Pearson Longman, 2007), 76.

⁹⁷ Banning, "To Secure These Rights: Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution," 299.

⁹⁸ Alan Gibson, "The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research," *The Review of Politics*, Vol. 64, No. 2, Spring, 2002: 322.

⁹⁹ Banning, "To Secure These Rights: Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution," 300-301.

as plans for extensive nationalism, in the form of the negative on state laws, was actually just a federal check on abusive states (enacting ex post facto for example) and was not intended as an extension of national power.¹⁰⁰ Thus, while Henry was right about some of the Federalists' intentions regarding consolidation, Madison clearly was different.

With this in mind, Madison's arguments against Henry's assertions can be seen as truly heartfelt and consistent. In reply to Henry's first belief, Madison gave a lengthy answer that demonstrated that some powers were national while others were locally held. Madison also noted that the people, thus a national element, would elect the members of the House while the Senators would be elected by the states, a confederation element. Madison concluded his refutation of consolidation by saying, "Thus it [the Constitution] is of a complicated nature, and this complication, I trust, will be found to exclude the evils of absolute consolidation, as well as of a mere confederacy."¹⁰¹ In this passage, Madison reiterated his arguments from Federalist 14 and 39 and attempted to show that Henry's fears were baseless since the Constitution was not simply a consolidation of the governments of America, since it had elements of confederation in it. Thus, the assumption regarding compromise of the protections for liberty at the state level (bills of rights) was incorrect and liberty was protected at the national level. It is also important to note that Madison admitted that a government of this "mixed nature" was "unprecedented: We cannot find one express example in the experience of the world."¹⁰² Yet he believed that this system would protect liberty better than any past systems.

However, Henry was arguing against the Federalist cause in general and he either did not believe that Madison was being genuine in his designs to protect liberty or he sensed that

¹⁰⁰ Gibson, 326-327.

¹⁰¹ Madison, *The Debate on the Constitution: Part Two*, 618-620. Madison's speech at the Virginia convention on June 6th.

¹⁰² Madison, *The Debate on the Constitution: Part Two*, 618-619. Madison's speech at the Virginia convention on June 6th.

Madison was different from the Hamiltonian Federalists. Thus he continued to argue against these more nationally-oriented figures. In his opening remarks on June 9th, Henry betrayed a fundamental belief about the nature of government when he stated “That government is no more than a choice among evils, is acknowledged by the most intelligent among mankind, and has been a standing maxim for ages.”¹⁰³ This statement shows that Henry saw government as a constant danger to liberty (a necessary evil) which was to be restricted, not an agency that was used to secure liberty through certain means necessary for the protection of liberty. It is important to note that while Madison saw human nature as evil and in need of control, he thought it was possible to design a government that would “control itself.”¹⁰⁴ This led Madison to conclude that given human nature, government was a *good* thing for liberty. Thus, his ideas about the inherent nature of governments differed dramatically from Henry’s position of the automatic evil of *any* governing body.

Henry’s arguments came to a head at the end of his speech where he directly addressed Madison’s claims about enumerated powers. Here, Henry drew on the aforementioned fear of implication in the British system of government. This fear, based on the idea that implication would be used by any government to take additional power, was the basis for Henry’s attack. Using the fact that the number of representatives per number of citizens was not directly laid out, Henry stated that the guarantee of enough representatives must be implied. Thus he concluded,

“If they can use implication *for* us [in guaranteeing representation], they can also use implication *against* us. We are *giving* power; they are *getting* power; 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.”¹⁰⁵

¹⁰³ Henry, 458. Henry’s speech to the ratification convention in Virginia on June 7, 1788.

¹⁰⁴ Madison, *Madison Writings*, 295. Federalist 51.

¹⁰⁵ Henry, 472. Henry’s speech to the ratification convention in Virginia on June 7, 1788.

With this accusation, Henry accused the Federalists of using implication to secure rights, such as representation, and noted the flaw that this presented to the enumerated powers doctrine. If any hint of implication was allowed into the system, then it followed that not everything was spelled out and the national government did indeed have a limitless grant of power through implication that needed to be checked. Henry continued,

“Trial by jury and liberty of the press, are also on this foundation of implication. If they encroach on these rights, and you give your implication for a plea, 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 powers into execution.” Implication is dangerous, because it is unbounded; if it be admitted at all, and no limits be prescribed, it admits of the utmost extension.”¹⁰⁶

Thus, Henry presented a new line of attack on the idea of enumerated powers. Since the rights were not spelled out, then they were implied just as they had been in Britain. As Henry noted, the grant of implication left the people with no direct plea if their rights were violated since the rights were not written down. Additionally, he picked up one clause that he suspected was a device to sneak the large grant of power besides those enumerated in the Constitution: The “necessary and proper” clause. This clause appeared to him to be a general grant of power, just as every past government had been, not one of limited power as described by Madison. Finally, Henry responded directly to Madison.

“They say that everything that is not given is retained. The reverse of the proposition is true by implication. 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.”¹⁰⁷

¹⁰⁶ Henry, 472. Henry’s speech to the ratification convention in Virginia on June 7, 1788.

¹⁰⁷ Henry, 472-473. Henry’s speech to the ratification convention in Virginia on June 7, 1788.

With this, Henry concluded with an accusation that the Constitution led America back to a situation under the British monarch before the English Bill of Rights had been secured in 1689. No rights were secure and no way of settling the disputes over violations was possible, Henry claimed. Thus, rights protected by implication in this way were lost and a Bill of Rights was “indispensably necessary.”¹⁰⁸

On the 9th of June Henry made a blunder. When speaking of the nature of representatives in the Constitution, Henry said, “Tell me not of checks on paper; but tell me of checks founded on self-love. This powerful irresistible stimulus of self-love has saved that government.”¹⁰⁹ This statement contradicts what he said earlier on two counts. First, bills of rights are checks on paper. Thus, he seems to reject the very method of checking the government, which he had insisted on earlier. Second, the fact that Henry now based his admiration for British liberty in the checks and balances of that government instead of its bill of rights as the critical point of preserving liberty shows a serious deviation in his argument.

In this speech Henry also noted, when speaking on the powers concerning the militia, that “implication is to operate in favor of congress on all occasions, where their object is the extension of power...”¹¹⁰ Here, Henry picked up his earlier point on implication to demonstrate the danger of giving the national government implied powers in regard to the military since they would only gain power without check. Henry also believed that it was because of the lack of unrestricted power through Virginia’s bill of rights and the limited national confederacy that gave liberty. “For want of that consolidation do we now enjoy liberty, and the privilege of

¹⁰⁸ Henry, 473. Henry’s speech to the ratification convention in Virginia on June 7, 1788.

¹⁰⁹ Henry, 489. Henry’s speech to the Virginia convention on June 9.

¹¹⁰ Henry, 495. Henry’s speech to the ratification convention in Virginia on June 9, 1788.

debating at this moment.” Thus, Henry did not desire to see a change that could threaten the ideal situation of liberty that he felt the current system afforded.

It was near the end of this speech on June 11th that Madison addressed Henry’s arguments regarding the implication of power and nature of the government. “The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects that immediately concern the prosperity of the people. Let us observe also, that the powers in the general government are those which will be exercised mostly in time of war, while those of the state governments will be exercised in time of peace.”¹¹¹ Thus, Madison reiterated his argument from federalism and the theory that the states retained all the powers not given to the government. The addition to his argument here was in trying to show the highly restricted nature of the national power by saying that those powers would be exercised primarily in wartime. However, his real rebuttal to Henry came on the next day after another speech from the former governor.

On June 12 Henry again argued that the use of implication to secure rights had been tried and failed in Britain. He reiterated the history of Charles the first and the other abusive kings until the Declaration of Rights in 1689.¹¹² After these observations, he forwarded an argument for the clear and unmistakable statement of rights as opposed to using the logic of enumerated powers.

There is many a religious man who knows nothing of argumentative reasoning; there are many of our most worthy citizens, who cannot go through all the labyrinths of syllogistic argumentative deductions, when they think that the rights of conscience are invaded. This sacred right ought not to depend on constructive

¹¹¹ Madison, *Madison Writings*, 377-378. Madison’s speech to the Virginia convention on June 11, 1788.

¹¹² Henry, 507. Henry’s speech to the ratification convention in Virginia on June 12.

logical reasoning. When we see men of such talents and learning compelled to use there utmost abilities to convince themselves that there is no danger, is it not sufficient to make us tremble?”¹¹³

Here, Henry carried his argument against enumerated powers to its full extent. Rather than base rights on clearly written declarations, he accused the Federalists (and Madison in particular) of trading “these rights for logical reasons.”¹¹⁴ Henry’s distrust of logic-based rights was founded on the experience of Britain herself since it lacked a written constitution. Thus, his case for adding such a declaration to the Constitution seemed entirely plausible.

One can imagine the scenario that Henry alluded to as the following. A person is arrested for an inflammatory piece of political writing. When arguing in court, the arrested person would have to follow a syllogism such as the following. The national government has only the powers granted it in the Constitution. Arresting people for political statements is not one of those powers. Therefore, I have the right to print this writing no matter how inflammatory. Henry implicitly asked those at the convention to contrast this difficult and vague defense with the defense of “I have the right to free speech because it says I do in the bill of rights.”

Madison took the floor the same day and began to make his case against a bill of rights. First, Madison attacked the idea (as noted in section 2) that a bill of rights would actually protect people against a determined majority. As noted before, he made the case that the multitude of sects, not the protections written into the state constitutions were what had kept religion secure from government interference.¹¹⁵

Having made this argument against the effectiveness of bills of rights, Madison then returned to his argument from enumerated powers. “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant

¹¹³ Henry, 508-509. Henry’s speech to the ratification convention in Virginia on June 12.

¹¹⁴ Henry, 509. Henry’s speech to the ratification convention in Virginia on June 12.

¹¹⁵ Madison, *Madison Writings*, 381. Madison’s speech to the Virginia convention on June 12.

usurpation.”¹¹⁶ The conclusion Madison reached here on the power of the national government shows that he rejected Henry’s distrust. He did not accept that the rights were based on a long logical proof. Instead, he felt that enumerated powers clearly stated the protection for liberty. His statement on their not being a “shadow of right” shows that he disagreed profoundly with the assessment Henry had made of the nature of enumerated powers. Even the factions of Federalist 10 would be unable to take advantage of this system since even if they had the will to exercise power against other groups, they would be bound to only the powers granted.¹¹⁷

This is made clearer by his statements on June 14th. In that speech Madison made clear that if power needed to be given, then it was “unsafe to withhold it.”¹¹⁸ Thus, Madison saw the Constitution as creating a safe and necessary location in which to lodge the powers spelled out within the document.

V. The Debate Over Liberty: The Negatives Objection and Concluding Arguments

Against a Bill of Rights

On June 16th Henry is reported as saying the following.

“[Henry] asked, if the doctrine which had been so often circulated, that rights not given were retained, was true, why there were negative clauses to restrain Congress? He told gentlemen that these clauses were sufficient to shake all their implication. For, says he, if congress had no power but what was given them, why restrict them by negative words? Is not the clear implication this – that if these restrictions were not inserted, they could perform what they prohibit?”¹¹⁹

Thus, halfway through the debate, Henry hit an apparent contradiction in the Federalist case of enumerated powers. If certain things were prohibited already, then, as he had suspected,

¹¹⁶ Madison, *Madison Writings*, 382. Madison’s speech to the Virginia convention on June 12

¹¹⁷ The point of parchment barriers will be revisited in the final section.

¹¹⁸ Madison, *Madison Writings*, 385. Madison’s speech to the Virginia convention on June 14.

¹¹⁹ Henry, 539-540. Henry’s speech to the ratification convention in Virginia on June 16.

the document was a general grant of power with only a slim bill of rights. The contradiction of the negatives in the Constitution came back up again toward the end of his speech on the 16th too. There Henry noted that interference in the slave trade was prohibited, showing that if the restriction had not been present, the general grant of power would have allowed the national government to exercise its power over the trade.¹²⁰

To bolster this claim Henry again noted the “necessary and proper clause”¹²¹ as evidence of the large grant of power and concluded that this confirmed the Federalist scheme. He noted that, despite the need for an energetic government, “to grant an unlimited, unbounded authority” was against all “prudence” and “good policy.”¹²²

Henry also argued that his interpretation of government as a general grant of power was supported by the experience of every other nation. He stated that “For every possible right which is not reserved to the people by some express provision or compact, is within the king’s prerogative. It is so in that country [Britain], which is said to be in such full position of freedom. It is so in Spain, Germany, and other parts of the world.”¹²³ Henry did not believe that the Constitution proposed anything different than what these countries had in a general grant of power. Thus, he concluded that unless the people take their rights and “reserve them, they will be supposed to be given up.”¹²⁴

Henry made one other argument on the 16th that should be noted. He asked why rights should not be written down. He noted that a bill of rights shows “That our rights are reserved. –

¹²⁰ Henry, 549. Henry’s speech to the ratification convention in Virginia on June 16.

¹²¹ Henry, 540, 542. Henry’s speech to the ratification convention in Virginia on June 16.

¹²² Henry, 543. Henry’s speech to the ratification convention in Virginia on June 16.

¹²³ Henry, 544. Henry’s speech to the ratification convention in Virginia on June 16.

¹²⁴ Henry, 545. Henry’s speech to the ratification convention in Virginia on June 16. Wood also emphasizes this point in analyzing the Anti-Federalists. Wood, *The Creation of the American Republic: 1776-1787*, 541.

Why not say so? Is it because it will consume too much paper?”¹²⁵ Here Henry argued that there was no good reason not to have a bill of rights and wondered what harm could be done by one since they only stated what rights were reserved.

Henry resumed his seemingly deadly argument on negatives in the Constitution the next day by stating that “Let me briefly remark, that there is a bill of rights in that government [the Constitution]. There are express restrictions which are in the shape of a bill of rights: But they bear the name of the ninth section.” These restrictions, he said, were “the sole bounds intended for the American Government.” With this accusation, Henry then noted that the most important rights were absent from this section such as freedom of conscience. Then, he took the logic of negatives on supposedly enumerated powers to its conclusion. Rather than a government which had only a few powers given to it while the rest remained in other hands, Henry stated that the presence of negatives showed that “everything is given up, which is not expressly reserved.” Thus, he finished by saying that “every thing which is not negated, shall remain with Congress.”¹²⁶

This assault on the Constitution, despite its late arrival in the debate, represented a major theoretical challenge to the Constitution and allowed Henry to articulate an important principle, which Madison would use in one of his last speeches. The principle in question is whether the doctrine of enumerated powers would still be valid if restrictions on the use of power also existed in the Constitution. If only certain powers were explicitly granted, how could those powers then need restricting? This line of reasoning was especially devastating in light of the fact that Madison had been arguing that it was the very precise nature of the powers given that protected

¹²⁵ Henry, 547. Henry’s speech to the ratification convention in Virginia on June 16.

¹²⁶ Henry, 549-550. Henry’s speech to the ratification convention in Virginia on June 17.

liberty. Yet, as Henry pointed out, in section nine, several restrictions were placed on the new government.

However, Edmund Randolph rescued the enumerated powers doctrine from contradicting itself. He noted that, rather than indicating implied powers not expressly laying out, “every exception here [in the 9th section] mentioned, is an exception not from general powers, but from the particular powers therein vested.” Randolph then specifically outlined how the powers given to Congress *would* have allowed the actions mentioned in section 9. For example, Randolph pointed out that the special protection for habeas corpus was needed since Congress had been given the power to regulate the courts and thus “could suspend the writ...” were it not for the clause in section 9.¹²⁷ Thus, these particular exceptions were needed to stop the particular abuses that might have happened even with only the specific powers given.

As the Virginia Ratification convention drew to a close, Henry’s arguments became more desperate. When a motion was made on June 24 that contained three suggested amendments to the Constitution, Henry protested that if voted for then “only three things [would] be retained:- Religion, freedom of the press, and jury trial.”¹²⁸ This argument continued to count on the idea that the document was not one of enumerated powers. Henry then stated that unless the Constitution said that it only granted enumerated powers, such an interpretation would not be used when the government was enacted. Thus, he proposed that an amendment saying this “must be previous to adoption...” His proposal resembles the 10th Amendment that Madison eventually added remarkably. Henry stated that the Constitution should have a clause reading

¹²⁷ Edmund Randolph, *The Debate on the Constitution: Part Two*, edited Bernard Bailyn (New York: Literary Classics of the United States, 1993), 710-711. Randolph’s speech at the Virginia convention on June 17.

¹²⁸ Henry, 573-574. Henry’s speech to the ratification convention in Virginia on June 24.

“that every power not granted remains with the people...”¹²⁹ This proposal, however, was not acted upon by the convention.

Finally, on the 24th Henry made two other points. The first is related to the point he had made earlier regarding the negatives already in the Constitution. “When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.”¹³⁰ This point of Henry’s shows a great weakness in his claims for a bill of rights as will be shown shortly.

Madison, replying to Henry on June 24th moved to address the practical problems of proposing amendments from the Virginia convention. He noted that if Virginia could propose amendments, then every state could and he feared that none of the proposals would agree enough to be used. This would have the effect of killing the Constitution before it began. To support this observation, Madison pointed out that there was “a great contrariety of opinions among the gentlemen in the opposition.”¹³¹ If even the opponents of the Constitution could not agree on the right way to change it, how could the thirteen states even consider agreeing on the necessary changes? Thus, Madison made the case that the document must be left as it was.

Madison then took the logic of losing every right not enumerated and turned it around upon Henry himself. First, Madison rebutted Henry’s arguments revolving around the notion that all rights not enumerated were given up. He stated that “the powers granted by the proposed Constitution, are the gift of the people, and may be resumed by them when perverted to their oppression, and every power not granted thereby, remains with the people, and at their will.”¹³²

¹²⁹ Henry, 575. Henry’s speech to the ratification convention in Virginia on June 24. Note that the 10th Amendment reads, “The 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.”

¹³⁰ Henry, 580. Henry’s speech to the ratification convention in Virginia on June 24.

¹³¹ Madison, *Madison Writings*, 401-403. Madison’s speech to the Virginia convention on June 24.

¹³² Madison, *Madison Writings*, 404. Madison’s speech to the Virginia convention on June 24.

Here Madison restated the enumerated powers doctrine to refute the objection. This shows again that Henry and Madison were operating from fundamentally different interpretations of how to protect liberty and the nature of the Constitution.

Second, and more importantly, Madison took the arguments of Henry regarding negatives in the Constitution and regarding his point that all rights not enumerated were lost and turned them to his own advantage.

“Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied, that every thing omitted, is given to the general government? Has not the Honorable Gentleman himself, admitted, that an imperfect enumeration is dangerous?”¹³³

With this statement Madison attacked the entire idea of bills of rights as opposed to enumerated powers. If, as Henry himself had noted, a critical right was left out of such an enumeration of rights, then it was lost under a general grant of power. Madison pointed out here that the Constitution did better than simply granting power with a few exceptions in its use of only granting enumerated powers, thus protecting liberty to a greater degree than Henry’s model could obtain. Madison went on to explain,

“Does the constitution say that they shall not alter the laws of descents, or do these things which would subvert the whole system of the state laws? If it did, what was not excepted would be granted. Does it follow from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds.”¹³⁴

Here Madison concluded that it was in fact the lack of restrictions that protected liberty. He maintained that to add restrictions would make the Constitution appear to be a general grant of power. Since this was not an implication that was intended and since such an interpretation would destroy the protection of liberty itself, enumerating rights became dangerous. With this in

¹³³ Madison, *Madison Writings*, 405. Madison’s speech to the Virginia convention on June 24.

¹³⁴ Madison, *Madison Writings*, 405. Madison’s speech to the Virginia convention on June 24.

mind, Madison opposed a bill of rights since, according to Henry's own logic, it would destroy the enumerated powers doctrine and provide an imperfect protection for liberty if anything was forgotten. Rather than being left out because of concerns over the use of paper, Madison maintained that the heart of the Constitution was at stake in leaving out a bill of rights.

Madison, at the end of his speech made one concession. He acknowledged that, if the Constitution was ratified, amendments could be recommended and he might find those acceptable since they would dispel fears. However, he flatly opposed amending the Constitution prior to ratification.¹³⁵

On June 25th, the Virginia convention voted 89 to 79 in favor of the Constitution without amendments. In addition to the vote, they formed a committee that included both Henry and Madison to draft a resolution proposing amendments to the new government.¹³⁶ In his last speech Henry also pledged to continue to fight to regain the rights he felt were lost with the Constitution, but not in a violent manner.¹³⁷

This concluded the debate over ratification. Madison was forced, as noted before, to be ready to try to add amendments to the Constitution.¹³⁸ However, Henry and Richard Henry Lee were both extremely dissatisfied with Madison's amendments. Henry wrote to Lee that "the Amendments, I think they will tend to injure rather than serve the cause of liberty – provided

¹³⁵ Madison, *Madison Writings*, 407. Madison's speech to the Virginia convention on June 24.

¹³⁶ Henry, 591. Henry's speech at the Virginia convention on June 25.

¹³⁷ Henry, 590. Henry's speech at the Virginia convention on June 25.

¹³⁸ For a detailed analysis of Madison's motivations and the process involved in passing the Bill of Rights, see Kenneth R. Bowling, "A Tub to the Whale: The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic*, Vol. 8 No. 3. Autumn, 1988. Note especially page 224 on Madison's motivations and pages 249-251 on Virginia's reaction to the proposed amendments from Madison. In his letter to Richard Peters, Madison's listed 6 motivations, such as a duty as an honest man, for his reasoning that led him to pursue the amendments. Another reason given was a fear that his political opponents would propose more damaging amendments. Madison, *Madison Writings*, 471. Madison's letter to Peters on August 19, 1789.

they go no further than is proposed as I learn.”¹³⁹ A few weeks later, Lee wrote to Henry criticizing the short length of the amendments and stating “how wonderfully scrupulous have they been in stating rights? The English language has been carefully culled to find words feeble in their nature, or doubtful in their meaning.”¹⁴⁰ The rights were not what the Anti-Federalists wanted.¹⁴¹

The effect of the addition of the Bill of Rights on liberty and the doctrine of enumerated powers in the past and in the present will be analyzed in the final section.

VI. Conclusion

Throughout this essay, two distinct views on the protection of liberty have been explored. The first purports to protect liberty through the enumeration of specific rights that are sacred and cannot be violated without destroying liberty.¹⁴² Patrick Henry represented this view. Whether these rights were Henry’s *definition* of liberty is not clear but it is clear that having written rights was an essential part of the defense of liberty in his mind. On the opposing side, James Madison represented a dramatically different method of protection. Madison’s methods of protection was to enumerate the powers given to Congress and thus protect rights through not granting the national government the power to violate the people’s liberty.

In this final section it will be demonstrated that these two methods are incompatible. Despite this, both methods are incorporated into the Constitution. It will be maintained that this

¹³⁹ Henry, 398. Henry’s letter to Richard Henry Lee on August 28, 1789.

¹⁴⁰ Richard Henry Lee, *Patrick Henry: Life, Correspondence and Speeches*, edited William Wirt Henry (Harrisonburg: Sprinkle, 1993), 3: 398. Lee’s letter to Henry on September 27, 1789.

¹⁴¹ Lienesch, 273.

¹⁴² The enumeration of rights has been, in more modern writings, one of the primary theories for the protection of liberty, often called negative liberty. The development of this idea can be seen in Isaiah Berlin’s essay, “Two Concepts of Liberty.” Isaiah Berlin, “Two Concepts of Liberty,” in *The Liberty Reader*, edited David Miller (Boulder: Paradigm, 2006), 33-57.

combination has led to the endangering of the very liberty both men sought to protect. Madison attempted to prevent this paradox in his construction of the Bill of Rights but his methods were forgotten or ignored and thus failed. The result of this has been the realization of Madison's predictions about the loss of liberty and has resulted in a Constitution that does not have a single clear protection for liberty.

First, Hamilton in Federalist 84 argued the case for incompatibility of the two methods.

“I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more that were granted. For why declare things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”¹⁴³

In this passage Hamilton outlined the same fear that Madison had presented during the debate at Virginia. If a bill of rights was attached, then the implication that those powers could be violated was clearly given. Hamilton asked why powers not given should be exempted. This led to the danger and incompatibility, which Hamilton went on to expound.

“I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers by the indulgence of an injudicious zeal for bills of rights.”¹⁴⁴

¹⁴³ Alexander Hamilton, *The Federalist Papers*, (New York: Bantam Dell, 2003), 524.

¹⁴⁴ Hamilton, 524-525.

Hamilton's case presented the idea that rather than regulate actions, as a bill of rights intuitively should do, given the nature of enumerated powers the bill would actually grant power. Since the powers were enumerated and strictly defined (or so they said), a bill of rights exempting powers not within those definitions implied that those powers were in fact included. Thus, in attempting to protect liberty, adding a bill of rights would in fact endanger it by adding, through implication, power to the government that was not supposed to be given. This case was expounded upon and accepted by the recent author Forrest McDonald who maintained that the Bill of Rights was damaging to the protection of liberty and the rule of law.¹⁴⁵

However, it seems that the historical case is not quite so simple, particularly considering Madison and Jefferson's time in office. On February 2, 1791 in the first Congress under the new Constitution, Madison made a desperate plea. The issue before the House was on whether to charter a national bank. The reasoning behind the bank was that the "Necessary and Proper" clause allowed the government a wide range of power to operate with. Hamilton propagated this interpretation, despite his comments noted before in the Federalist that indicated a government limited to enumerated powers. In the end, he was successful and defeated Madison, who still maintained that the Constitution only granted enumerated powers.¹⁴⁶ In his speeches opposing the bank, Madison made several key statements about what was happening to the government if these implied powers were used.

First, Madison asked "Is the power of establishing an *incorporated bank* among the powers vested by the constitution in the legislature of the United States?"¹⁴⁷ After answering in

¹⁴⁵ McDonald, 390-394, 418.

¹⁴⁶ Rakove, 114-116.

¹⁴⁷ Madison, *Madison Writings*, 482. Madison's speech to Congress on Feb. 2, 1791.

the negative, Madison went on to refute the claims from Hamilton's followers about certain clauses in the Constitution.

“No argument could be drawn from the terms [in the preamble of the Constitution] “common defense, and general welfare.” The power as to their general purposes was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the state governments.”¹⁴⁸

Madison then went on to revisit the interpretation he had given at the Virginia convention and the interpretation Hamilton had given in Federalist 33 of the “Necessary and Proper” clause.

“Whatever meaning this clause [the Necessary and Proper clause] may have, none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means *necessary* to the *end*, and *incident* to the *nature* of the specified powers.”¹⁴⁹

Rather than being an open grant of power, Madison pointed out that the clauses being used to justify actions not among the enumerated powers were not intended to imply that Congress could take any action. Madison went on to show the destructive end that allowing such implication would have on liberty.

“If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”¹⁵⁰

Madison's use of the chain metaphor is an indication of the fears he had for the doctrine of allowing implied powers. With these new powers, the Constitution became an instrument to take any and every action, no matter the cost to liberty and destroyed the nature of the document

¹⁴⁸ Madison, *Madison Writings*, 483. Madison's speech to Congress on Feb. 2, 1791.

¹⁴⁹ Madison, *Madison Writings*, 484. Madison's speech to Congress on Feb. 2, 1791.

¹⁵⁰ Madison, *Madison Writings*, 486. Madison's speech to Congress on Feb. 2, 1791.

as only giving enumerated powers. The extent of this strict interpretation was made clear by Madison when he said, “no power...not enumerated could be inferred from the general nature of government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the constitution.”¹⁵¹ Thus, no matter what the power might be, according to the interpretation of the Constitution, nothing besides the powers granted could be used. According to Madison, “In this sense it had been explained by the friends of the Constitution, and ratified by the state conventions.”¹⁵² As a point of speculation, it may be that Madison’s reference to “friends” in this passage refers to Hamilton. His writings during the Ratification debate certainly conformed to the interpretation Madison had for the Constitution and it is clear that Hamilton changed his position.

This argument returned to the bill of rights issue in a dramatic way when Madison returned to the debate that had taken place over two years previously between the Federalists and Anti-Federalists.

“The defense against the charge founded on the want of a bill of rights, presupposed... that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c. could not have been disproved. *The explanations in the state conventions* all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated.”¹⁵³

With this statement Madison pointed to the clear original intent of the document using the debate over enumerated powers and bills of rights. Madison pointed out that unless the

¹⁵¹ Madison, *Madison Writings*, 488. Madison’s speech to Congress on Feb. 2, 1791.

¹⁵² Madison, *Madison Writings*, 485. Madison’s speech to Congress on Feb. 2, 1791.

¹⁵³ Madison, *Madison Writings*, 488-489. Madison’s speech to Congress on Feb. 2, 1791.

document had meant for only strictly enumerated powers to be used, then they never could have reasonably argued that liberty was protected by the Constitution in its original form.

Madison's conclusion foretold of dire consequences if the original intent of the Constitution was ignored. If implied powers were allowed to enter, it "establishes a precedent of interpretation, leveling all the barriers which limit the powers of the general government, and protect those of the state governments." This elimination of limits would in the end "destroy the main characteristics of the constitution..."¹⁵⁴ With this destruction, Madison saw the loss of liberty as imminent. Without limits, the Constitution truly did represent what Henry had claimed it did, a general grant of power.

Despite Madison's speech and the clear record of past writings, implied powers entered the United States through a changed interpretation of the Constitution.¹⁵⁵ With this in mind and the fact that Henry had been exactly right when he claimed that the "Necessary and Proper" clause would be used to expand the powers of the government it might be tempting to decide that the Bill of Rights was a providential stroke to save the republic from the disaster of an unlimited power. Paul Finkelman has argued that without the Bill of Rights "the republic might not have survived to celebrate its two hundredth birthday."¹⁵⁶

However, despite the quick demise of the original intent of the Constitution, many problems remain as a result of the Bill of Rights. McDonald chronicles the ineffectiveness of the Bill of Rights throughout American history. This account emphasizes the fact that the Bill of Rights, when a majority is determined, offers no protection. Cases such as Dred Scot, Lincoln's suspending most of the Bill of Rights to arrest 20,000 "disloyal" citizens, the incarceration of

¹⁵⁴ Madison, *Madison Writings*, 489-490. Madison's speech to Congress on Feb. 2, 1791.

¹⁵⁵ Rakove, 115-116.

¹⁵⁶ Finkelman, 172.

tens of thousands of Japanese during World War Two (70,000 of whom were U.S. citizens), the McCarthy investigations, and abuses of martial law (such as Jackson's punishment of press criticism after his campaign in New Orleans) compose only a partial list of McDonald's instances of ineffectiveness. This result is exactly what Madison had predicted when he accused the Anti-Federalists were after parchment barriers.¹⁵⁷

What is even more incredible is that the first general violation of the Bill of Rights came just a few short years after its ratification. In 1798 Adams and the Federalist majority in the national government passed the Alien and Sedition Acts. As Paul Johnson described them, "These four measures limited freedom of the press and speech and restricted the activities of aliens, especially French and Irish."¹⁵⁸ Rakove writes that these acts were not simply a show but were used by the Federalists as "a handy club to beat their critics into submission." This violation of the first amendment came less than a decade after it was ratified. Thus, the parchment nature of the Bill of Rights appeared early in American history.

Alexis De Tocqueville observed that, rather than having sanction in rights, America had all of the systems set up to make the majority omnipotent and without appeal. He concluded his remarks on this point by observing "no guarantee against tyranny is evident and that the causes for the mildness of the government should be sought more in circumstances and habits than in laws."¹⁵⁹ Additionally, Akhil Amar has observed that the Bill of Rights is carved up in law schools. Thus it is not taken as a whole and the second and third amendments are usually not

¹⁵⁷ McDonald, 402-417, 391.

¹⁵⁸ Paul Johnson, *A History of the American People*, (New York: Harper Collins, 1997), 240.

¹⁵⁹ Alexis De Tocqueville, *Democracy in America and Two Essays on America*, (New York: Penguin Classics, 2003), 292-296.

even considered.¹⁶⁰ McDonald also maintains that the ninth and tenth amendments have been ignored.¹⁶¹

Thus, it seems that the Bill of Rights has not always fulfilled its promise. This was partially due to the fact that Madison drafted it in such a way as to attempt to protect the enumerated powers doctrine. The ninth and tenth amendments, taken in the context of the debates leading to their adoption, restate the doctrine.

“Article IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Article X: The 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.”

These amendments were Madison’s attempt to reconcile a Bill of Rights with the enumerated powers ideals. McDonald noted, “the Ninth Amendment sought to guarantee that the first eight would not be dangerous, and the Tenth declared them to be unnecessary.”¹⁶² Additionally, as Hadley Arkes has noted, by tacking the rights on at the end of the document, the Founders implied that the original focus of the document had *not* been to protect liberty. Thus, another focus was perceived in the original document. This change in focus was, according to Arkes, brought about when the Bill of Rights was added.¹⁶³

This change in focus, predicted by Madison and Hamilton when arguing against a bill of rights, may have caused the inability of the government to correct after the Federalists were driven from power in 1800. When Jefferson and Madison took office, they attempted to use a limited Federal government. An example of this is the classic incident of Jefferson questioning

¹⁶⁰ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, (New Haven: Yale UP, 1998), xi.

¹⁶¹ McDonald, 401.

¹⁶² McDonald, 398.

¹⁶³ Hadley Arkes, “To Secure These Rights: Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution,” in *To Secure The Blessings Of Liberty: First Principles of the Constitution*, edited Sarah B. Thurow (New York: UP of America, 1988), 127-128.

whether he had the power to purchase the Louisiana territory.¹⁶⁴ Jefferson, using the enumerated powers doctrine, agonized over the question of whether such power could be clearly seen in the description of the president. However, despite the fact that he felt he was “breaking the Constitution,” he made the purchase and justified himself with an ends justifies the means thought.¹⁶⁵ Thus, had it not been for the change in focus, the country may have returned to its roots of enumerated powers. Perhaps the Bill of Rights and the kind of government it implied (a government with a general grant of power) helped override the ninth and tenth amendment, thus pushing enumerated powers as a protection aside.

The Court has not been friendly to the doctrine of enumerated powers either. It was the Court that gave its approval to the use of powers outside those enumerated in 1819 with its decision in the *McCulloch v. Maryland* case. This case involved the national bank again. Maryland had attempted to tax the bank. The national bank refused to pay and the case went to the Supreme Court with Chief Justice Marshall. In this decision, “Marshall fully adopted Hamilton’s reasoning and the government’s claims [to implied powers].”¹⁶⁶ Thus, the Court refused to hold Congress to its powers.

As history has played out, enumerated powers are forgotten. As shown from the national bank incident, Congress abandoned the original doctrine nearly from the beginning, even though Madison himself was in the House at the time. A few years later, Jefferson as President explicitly broke the doctrine to purchase the Louisiana Territory. Finally, the Court in 1819 with the *McCulloch* case effectively legitimized the original intent of the Constitution being abandoned. Thus, within the first 30 years of government under the Constitution, the original

¹⁶⁴ Rakove, 159-164.

¹⁶⁵ Johnson, 252.

¹⁶⁶ Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 5th ed. (Washington D.C.: CQ Press, 2004), 151-159.

intent with regard to protecting liberty was lost. Additionally, over the last half-century, the Court has adopted views against any kind of original intent philosophy preferring more liquid interpretations of the document.¹⁶⁷ Loose interpretation of enumerated powers is the equivalent of destroying the entire philosophy. Without strict definitions, as Madison pointed out clearly, the protection was lost completely.

Arkes and McDonald both lament the effects of the Bill of Rights. Arkes wrote that the Bill of Rights caused Americans to forget the principles of liberty upon which the republic was founded.¹⁶⁸ He also noted, as Madison had in the debate, that a complete list of rights is not possible, thus making a bill of rights an impractical way to protect liberty.¹⁶⁹ McDonald goes a bit further and argues that the bill has resulted in absurdities that he calls “freedom from religion” where a school can not have any mention of God yet coins minted by the national government itself bear His name. Additionally, he argues that since the Bill of Rights is not universally applied it has led to a decline in the rule of law.¹⁷⁰ This has resulted in a situation where, as Rushdooney notes, “we are less and less under the Constitution and increasingly under the Supreme Court.”¹⁷¹

However, one might wonder that even if enumerated powers had not been rejected early in American history, would they have proven to be more than parchment barriers themselves? Enforcement of the barriers, like the Bill of Rights, would depend on the check of elections and institutional checks. Once again, a process of Judicial Review would probably have sprung up. However, the key difference between enumerated powers and the Bill of Rights is contained in

¹⁶⁷ Epstein and Walker, 25-33.

¹⁶⁸ Arkes, 144.

¹⁶⁹ Arkes, 131.

¹⁷⁰ McDonald, 418-419.

¹⁷¹ Rousas John Rushdooney, *This Independent Republic*, (Vallecito: Ross House Books, 2001), 147.

the specific nature of the enumerated powers. When a right seems to be violated, as Arkes points out, it is unclear whether such an instance is warranted (such as a suppression of profane or dangerous speech) and leaves a great deal of room for interpretation.¹⁷² In contrast to this, when the government exercises a power not specifically enumerated, the violation is clear and could easily be reviewed by the Court or overturned by other institutional means (such as the president refusing to enforce the unconstitutional act). Thus, liberty would be protected by far more than vague parchment barriers; liberty would be protected by clear restrictions on the power the government could exercise.

It is important to remember however, that liberty is not completely unsafe in America. Both Henry and Madison did not see either enumerated powers or a bill of rights as the only protection of liberty; these were the additional ingredients they saw as necessary. Both men also, as noted, looked to republican institutions to protect liberty. It is these institutions and not the bill of rights or the enumeration of powers (since it has been abandoned) that have preserved liberty in the United States. However, the majority in America is designed to rule over the long term. Thus, if these institutions are the only protections of liberty, then liberty truly does depend, as Tocqueville said, upon the mild manners of the people, not anything in the government itself. The answer to the complex questions surrounding rights and the role of the United States government in protecting liberty resides in the understanding of the Constitution at the time of its adoption. To secure the liberty America was founded to maintain, the enumerated powers doctrine needs to be reestablished.

¹⁷² Arkes, 132.