were referred to a select committee on July 26 and did not come before the House until mid-August. At that point, however, he insisted that despite the urgency of other business, a large proportion of the people were "also anxious to secure those rights which they are apprehensive are endangered." Considering the confidence that had been placed in Congress when the Constitution was adopted, he considered it "incumbent" on the representatives "in point of candor and good faith, as well as policy" to "pursue the subject to effect."[74]

The standard story of the framing of the Bill of Rights may be familiar to most readers. Madison, this says, considered the persistent clamor for addition of a bill to be the lynchpin of the opposition coalition. Remove it, he perceived, and the supporters of the Constitution would "extinguish opposition to the system, or at least [would] break the force of it by detaching the deluded opponents [of the Constitution] from their designing leaders," who were still determined to impede or weaken the reform.[75] Accordingly, he carefully extracted from the changes recommended by the state conventions only those that he considered harmless, proposing a concession that would leave the powers and the fundamental structure of the federal government essentially untouched. Then, against the opposition of the Antifederalists in Congress, which was rendered all the more annoying by significant resistance from the Federalists themselves, he pleaded and persisted till the work was done. Every element of the completed bill was drawn from Madison's initial resolutions. It would not have been approved if he had not been present. And it succeeded brilliantly in meeting his objectives. It fractured the opponents of the Constitution, crushed the possibility of substantive amendments, and restored the author's popularity at home.[76]

All of this is true. Most of it, in fact, was candidly acknowledged by the sponsor of the first amendments in his speeches to the House. The problem with the standard story, insofar as one exists, is that it has been served so commonly in such a heavy sauce of modern disillusionment with politicians that much of the authentic flavor has been lost. This seems to me unquestionably the case when what is stressed most strongly is the point that may need emphasizing least: Madison's supposed alarm about his standing in Virginia, which had never been that seriously at risk. It seems the case, more subtly but more commonly, when nearly all the emphasis is placed on Madison's initial doubts about the wisdom and efficacy of libertarian amendments and his fixed determination to exclude amendments that would change the structure or reduce the powers of the new regime. Both of these concerns were present and important, but neither should be emphasized so heavily that we are left with the impression, as is frequently the case, that the Virginian acted from expediency alone:

that he was privately quite skeptical about attaching these amendments, found the project "nauseous" or galling, and decided to complete it only as a way of crushing the demand for more substantial changes.[77] For Madison, the first amendments were by no means mere "whip-syllabub," as one of his opponents said: "frothy and full of wind, formed only to please the palate," or a tub thrown out by sailors to amuse the whale and gain safe passage for the ship.[78] A close examination of Madison's thinking shows that while he did have reservations, he had also privately concluded that the Bill of Rights was proper in itself. The reasons ran much deeper than can possibly be captured in a cynical, reductionist account. Indeed, when they are placed within the context of the principles and strategy that he had advocated since the opening of Congress, the taste of his distinctive statesmanship emerges with a clarity that can improve our understanding of his course throughout the founding.

Writing Thomas Jefferson in mid-October 1788, Madison declared that he had "always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration."[79] This was as disingenuous, the evidence suggests, as he ever was about a previous political position. At the Constitutional Convention, the states unanimously defeated Mason's motion to prepare a bill of rights, and this could not have been the case if Madison had voted for it.[80] At the Virginia state convention, though he said that "he would be the last to oppose" such amendments, he also argued that "a solemn declaration of our essential rights" was both unnecessary and potentially pernicious.[81] For the months between the two conventions and for some time after the Virginia meeting, Madison's surviving papers are completely silent on the subject. As he said, this was a time when the demand for such a bill was so entangled with the possibility of a conditional ratification of the Constitution (or with the movement for a second federal convention) that it was necessary to deny that *any* alterations were required. Nevertheless, it seems quite certain that until the fall of 1788, Madison agreed with many other Federalists that a reservation of essential rights was inappropriate in a federal Constitution and could, indeed, be positively dangerous to many of the liberties that its proponents wanted to protect.

At the Constitutional Convention, Mason's motion to prepare a bill of rights was overwhelmed without significant discussion. Roger Sherman simply noted that the declarations of the states were not to be repealed by the new Constitution, "and being in force are sufficient."[82] There was nothing cavalier in this remark, and nothing in the quick rejection of the

motion to suggest that members did not care about the rights in question. When Sherman said that it could not be necessary to prepare a federal declaration, he was speaking to a gathering that had been laboring for months to frame the Constitution. No one, then or since, has understood more clearly that the members had been working from the start to frame a government of delegated and enumerated powers—a government, that is, quite different from the governments of Europe or even of the several states, which were assumed to have a plenary authority to act, in any area at all, unless a written reservation or the natural rights of man imposed a prohibition. On this understanding, to insist on a federal bill of rights was simply to mistake the fundamental nature of the government they were creating. In fact, it was to make an error that was anything but friendly to the natural rights that everybody wanted to protect. For if the federal government were understood to have *no* powers other than the ones the Constitution granted, then it had *no* lawful right to enter into any other province. It was forbidden by its very nature to encroach on nearly all that vast domain where human rights are exercised and threatened; and all of that preserve—the province of the states—was therefore safer, on this understanding, than could ever be the case as a result of any effort to define it. For who could ever make a comprehensive list of all the liberties that were entitled to protection?[83] And if something should be inadvertently omitted, might that not imply a federal authority to act on matters that were meant to be beyond the federal sphere?

Though none of this was said at the convention, Federalists began to spell the implications out as soon as they encountered opposition.[84] In a widely published speech, delivered in the State House yard at Philadelphia on October 6, 1787, James Wilson developed the distinction between the federal Constitution, in which "everything which is not given is reserved," and the constitutions of the states, in which "everything which is not reserved is given." It would have been "superfluous and absurd," Wilson reasoned, "to have stipulated with a federal body of our own creation that we should enjoy those privileges of which we are not divested." Moreover, such a declaration "might have been construed to imply that some degree of power was given, since we undertook to define its extent."[85] Hamilton expanded on these arguments in *Federalist* no. 84, which also pointed out that there were numerous specific guarantees of rights in the body of the Constitution.[86] Madison was plainly influenced by the same considerations (and by both of these important texts). Thus he told his state convention that it was "unnecessary" to attach a bill of rights, since "everything not granted is reserved," and that it would be "dangerous" to frame a bill if the enumeration was imperfect, since omissions might be taken to imply a grant of federal powers that had never been intended.[87]

Antifederalists were not persuaded. Neither was the minister to France. On the morning after getting Madison's detailed report on the proceedings of the Constitutional Convention, Jefferson had answered with a lengthy letter praising most of the convention's work, but vigorously objecting to provisions he disliked. "A Bill of Rights," he wrote, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference." Jefferson had seen James Wilson's speech and understood that the convention's plan proposed a limited regime. Still, he pointed out, the great convention had itself seen fit to write explicit guarantees of several rights into the body of the Constitution—a prohibition of religious tests for office, of ex-post-facto laws, and such. He wanted similar protections for the freedom of the press and freedom of religious conscience.[88] Accordingly, when he received the news that nine states had approved the Constitution, he was at his desk again to tell his old collaborator that he still believed that voices North to South were calling for additional protections. He understood the danger from omissions or a flawed enumeration, which was Madison's most serious concern, but he believed that this could be surmounted by declaring prohibitions to be absolute in cases where there seemed a difficulty in agreeing on legitimate exceptions—powers to create monopolies or standing armies for example.[89] In any case, he later added, the supporters of a bill of rights were "too respectable not to be entitled to some sacrifice of opinion," especially when most of the opponents of the Constitution would be satisfied with this addition.[90]

Jefferson did not elaborate his reasoning in full, but Madison could readily supply the missing steps as he had heard them from the Constitution's other critics. The Constitution, they observed, contained a clause declaring it the supreme law of the land. In case of conflict, it would clearly override state bills of rights. Moreover, in addition to its delegated powers, Congress was to have authority to pass such other laws as might be "necessary and proper" to carry its enumerated powers into action. In judging what was necessary, it might well decide that freedom of the press or other fundamental liberties would have to be infringed.[91] Thus, when he received the letters from his friend, Madison was prompted to explain his thinking more completely than he had in any of his papers to this time.

Except for the remark that he had always been in favor of a declaration, Madison's reply to Jefferson was candid. "At the same time," he continued, "I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment for any other reason than that it is anxiously desired by others." In the first place, Madison

explained, he thought the rights in question were protected by the grant of only limited authority to Congress, "though not in the extent argued by Mr. Wilson." Second, he was deeply doubtful that "a positive declaration of some of the most essential rights could . . . be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more" than he or Jefferson would wish. Moreover, he had seen "the inefficacy" of bills of rights at just those times and on those points where they were most to be desired. "Repeated violations of these parchment barriers have been committed by overbearing majorities in every state." In Virginia, he reminded Jefferson, despite the bill of rights' provision for religious freedom, a general assessment would undoubtedly have passed if the majority of citizens had backed it. "If a majority of the people were now of one sect, the measure would still take place and on narrower ground than was then proposed," despite the passage in the meantime of the Statute for Religious Freedom. In America, in short, "power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of constituents." A bill of rights would not control a fixed, tyrannical majority of voters. "Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince."

Madison did not agree with Jefferson that "absolute restrictions" ought to be imposed "in cases that are doubtful." Emergencies would override the plainest charter prohibitions. If Spain or Britain, for example, should send an army to the neighborhood, a parchment prohibition of a peacetime army would at once be overruled. "No written prohibitions on earth" could prevent a measure if necessity and overwhelming public pressure should demand it, and "repeated violations" of such absolute restrictions would destroy the value of a bill of rights in "ordinary" cases. Madison unquestionably believed, as he had said so often, that private rights could be protected most securely, not by parchment declarations, but by the multiplicity of interests in a large republic and by constitutional devices that would check the passions of the moment with the cooler, more mature reflections of the system's other branches.[92]

And yet, although he found the arguments against a bill of rights persuasive, Madison did not consider them conclusive. Like Jefferson, he thought that the proponents of a bill of rights were too respectable and far too numerous to be ignored. To ease the anxious minds of men whose judgment he respected—men like Jefferson himself—was an appropriate republican objective. In addition, he observed, a bill of rights would have

at least two further uses. First, he reasoned, "the political truths declared in that solemn manner [would] acquire by degrees the character of fundamental maxims of free government." As they became "incorporated with the national sentiment," these principles would work to "counteract the impulses of interest and passion" in the minds of the majority itself. Second, even though the rights in question would usually be threatened by an "interested majority" of people, there might still be times when the evil might issue from the usurpations of governing officials. At those times,

> a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps, too, there may be a certain degree of danger that a succession of artful and ambitious rulers may by gradual and well-timed advances finally erect an independent government on the subversion of liberty. Should this danger exist at all, it is prudent to guard against it, especially when the precaution can do no injury.[93]

On June 8, when he presented his amendments to the House, Madison incorporated all the arguments elaborated in his private letters, together with the most persuasive Antifederalist appeals for "additional guards for liberty." To these, he added yet another argument, which Jefferson had offered in a letter of March 15: the legal check on governmental usurpations that a bill of rights would put into the hands of federal judges.[94] Once these changes were incorporated in the fundamental law, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative and executive" branches.[95] In this speech, as in his private letters, Madison did not disguise his hope that the adoption of his propositions would appease opponents of the Constitution and demonstrate that its supporters "were as sincerely devoted to liberty and a republican government as those who charged them with wishing . . . to lay the foundations of an aristocracy or despotism."[96] He was careful to assure the House that he had not included anything that would dilute essential powers, anything that he did not regard as proper on its merits, or anything that seemed unlikely to receive approval from the states. Obviously, there was nothing underhanded in these tactics, nor were these the only grounds on which he thought the House should act.

Madison apologized repeatedly for taking time from other business to deliberate a bill of rights, which helps explain why some of his contemporaries thought that he was tepid in his own commitment to the project.[97] He also spoke repeatedly about his promise to his district, which encouraged others to believe that he was courting popularity with voters.[98]

Nevertheless, these critics gravely underestimated an extraordinary man, an error which has been repeated all too often in historical discussions of his motives. Several of the other Federalists in Congress certainly believed that Madison was asking them to sacrifice their own opinions to the views of the opponents of the Constitution. Their resentment of concessions they considered both unnecessary and improper prompted much of the resistance to his motions, which was reinforced by sheer impatience to get on with other business.[99] But despite his early reservations, this was not how Madison himself was thinking of the project. In his own conception, he was not surrendering his private judgment to opponents of the Constitution who could be distracted and confused by basically cosmetic changes, nor was this what he was asking other Federalists to do.[100] On the contrary, what he asked in his remarks proposing the amendments will reward a very close consideration, for there is little in his life that tells us more about his thought or takes us closer to the concept of republican statesmanship that he had advocated and attempted to exemplify since the beginning of the session.

"A great number of our constituents . . . are dissatisfied," Madison said,

> among whom are many [who are] respectable for their talents, their patriotism, and . . . the jealousy they have for their liberty. . . . We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes and expressly declare the great rights of mankind secured under this Constitution. The acquiescence which our fellow citizens show under the government calls upon us for a like return of moderation.

Not only was it wise to reconcile the many who were "much inclined to join their support to the cause of federalism if they were satisfied in this one point." Not only was it well to seek reunion with the two nonratifying states. It was important in itself "to extinguish from the bosom of every member of the community any apprehension that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled." Most of those who opposed the Constitution, Madison repeated, disliked it because they thought their rights unsafe, "*nor ought we to consider them safe* while a great number of our fellow citizens think these securities necessary."[101] "If we can make the Constitution better in the opinion of those who are opposed to it, without weakening its frame or abridging its usefulness in the judgment of those who are attached to it, we act the part of wise and liberal men."[102]

In many of his greatest speeches, Madison's habitual procedure was to

summarize the arguments and options that had been developed in the course of a debate, to analyze their weaknesses and strengths, and thus to recapitulate for others the considerations that had led him to his own conclusions.[103] His mind was like a finely calibrated scale. It felt the weight of arguments on both sides of an issue, measured them with care, and tipped in one direction or the other. Like the scale, moreover, when the balance started tilting, it dropped decisively in that direction. Not infrequently, the arguments on the opposing side slid over and were blended with their opposites into a compound that was new. In addition, Madison was genuinely capable of thinking that the well-considered judgments of the collectivity could be superior to the conclusions of his own unaided reason. In the weeks between the federal convention and the time when he embarked on his defense of the completed Constitution, he decided that the finished charter was superior in most respects to the proposals he had drafted in his closet, a better plan than he had judged it at the moment of its signing. In *The Federalist*, accordingly, he freely used the arguments that his opponents had advanced at the convention. Something similar occurred between the state convention and the drafting of the Bill of Rights. Madison decided that the arguments in favor of a bill were stronger than the arguments against it—clearly so if the amendments could be drafted (by himself) in such a manner that the most apparent dangers could be skirted. And finally, though not the least, Madison, as always, was a *revolutionary* statesman, genuinely dedicated to a special concept of how decisions should be made in a republic. He believed that a republic ultimately rests on mutual respect among its citizens and on a recognition on the part of all that they are the constituents of a community of mutually regarding equals, participators in a polity that asks them to be conscious that they are, at once, the rulers and the ruled.[104] Legislators were by no means an exception. Not only did their duty tell them not to disregard the wishes and ideas of many valued brethren. It urged them to exemplify the mutual respect and the awareness of the differentiated whole which would be all the more essential in a federal system of republics.

If Madison had had his way entirely, the Bill of Rights would have been different in significant respects from the amendments that were finally approved. The alterations would have been incorporated in the body of the Constitution, not tacked onto its end. Madison believed that it would be more logical to interweave amendments with the text: that this would make the charter more accessible to ordinary understandings, and possibly that it would render the amendments as authoritative as the rest.[105] Roger Sherman, on the other hand, insisted that the Constitution, as originally approved, had been the highest sovereign action of the people and

should not be alloyed with amendments based on the lesser authority of Congress and the states.[106] Sherman's motion to append the changes rather than incorporate them in the text was defeated when he first proposed it; but, as Madison lamented, the plan of interweaving the amendments proved a victim, in the end, "to *a few* who knew their concurrence to be necessary to the dispatch if not the success of the business."[107]

If Madison had had his way, the Constitution would have opened with a declaration

> that all power is originally vested in and consequently derived from the people.
>
> That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.
>
> That the people have an indubitable, unalienable, and indefeasible right to reform and change their government whenever it be found adverse or inadequate to the purposes of its institution.[108]

Adoption of this language would have meant, of course, that it would never have been doubted that the fundamental principles of the Declaration of Independence (or of the Virginia Declaration of Rights, from which it was taken) are part of the Federal Constitution, along with the specific liberties which it protects. But Madison conceded in his June 8 speech that it might not be "absolutely necessary" to insert these "truths" at the beginning of the Constitution,[109] and others were determined to restrict the alterations to as few as their proponents could accept. The select committee which reported on July 28 substituted a single sentence in place of Madison's initial declaration, and even that was dropped when it did not receive approval from two-thirds of the House.[110] Another clause explicitly enunciating the implicit constitutional principle of separation of the three great branches was deleted by the Senate.[111]

Again, if Congress (and the states) had thoroughly indulged its sponsor, the Bill of Rights would have contained from the beginning a provision that did not become a part of constitutional law until the twentieth century—and then by way of the judiciary's construction of the First and Fourteenth Amendments: "No *state* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[112] This proposal to extend the First Amendment's guarantees to cover state as well as federal measures, which Madison regarded as "the most valuable . . . on the whole list,"[113] passed the House of Representatives in 1789, but was defeated in the Senate. The amendments passed

that year and ratified in 1791 did not include additional securities against state or local legislation.

The Senate's alterations and deletions sharply tested Madison's good temper.[114] Even in the House, the tedious, extended process was a trial. After overcoming the initial opposition to considering a bill at all, Madison was forced to struggle with resentful Federalists, who were determined that the changes would be few and sparsely worded, as well as with the dozen Antifederalists in Congress, who worked repeatedly to add amendments he opposed, then turned to sheer obstructionism and delay.[115] As his original proposals were compacted into twelve amendments, some were lost and others suffered some dilution.[116] As he feared, it proved impossible to guarantee the most essential rights in all the amplitude that he preferred. He was unable to secure the liberties of conscience and the press against the possibility of state infringements. He was unable, for that matter, even to secure as broad and firm a guarantee of freedom of religion at the federal level as he would have liked. Madison's original proposal would have read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or on any pretext infringed."[117] The Senate weakened this to "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[118] Madison was forced to fight a final battle in the conference committee and the House in order to secure the language that was finally adopted, language that was nonetheless less sweeping than his first proposal and has led to countless modern arguments about the prohibition's meaning and extent: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[119]

Nevertheless, Congress did indulge its leading member very far indeed. With the exceptions of the article concerning state infringements and a measure to impose a monetary floor on appeals to the federal courts, not a single substantive proposal was defeated; and nothing was included in the finished bill that Madison had not originally proposed. The twelve amendments offered to the states, for all of the stylistic alterations, were very much the ones that he had drafted. Indeed, they represented his distinctive wishes more completely than is frequently suggested by repeated, casual references to his extraction from the propositions of the state conventions only those that he considered safe. The two amendments not approved by three-fourths of the states—one intended to ensure enlargement of the lower house and one providing that the salaries of congressmen could not be changed without an intervening federal election—were measures he had advocated since the Constitutional Conven-

tion.[120] The defeated article concerning state infringements of essential rights was as much his own unique proposal as the federal negative on local acts, of which it was, in fact, an echo. The Ninth Amendment, which was recommended only by Virginia and New York, was Madison's attempt to obviate the possibility that an enumeration of essential rights could lead to claims that rights not listed lacked the same protection, and thus to claims for larger federal powers than were granted in the constitutional enumeration. The Tenth Amendment, which reaffirmed the understanding that "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," did not include the word "expressly."[121] Tabulations vary, but it seems apparent that Madison drew as deeply for his propositions on his own ideas and on the revolutionary charters of the states as on the recommendations of the state conventions. And although he quite deliberately excluded nearly all of the demands for structural reforms or substantive reductions of the delegated powers, he included constitutional protections for the overwhelming body of the state and private rights for which the state conventions were concerned.[122]

Small wonder that before the session ended, nearly all of Madison's Virginia correspondents were reporting general satisfaction with the House proceedings on amendments, titles, and much else. If all the session's business had been finished so entirely as he wished, Madison might not have been so deeply troubled by the measures of the second session of our first and longest Congress. As it was, however, this was not the case. Already, he had felt the stirrings of significant suspicions; and in no great time, he would conclude that his conception of the Constitution and the nation's needs, together with his principles of equity, morality, and harmony between the sections, could only be defended by a public war against many of his one-time allies in the struggle to secure a strong and lasting Union.

PART FOUR

Tender of the Fire