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CLIPPING THE WINGS OF ANGELS

The History and Theory behind the
Ninth and Tenth Amendments
of the United States Constitution

by

Ted Cruz '92



Princeton University

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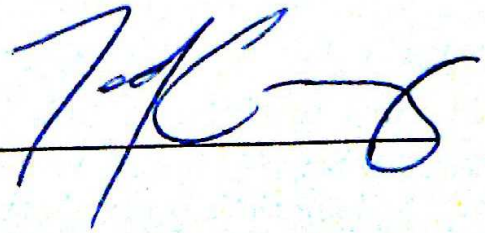
Professor Robert George

in partial fulfillment of the requirements for graduation from

The Woodrow Wilson School of Public and International Affairs
Princeton University

April 2, 1992

I pledge on my honor that this represents my own work in accordance with Princeton University regulations.

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ACKNOWLEDGEMENTS

I would like to thank all of the people who have helped me and cared so much as I have been laboring with my "child." Truly, I feel I have given birth. I would like to thank the Woodrow Wilson School Librarian, Laird Klingler for his assistance in research, and all of my friends for putting up with me through my trials. To Shorty, Simpson, Eugene, and Misi—thanks for not killing me! To Coleman, we have labored together, "spheres towards the wall, Oedipus." To Daniel, for serving as intellectual backboard. And to David, a friend like a brother, thanks for being there for me when I need you.

I would also like to thank Professor Walter Murphy for his advice and for his wisdom and Wayne Moore for the kind use of his unpublished dissertation. And, of course, I am deeply indebted to Professor Robert George for his guidance and friendship. He has been an inspiration. Thank you.

But most of all, I would like to thank my parents, Rafael and Eleanor Cruz. This thesis is dedicated to them—the two greatest people I have ever known.

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

— James Madison, Federalist No. 51.

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by it to the States, are reserved to the States respectively, or to the people."[2]

Powers and Rights: Their Meanings

The idea behind these two innocuous looking provisions is about as far removed from present-day jurisprudence as are angels from demons. It is a simple idea, much simpler than the convoluted theories and justifications that have been furthered in its place. But in that simplicity is its beauty. Let us begin with the terms being discussed, for in them we find the first trap to understanding the Amendments. Madison told us,

> [t]he use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas....When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.[3]

The Ninth Amendment addresses "rights," and the Tenth, the distribution of "powers." Yet repeatedly, politicians, scholars, judges, even Framers confuse the two.[4] Each concept is distinct, and it is only through laxity of language

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[2] U. S. Constitution, Amendment X.

[3] Madison, *Federalist No. 37*, included in *The Federalist Papers* (New York: New American Library, 1961, 224, 229).

[4] John Calhoun's confusion was so great he actually misquoted the Ninth Amendment, replacing "rights" with "powers." Leslie W. Dunbar, "James Madison and the Ninth Amendment," 42 Va. L. Rev. 627, 639 n. 46 (1956). Gordon Wood discusses the "rights and powers adhering in the King's authority," blurring the distinction between rights and powers. (But see n.11, *supra*). Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton & Co., 1972, 19). Similarly, Chief Justice Charles E. Hughes confused rights with powers when he referred to the "rights which are expressly

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CHAPTER ONE

The Nature of Rights and Powers

The United States Constitution is a remarkable attempt at a social compact that provides for effective governance while still protecting individual liberty. It establishes a government of specifically enumerated powers and then goes on to catalogue the rights it explicitly protects. Immediately thereafter, the Constitution does an unusual thing: it states that all the rights and powers not specifically addressed still exist in their entirety. That proclamation, in the form of the Ninth and Tenth Amendments, is the subject of much misunderstanding.

This thesis will attempt to explore and to rectify that misunderstanding. It will, in the process, elaborate upon a conception of the Ninth and Tenth Amendments which revitalizes the Founders' commitment to limiting government, to restraining the reach of our none-too-angelic leaders. The Ninth Amendment provides, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[1] Immediately thereafter comes the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited

[1] U. S. Constitution, Amendment IX.

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Powers and Rights: Their Meanings

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that they are confounded.

Individuals have rights, personal spheres protected from infringement by others. Governments have powers, authority to command or coerce others for specified ends. It is meaningless for a government to have rights over people, for a government right is simply a legitimate power.[5] A power is the ability to control another; it is "legal authority."[6] As such, only governments (or governmental agencies) can wield it. It is meaningless to say that individuals have powers.[7] Governments possess powers and

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granted to the Federal Government." *Ashwander et al. v. Tennessee Valley Authority et al.*, 297 U.S. 288, 330 (1935). Also, Anti-Federalist "The Impartial Examiner" used "powers" in the place of "rights" when he wrote, "...each individual...gives up all [his] powers into the hands of the state." *The Impartial Examiner*, 20 February 1788, included in Herbert J. Storing, ed., *The Anti-Federalist* (Chicago: University of Chicago Press, 1985, 276). (*Complete Anti-Federalist*, 5.14.2). And finally, arch-Federalist James Wilson repeatedly used "rights" and "powers" interchangeably. See James Wilson, Address to a Meeting of the Citizens of Philadelphia, October 6, 1787 and James Wilson, Speech at the Pennsylvania Convention, November 21 to December 11, 1787, both quoted in Wayne D. Moore, *Constitutional Rights and Powers of the People* (Unpublished dissertation, Princeton University Department of Politics, 1992, 57).

[5] e.g., if a government has a "right" to tax, it may legitimately exercise the power of taxation.

[6] *Webster's New World Dictionary* (New York: Warner Books, 1984, 468).

[7] There are two exceptions to this. The first is parents and guardians over children and incompetents. However, the only reason that the former have "powers" over the latter is that children and incompetents are deemed incapable of exercising complete self-governance. (For a discussion of the justification of paternal power due to children's lack of "reason" see John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Co., 1980, 30-42)). The second exception is that of government employees exercising powers over others. This is less an exception than a misunderstanding. The power they wield is not their own; it is the government's. They are merely instruments for the exercise of government's powers. (Some might imagine a third exception: that of employers or of institutions of civic authority (like universities). Yet while they may have authority in

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exercise them over: a) individuals, b) institutions (i.e., collections of people), and c) other subsidiary governments. Hence each of the three can have rights in relation to the government exercising power.

Rights, like powers, express triadic relations. In addition to the issue of who possesses the right, there are also the issues of against whom the right exists and for what it is claimed.[8] Rights are claims to non-interference from others in particular arenas.[9] For example, the right to free speech is the right to express your beliefs and opinions without others suppressing you. Rights, for individuals, also exist against three groups: a) other individuals, b) institutions, and c) government. Against the first two, rights protect individual autonomy from excess interference through civil laws and government's police powers. Against the third, government, rights are claims against government powers—in a sense, "non-powers." It is only in this manner that rights can in any way be possessed by governments, and then only by subsidiary governments. A government can have a right only in that a state or a city may have claim against the power of the nation or state

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practice, it is not legal authority—merely the exercise of private contractual obligations). It is impossible for one autonomous individual to possess a power, a legal, legitimate authority, over another autonomous individual.

[8] Samuel Stoljar, *An Analysis of Rights* (New York: St. Martins's Press, 1984, 1).

[9] Rights only make sense when expressed against someone else. "If nobody ever threatened your physical integrity, or your growing roses, you would not be exercising a right to life or gardening, you would simply enjoy doing so. To speak of a right as something distinctive is therefore to claim some protective immunity or exclusivity in relation to others as well." Stoljar, 9.

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over it.[10] In other words, governments have rights only in the instances in which they are claiming them against government exercises of power over them—the exact same instances when individuals claim rights against powers.

Natural Law vs. Constitutional Rights

The response instantly: rights dependent upon governmental powers? But what of the natural rights of man? Such protestations are characteristic of the second pitfall to understanding the Ninth and Tenth Amendments: the confusion between moral/natural rights and Constitutional rights.[11] This problem is at the bottom of much of the current miasma of error surrounding these two amendments. Now it is certainly true that many of the Founders believed in natural rights, in the idea that each person is given by God "a natural right to his property, to his character, to liberty and to safety. From his peculiar relations, as a husband, as a father, as a son, he is entitled to the enjoyment of peculiar rights."[12] Most of them would also have agreed that

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[10] Hence Gordon Wood's reference to the "rights and powers" of the British "King's authority" (n.5, *supra*) is logical only when one establishes the precise correlation between his powers exercised over the people and between his rights against powers exercised over him by Parliament (also people, but exercising powers of government—see n.8, *supra*). For a discussion of the "struggle between Crown and Parliament" see Alan G.R. Smith, *The Emergence of a Nation State: The Commonwealth of England* (London: Longman Group Limited, 1984).

[11] H.L.A. Hart describes the problem that "law and morality...share a common vocabulary of rights obligations and duties," which, combined with the "use of grand but vague words like 'Positivism' and 'Natural Law,'" obscures the differences between them. H.L.A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University Press, 1963, 21.

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these rights "ar[e]...the Constitution itself."[13] They would have contended that in the state of nature (absent government) individuals did not find their natural rights fully protected, so they gathered together and each sacrificed some of his rights to be subject to the powers of the civil government they created.[14] "The liberty of every member is increased by this introduction; for each gains more by the limitation of the freedom of every other member, than he loses by the limitation of his own."[15] The people freely "ente[r] into a compact with each other to produce a government;"[16] the authority of that government comes from the people,[17]

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[12] James Wilson, quoted in Randy E. Barnett, "Reconceiving the Ninth Amendment," 74 Cornell L. Rev 1, 31 (1988). Similarly, in 1791, Thomas Paine wrote "natural rights are those which appertain to man in the right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others." Thomas Paine, *Rights of Man* (New York: Penguin Books, 1984, 68).

[13] Moore, 6.

[14] "In a state of nature every individual pursues his own interest;...thus the weak [illegible] a prey to the strong....In this state of things, every individual was insecure; common interest therefore directed, that government should be established, in which the force of the whole community should be collected, and under such directions, as to protect and defend every one who composed it." Essays of Brutus, 1 November 1787, Storing, 118 (2.9.24).

[15] James Wilson, Speech at the Pennsylvania Convention, as reported in Jonathan Elliot, ed., *The Debates in the Several State Conventions of the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (Salem, NH: Ayer Co. Publishers, 1987, Vol. 2, 426). Hadley Arkes argues against this notion of rights being "sacrificed" to the government. He claims that the Founders maintained (Wilson in particular) that rights were never sacrificed since all that is restricted by government is the right to do wrong, an no one has such a right. On the whole, his argument is unpersuasive, and the above speech by Wilson goes directly against his portrayal of Wilson's beliefs. Hadley Arkes, *Beyond the Constitution* (Princeton, NJ: Princeton University Press, 1990), 58-80).

[16] Paine, 70.

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for no government can legitimately have authority without the people's (as a whole, in the state of nature) consent.[18] This view is perhaps best evidenced in James Madison's first proposed amendment to the Constitution:

> First. That there be prefixed to the constitution 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.[19]

While a strong belief in the antecedent natural rights of mankind suffused the beliefs of the Framers, they were nonetheless very careful not to confuse those rights with the Constitutional rights they were creating.

> [T]hose giants who managed the awesome transition from revolutionaries to "constitutionaries"—men like Adams and

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[17] "The powers both of the general government and the state governments, under this system, are acknowledged to be so many emanations of power from the people." James Wilson, Speech at the Philadelphia Convention, Elliot, Vol. 2, 502.

[18] The best known argument for government by consent is Locke's *Second Treatise*. His argument for the idea of "popular sovereignty based on the consent of the governed" was incredibly influential in the formulation of the Constitution. James A. Gardner, "Consent, Legitimacy, and Elections: Implementing Popular Sovereignty under the Lockean Constitution," 52 U. Pit. L. Rev. 189, 208 (1990). It is interesting to note, though, that there is some indication that the Framers had not read *Second Treatise*, but were simply familiar with Locke's philosophical foundations. Handlin, "Who Read John Locke?," 58 The Am. Scholar 546, 547 (Fall 1989) as quoted in "When Words Mean What We Believe They Say: The Case of Article V," 76 Iowa L.Rev. 1, 53, n272 (1990). For significantly different portrayals of the state of nature and of the resulting social contracts and obligations thereunder see Thomas Hobbes, *Leviathan* (London: Penguin Books, 1968) and Jean-Jacques Rousseau, *The Social Contract*, included in *The Essential Rousseau* (New York: New American Library, 1974).

[19] *The Debates and Proceedings in the Congress of the United States* (the "*Annals of Congress*") (Washington: Gales and Seaton, 1834, 451).

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> Jefferson; Dickinson and Wilson; Jay, Madison, Hamilton, and, in a sense, Mason and Henry—were seldom, if ever, guilty of confusing law with natural right. These men, before 1776, used nature to take the measure of law and to judge their own obligations of obedience, but not as a source for rules of decisions.[20]

Similarly, a prominent Anti-Federalist explained,

> Of rights, some are natural and unalienable, of which even the people cannot deprive individuals; Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them—These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usuage [sic] as not to be repealable by the ordinary legislature—and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.[21]

Furthermore, Madison "suggested that even if persons had a *natural* right to disobey unjust laws, there could be no *constitutional* or *legal* right to disobey laws made."[22]

This distinction, between natural, constitutional, and legal rights, is one very few modern readers of the Constitution have understood. Hence, they have seen the word "right" in the Constitution and have immediately leapt

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[20] Robert Cover, *Justice Accused*, as quoted in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980, 39).

[21] *Observations Leading to a Fair Examination of the System Of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, 25 December 1787, Storing, 70 (2.8.60). It has been generally supposed that the Federal Farmer was Richard Henry Lee, although several scholars, including Storing, William W. Crosskey, and Gordon Wood, have questioned his authorship. Storing, 24.

[22] *Moore*, 432.

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to the conclusion that it was protecting fundamental, individual—natural—rights. The Constitution is a legal document. It's functions are twofold: first, an aspirational role, to embody the nation's fundamental beliefs and its political values, to serve as "a declaration of articles of faith,"[23] and second, a practical role, to define the structure and the powers of the government and the rights of the people.

> A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in like manner governed by the constitution.[24]

Constitutional Rights: Federal Non-Powers

It is primarily this second function, that of defining the powers of the government and the rights of the people, to which we must look in

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[23] William O. Douglas, *We the Judges* (New York: Doubleday, 1956, 429), as quoted in Walter F. Murphy, James E. Fleming, esq., and William F. Harris, II, *American Constitutional Interpretation* (Mineola, NY: The Foundation Press, 1986, 7).

[24] Paine, 71.

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determining how our system was intended to operate. As should be apparent by now, the rights which were discussed above, rights in general in contradistinction to powers, were *Constitutional* rights. When the Constitution refers to rights, it does not mean natural rights; it means claims of non-interference against the government—it means "non-powers." Constitutional rights reflect claims against Constitutional powers, plain and simple.[25]

One can see this in the Federal Farmer's explanation of the need for "constitutional barriers...well fixed between the powers of the rulers and the rights of the people."[26] Similarly, Madison described the reciprocal relation between Constitutional rights and powers in his December 5, 1979 letter to George Washington:

> [Edmund Randolph's] principle objection was pointed ag[st] the word *retained*, in the eleventh proposed amendment [what would soon become the Ninth Amendment], and his argument if I understood it was applied in this manner—that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and that as there was no criterion by

[25] Dunbar, 42 Va. L. Rev. at 228; Raoul Berger, "The Ninth Amendment," 66 Cornell L. Rev. 1, 9 (1980); John B. Attanasio, "Everyman's Constitutional Law: A Theory of the Power of Judicial Review," 72 Geo. L. J. 1665, 1693 (1984); Helen K. Michael, "The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights," 69 N. C. L. Rev. 421, 469-477 (1991); Charles J. Cooper, "Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons," included in Eugene W. Hickok, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, VA: University Press of Virginia, 1991, 425); Edward J. Erler, "The Ninth Amendment and Contemporary Jurisprudence," included in Hickok, 438; Moore, 2, 82-83, 89.

[26] *Letters from the Federal Farmer*, 25 December 1787, Storing, 67 (2.8.70).

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> which it could be determined whether any other particular right was retained or not, it would be more safe and more consistent with the spirit of the 1st & 17th amend.ts proposed by Virginia that this reservation ag.st constructive power, should operate rather as a provision ag.st extending the powers of Cong.s by their own authority, than a protection to rights reducible to no definite certainty. But others, among whom I am one, see not the force of this distinction....If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.[27]

As these reciprocal rights and powers established in the Constitution create triadic relationships, it is appropriate to ask who is exercising the powers and against whom the rights are claimed. The answer illuminates the third major pitfall to understanding the Amendments. The Constitution is a document creating the federal government. It was establishing a new central government and defining how it would relate to the states and to the people. It goes to great lengths to describe the powers of the federal government, and then, in the Bill of Rights, it specifically enumerates the rights of the people against it. In other words, as the Constitution was creating a national government, and as Constitutional rights are claims against the powers of governments, those rights were to be claims *against the national*

[27] Letter to George Washington, 5 December 1789, included in Gaillard Hunt, ed., *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1904, Vol. 5, 431-32). Randy Barnett has argued that this passage supports rights limiting powers as surely as powers limit rights. 74 Cornell L. Rev. at 16. For a further discussion of this issue see Chapters 4 and 5.

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government it was creating.

This view was confirmed in the 1833 case, *Barron v. Baltimore*,[28] which held that the "fifth amendment [and, in fact, the entire Bill of Rights is] intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."[29] The reason given was that "[t]he powers [which the people] conferred on this [national] government were to be expressed by itself, and the limitations on power [i.e., Constitutional rights], if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument."[30] This holding "seemed a self-evident proposition to the Justices in 1833."[31]

While some modern scholars have expressed surprise (or perhaps dismay) that the broad language of Amendments two through eight (none of which explicitly limit their reach to the federal government, as does Amendment I) was not used to apply their protections against the states,[32] such a reading would have violated the spirit of the document and the

[28] 7 Pet. 243 (1833).

[29] 7 Pet. at 245.

[30] 7 Pet. at 243.

[31] Gerald Gunther, *Individual Rights in Constitutional Law* (Mineola, NY: The Foundation Press, 1986, 74). In fact, counsel for Baltimore, soon-to-be Chief Justice Roger Brooke Taney, was "stopped by the court" before completing oral argument. Gunther, 74.

[32] See Gunther, 74; Murphy, et al., 399, 448.

understanding of its ratifiers.[33] Those rights, properly understood, were not natural rights—deemed fundamentally applicable to all and every government—but rather were Constitutional rights, limiting the reach of the powers of the national government that the Constitution was creating.

Admittedly, the Fourteenth Amendment changed the applicability of the Bill of Rights to the states.[34] It did not, however, change the nature of the rights referred to in the first ten Amendments. They remained Constitutional, not natural, rights.

The Bill of Rights Debate

The question nonetheless remains how Constitutional rights exert their claim over Constitutional powers. To understand the interaction of rights and powers one must first understand the debate over the explicit inclusion of rights in the Constitution.[35] Initially, the Constitution contained no Bill of Rights. While it did explicitly prohibit the federal government from a few activities,[36] on the whole it relied upon positive grants of powers rather than negative protection of rights to define the government. Anti-Federalists

[33] Michael, 69 N. C. L. Rev. at 477; Melvin I. Urofsky, ed., *Documents of American Constitutional & Legal History* (Philadelphia: Temple University Press, 1989, 261-62); Sanford Levinson, "Constitutional Rhetoric and the Ninth Amendment," 64 Chi.-Kent L. Rev. 131, 143 (1988). "In terms of the original understanding, *Barron* was almost certainly decided correctly." Ely, 196, n 58.

[34] See Chapter 5.

[35] This debate is recounted in detail in Chapter 2.

[36] See U. S. Constitution, Article I, Section 10.

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argued that a Bill of Rights was essential, that rights not explicitly protected would be lost. To this, they were told that the government created was one of enumerated powers, the antithesis of ordinary governments of general jurisdiction. While the Federalists admitted that normally rights had to be explicitly protected, they argued that this was only a danger under governments which had the powers to violate them. Under most governments, the presumption was that the state had the power to pass any laws it wished, so long as they did not violate expressly enumerated rights which the people had established.

But this new federal government was different. With it, the presumption was that it did not have any authority whatsoever, except that explicitly given it. Hence, the Federalists argued, rights were already protected because the central government had not been given the power to violate them. The Anti-Federalists were not satisfied, arguing that governments naturally expand their powers and that essential rights could be violated within the already enumerated powers. Seeking a compromise to secure ratification, the Federalists finally agreed to include a Bill of Rights. This was in spite of the fact that many of the Federalists were convinced that explicit inclusion of rights would reverse the presumption, implying that the federal government suddenly had the power to do everything else not explicitly prohibited. So the Ninth and Tenth Amendments were drafted to reiterate, in a sense, the prior presumption against federal power and for the people's

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Rights in Relation to Powers

Thus the Bill of Rights came into existence, with the first eight Amendments specifically protecting certain rights from government infringement. And the question remains, how do these rights interact with the already enumerated powers? Wayne Moore suggests three possibilities: "rights are absences of delegated authority, rights preempt otherwise legitimate exercises of power, and rights and powers are overlapping prerogatives."[37] The first suggestion is consistent with the argument of the Federalists that a Bill of Rights was unnecessary because the federal government never had the authority to violate the rights in the first place. However, the second possibility reflects the concern of the Anti-Federalists that vital rights could be violated though otherwise legitimate exercises of delegated authority—that they could be denied through the *means* chosen to carry out an authorized purpose. The third possibility emphasizes the indeterminate result of rights and powers in conflict.

Essentially, conflict and the resolution thereof is the key difference between them. The first interpretation assumes that rights and legitimate powers do not conflict, whereas the second and third assume they do. The second asserts that in such conflicts, rights win; whereas the third proposes

[37] Moore, 17.

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that sometimes rights win, and sometimes government powers win. Taken in sum, rights may be seen as limiting a) illegitimate powers, and b) illegitimate means to implement legitimate powers. In the first instance, rights are a redundant check upon the unauthorized powers, with their lack of delegation being the primary restraint. In the second instance, rights are seen as determinants of the proper manner for the exercise of government power.

The question of which prevails in case of conflict is irrelevant in instance (a), since the illegitimate power is already made void by its lack of enumeration. However, in instance (b), conflict can occur. Whether A) rights should predominate (Moore's second possibility), B) rights should sometimes predominate (Moore's third possibility), or C) government powers should predominate (a possibility not directly considered by Moore) is an issue of much contention. Sotirios Barber has argued forcefully for the first option, the inviolability of rights.[38] Similarly, Justice Hugo Black made famous his philosophy of "no law means no law" in advocating the First Amendment as an absolute prohibition on government restriction of speech and the press.[39] The second approach has been the dominant mode of

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[38] See Sotirios A. Barber, *On What the Constitution Means* (Baltimore: The Johns Hopkins University Press, 1984, 105-68).

[39] See Gunther, 647-51; Murphy, et al., 494-501. See also *Dennis v. United States*, 341 U.S. 494 (1951) (Black, J., dissenting); *Yates v. United States*, 354 U.S. 298 (1957) (Black, J., concurring in part and dissenting in part); *Barenblatt v. United States*, 360 U.S. 109 (1960) (Black, J., dissenting); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Black, J., concurring).

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judicial interpretation for much of our history, as rights have been held to be qualified exceptions from government powers, but nonetheless sometimes subservient to state interests.[40] The third approach has been less commonly employed, but it was forcefully advocated by Justice Stanley F. Reed in *United Public Workers v. Mitchell*:[41]

> Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes....Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[42]

While the wisdom of the approach espoused in *Mitchell* may be questionable, it does rightly look to the Ninth and Tenth Amendments as those reserving rights. Both of them reserve rights, and both of them limit powers. Perhaps as our inquiry progresses, the best approach to conflicting rights and powers will become clearer, but regardless, it will become clear how the Ninth and Tenth critically frame the issue. The Ninth retains rights,

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New York Times v. Sullivan, 376 U.S. 254 (1964) (Black, J., concurring); *The Pentagon Papers Case (New York Times v. United States)*, 403 U.S. 713 (1971) (Black, J., concurring).

[40] See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beacon*, 133 U.S. 333 (1890); *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *contra*, *West Virginia v. Barnette*, 319 U.S. 624 (1943). See also *Korematsu v. United States*, 323 U.S. 214 (1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *United States v. O'Brien*, 391 U.S. 367 (1968), *contra*, *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

[41] 330 U.S. 75 (1947).

[42] 330 U.S. at 95-6.

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protections from government, and the Tenth reserves powers, government's ability to infringe rights. Together, the two limit the reach of government; they are flip sides of the same coin,[43] reciprocal statements of the same idea. Together, they attempt to reiterate the idea of enumerated powers in spite of the implications of enumerating rights as well. It is as if they mean to say 'the Constitution limited powers, then enumerated rights as if the powers had not been limited, but it really meant the limited powers in the first place.'

Admittedly, to the degree that the Ninth serves an additional function of constraining the means of enumerated powers, it is distinct from the Tenth. That question will be explored in chapter 5. Absent that aspect, the two amendments perform the identical function: they limit the federal government. They simply do so from different directions; the Tenth stops new powers, and the Ninth fortifies all other rights, or non-powers. In a way, they mirror the Constitution and the Bill of Rights in entirety. The Constitution seeks to restrain the reach of angels by specifically enumerating powers; the Tenth Amendment echoes that sentiment and proclaims that the Bill of Rights did nothing to weaken it. The Bill of Rights, conversely, constrains the angels by specifically enumerating rights; the Ninth also comes from the direction of rights, reminding us that the Bill of Rights did not enumerate everything, did not reverse the presumption, and that the Constitution still embraced limited government.

[43] Cooper, 425.

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CHAPTER TWO

The Debates over the Constitution

Original Intent

To understand fully the meaning behind the Ninth and Tenth Amendments, one must first be immersed in the debates and the political culture which led to their creation. Some might question the value of such an inquiry and the relevance of the original intentions behind the Amendments. In particular, they would question the ability to discern a "Framers' intent," and the applicability of any such intent upon our modern-day interpretations. Some of these criticisms are quite valid, particularly those which focus upon the diversity of opinion of the Framers and the difficulty of discerning common understandings.[44] "Search for intent restrains judicial discretion less than most approaches to constitutional interpretation because it is based on the usually self-deceptive myth that there is such a discoverable entity as a single intent on particular matters."[45] Often such attempts can devolve into "charade[s] of 'pick your framer' in which the judge casts about for like-minded framers to conceal what would otherwise

[44] This is an admission which even Madison made. "[The Constitution] was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads and many hands." Madison, as included in Hunt, Vol. 9, 533.

[45] Walter F. Murphy, "Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?," 87 Yale L. J. 1752, 1770 (1978).

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stand out as a straight-forward value statement."[46]

Others, like John Hart Ely, have pointed to the problems of interpretivism, of looking only to the text and to the intent of the Founders to discern its true meaning. "[T]his standard form of interpretivism runs into trouble....For the constitutional document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond their four corners...cannot be construed away."[47] Robert Bork has responded by arguing that those provisions were never intended to be seen as wide-open judicial mandates.[48] This issue will be explored more as this thesis progresses.

Despite this criticism, many have admitted the importance of original intent. Framers themselves have:[49] "If the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding the Constitution, there can be no security for a...faithful exercise of its powers."[50] Similarly, "[t]he first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it."[51] Jurists have looked to

[46] Paul Brest, "The Misconceived Quest for the Original Understanding," 60 B. U. L. Rev. 204, 222 (1980).

[47] Ely, 13.

[48] See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990), 178-85).

[49] Although it is admittedly ironic to cite the views of the Framers as evidence that one should look to the views of the Framers.

[50] Madison, as included in Hunt, Vol. 9, 191.

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intent as well: "[We should ask] not what works did Madison and Hamilton use, but what was it in their minds which they conveyed."[52] Also, "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."[53] Decisions abound,[54] as does scholarly support: "[Interpretivism is a theory] of great power and compelling simplicity...deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our Constitution."[55] Even Ely admitted that "[interpretivism] better fits [than its converse] our usual conceptions of what law is and the way it works."[56]

But the best reason to consider intent was proffered by Philip Kurland:

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[51] James Wilson, as quoted in Raoul Berger, *Federalism: The Founders' Design* (Norman, OK: University of Oklahoma Press, 1987, 16).

[52] *Dennis*, 341 U.S. at 523 (Frankfurter, J., concurring).

[53] Joseph Story, *Commentaries on the Constitution of the United States* (Durham, N.C.: Carolina Academic Press, 1987, 135) (§ 181 in *Commentaries on the Constitution of the United States: with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, abridged by Joseph Story, 1833).

[54] See e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, (1803); *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *South Carolina v. United States*, 199 U.S. 437, 448 (1905); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1938); *Bell v. Maryland*, 378 U.S. 226, 288-9 (1964) (Goldberg, J., concurring).

[55] Thomas Grey, "Do We Have an Unwritten Constitution?," 27 Stan. L. Rev. 703, 705 (1975).

[56] Ely, 3. See also William H. Rehnquist, "The Notion of a Living Constitution," 54 Texas L. Rev. 693, 698 (1976); Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L. J. 1 (1971); Raoul Berger, "Mark Tushnet's Critique of Interpretivism," 51 Geo. Wash. L. Rev. 532 (1983); Raoul Berger, "Some Reflections on Interpretivism," 55 Geo. Wash. L. Rev. 1 (1986).

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"[non-interpretivism] makes nonsense of the concept of a written Constitution....[It is simply] deconstruction."[57] It would be foolish to attempt to understand the Constitution or the Ninth and Tenth Amendments in particular without comprehending what their authors meant when they penned them and what the states meant when they ratified them.[58] While it is certainly true that there was not unanimity among the Framers, one can nevertheless "identify a range of constitutional meanings."[59] I will therefore look to the debates and ratifications of the Constitution and the Amendments for guidance as to what they mean.[60] No legal document would be interpreted otherwise,[61] and it would be a mistake to do so with legal documents of such great importance.

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[57] Philip Kurland, "Curia Regis: Some Comments on the Divine Right of Kings and Courts 'To Say What the Law Is.'" 23 Ariz. L.Rev. 581, 582 (1981).

[58] James Madison particularly emphasized the intent of the State Conventions: "it is clear, that if the meaning of the Constitution is to be sought outside of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions, which gave it all the validity and authority it possesses." Madison, included in Hunt, Vol. 9, 477.

[59] Moore, 12.

[60] "To the extent that such unspoken thoughts [the Founders' intent] control the text, they become a supertext." Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy," to appear in Stanley N.Katz and Douglas Greenberg, eds., *Constitutionalism and Transformations in the Modern World* (New York: Oxford University Press, 1992, 22 (in the unpublished draft)).

[61] For example, treaties between the U.S. and the Indians must be interpreted as the Indians understood them, i.e., in accordance with their intent. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

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The Articles of Confederation

The Constitution was born out of the tumult of post-Revolutionary America. The Revolution can be thought to have begun on May 15, 1777 when Virginia instructed its delegates to move in Congress that the colonies declare themselves "free and independent states." On June 7, Richard Henry Lee did so, presenting a three-part motion that the colonies 1) were "free and independent," 2) should form foreign alliances, and 3) should draw up a "plan of confederation." The motion was debated until June 10, at which point it was postponed until July 1. On June 11 a committee was appointed to draft a declaration of independence. It had five members: John Adams, Benjamin Franklin, Thomas Jefferson, Roger Sherman, and Robert R. Livingston; Jefferson was given the responsibility of composing the first draft. The draft was presented first to Adams and Franklin, then to the whole committee, and then, on June 28, to Congress. It "lay on the table" until July 1, when debate recommenced. July 2 all the colonies except New York approved it,[62] and on July 4, 1776 the final draft was ready. The colonies declared their independence, and the "united States of America"[63] was born.[64]

In line with the third provision of Richard Henry Lee's June 7 proposal,

[62] New York approved it on July 9, reporting it to Congress on July 15. On July 19, Congress formally acknowledged that independence was unanimous.

[63] Declaration of Independence, line one.

[64] Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution* (Madison, WI: State Historical Society of Wisconsin, 1976, 72.

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a committee was appointed to draw up plans for confederation. Despite the great difficulty of designing a government while fighting a war, Congress managed to do so, and on November 15, 1777, it approved the Articles of Confederation.[65] Approval from the states took four years, but with Maryland's ratification on February 2, 1781, official ratification (with unanimous approval) was possible on March 1, 1781. The United States had formed a loose confederacy that was to govern them for eight years.[66]

But the system had problems. James Madison described them as follows:

1. Failure of the states to comply with the constitutional requisitions....
2. Encroachments by the states on the federal authority....
3. Violations of the law of nations and of treaties....
4. Trespasses of the states on the rights of each other.
5. Want of concert in matters where common interest requires it....
6. Want of guaranty to the states of their constitutions & laws against internal violence.
7. Want of sanction to the law and of coercion in the government of the confederacy.
8. Want of ratification by the people of the articles of confederation.
9. Multiplicity of laws in the several states.
10. Mutability of the laws in the several states.
11. Injustice of the laws of the states.[67]

Madison found the causes of most of these to be the degree to which small republics were subject to factions, and his prescribed solution was a large

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[65] Jensen, 78.

[66] Jensen, 97-137.

[67] James Madison, *Vices of the Political System of the United States, April 1787*, included in Marvin Meyers, ed., *The Mind of the Founder: Sources and Political Thought of James Madison* (Hanover, NH: University Press of New England, 1981, 57-62).

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republic with sufficient authority to check the factions without itself becoming controlled.[68]

Gordon Wood described some of the abuses, characterized as "democratic despotism" by John Adams. "The confiscation of property, the paper money schemes, the tender laws, and the various devices suspending the ordinary means for the recovery of debts, despite their 'open and outrageous...violation of every principle of justice.'"[69] Yet Wood also pointed out that it was a time of strong economic growth, unrivaled population growth, and relative government stability. "On the surface at least the American states appeared remarkably stable and prosperous."[70] So why the perceived crisis? "[B]ecause the Revolution represented much more than a colonial rebellion, [it] represented in fact a utopian effort to reform the character of American society and to establish truly free governments, men in the 1780's could actually believe that it was failing....[B]y the 1780's the Revolutionary ideals seemed to be breeding the sources of their own miscarriage."[71] The American people wanted too much: they wanted to create a perfect society with a perfect government.

The Constitutional Convention

[68] Madison, *Vices*, Meyers, 62-65.

[69] Wood, 404.

[70] Wood, 394.

[71] Wood, 395-7.

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It was in this spirit that the move for a Constitutional convention began. In the summer of 1782 the New York legislature called for a general convention to revise the Articles; the proposal was sent to committee in Congress and died by September 1783. For the next three years critics of the Articles wrote countless letters, pamphlets, and newspaper articles advocating revision. On January 21, 1786, the Virginia legislature proposed a convention to meet at Annapolis in September 1786. Nine states elected delegates to attend, but delegates arrived from only five of them.[72] The report of the convention was sent to all the states and to Congress. It proposed that the states elect delegates to meet in Philadelphia in May "to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union."[73] Following Shays' Rebellion in 1786-7, Congress passed by an 8-1 majority a motion by Massachusetts to call a convention in Philadelphia "for the sole and express purpose of revising the Articles of Confederation [and making necessary] alterations and provisions."[74] Finally, on May 25, 1787, the delegates arrived in Philadelphia and the Convention began.[75]

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[72] The delegates who attended were Alexander Hamilton and Egbert Benson from New York; Abraham Clark, William C. Houston, and James Schureman from new Jersey; Tench Coxe from Pennsylvania; George Read, John Dickenson, and Richard Bassett from Delaware; and Edmund Randolph, James Madison, and St. George Tucker from Virginia. Eight of the twelve were also elected to the Convention of 1787 (although only seven attended). Jensen, 177.

[73] *Proceedings and Report of the Commissioners at Annapolis, Maryland, 11-14 September 1786*, as included in Jensen, 181-5.

[74] Jensen, 176-9.

[75] Jensen, 232.

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The selection of delegates gathered were among the finest ever assembled. They included George Washington, James Madison, Alexander Hamilton, James Wilson, Benjamin Franklin, Edmund Randolph, Gouverneur Morris, and George Mason—all men of great stature and learning come to devise a government. They brought with them the political theories of Plato and Montesquieu and Locke, the foundations of Roman and British law, and the traditions and beliefs of Catholic and Protestant Christianity.[76] The debates which proceeded lasted throughout the hot Philadelphia summer and finally ended on September 17, 1787.

No public records of the proceedings were kept, so what knowledge we do have is from private notes. The most comprehensive is that of James Madison, but notes of the proceedings were also taken by William Jackson (the official secretary), Luther Martin, Robert Yates, William Pierce, Rufus King, William Patterson, Alexander Hamilton, James McHenry, and John Lansing.[77] While Madison's notes seem fairly accurate, he doubtless editorialized at least to the extent that he viewed the debate from his perspective. Those opposed to Madison's positions, however, saw the debates in a different light.

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[76] Page Smith, *The Constitution: A Documentary and Narrative History* (New York: Morrow Quill, 1978, 29-40).

[77] Adrienne Koch, "Introduction," to James Madison, *Notes on the Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987, viii).

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A brief example is illustrative:

> M.r Bedford, contended...[i]f political Societies possess ambition, avarice...[w]ill not the same motives operate in America as elsewhere?...[L]ook at the votes. Have they not been dictated by interest, by ambition? Are not the large states evidently seeking to aggrandize themselves at the expense of the small?...Will it be said that an inequality of power will not result from an inequality of votes. give the opportunity, and ambition will not fail to abuse it....The little States...will meet the large ones on no ground but that of Confederation....The Large States dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice. He did not mean to intimidate or alarm....All agree in the necessity of a more efficient Gov.t and why not make such an one; as they desire.[78]

Madison seems to be fair in his reporting of the displeasure of the small states with proportional representation. He includes some vitriol, such as the somewhat ominous reference to "foreign all[ies]." But on the whole, it seems a displeased, yet calm speech. Compare the tone to that of the same speech as recorded by Robert Yates:

> Mr. Bedford. [E]ach of [the states] act from interested,...ambitious motives. Look at the votes....[T]he larger states proceed as if our eyes were already perfectly blinded. Impartiality, with them, is already out of the question....Pretences to support ambition are never wanting. Their cry is, where is the danger?...altho' the powers of the general government will be increased, yet it will be for the good of the whole; and although the three great states form nearly a majority of the people of America, they never will hurt or injure the lesser states. *I do not, gentlemen, trust you*....You gravely alledge [sic] that there is no danger of combination, and triumphantly ask, how could combinations be effected?...This, I repeat, is language calculated only to amuse us....The small states

[78] Madison, *Notes on the Debates*, Saturday, June 30, in convention, 229-30.

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> never can agree to the Virginia plan; and why then is it still urged?...Is it come to this, then that *the sword* must decide this controversy, and that the horrors of war must be added to the rest of our misfortunes?...Will you crush the smaller states, or must they be left unmolested? Sooner than be ruined, there are *foreign powers who will take us by the hand*. I say not this to threaten or intimidate, but that we should reflect seriously before we act....We all agree in the necessity of a more efficient government—and cannot this be done? Although my state is small, I know and respect its rights.[79]

Clearly some observers recorded more discontent with certain provisions than did others. Nonetheless, Madison's notes are still a fairly good record, and they are the best we have. What proceeded in the convention was speech after speech as the debates quickened and the delegates got around to the nuts and bolts of designing a government. As the convention progressed, problems arose one after the other as the conflicts grew. Ultimately, many of these were resolved by compromise, as much of the document began to take on a spirit of compromise towards consensus. Notable compromises include "the Great Compromise," between large and small states over representation (resulting in a proportional House and a fixed Senate), the 3/5 compromise (counting slaves as 3/5 of a person), and, eventually, the inclusion of the Bill of Rights.[80]

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[79] Robert Yates, *Secret Proceedings and Debates of the Convention Assembled at Philadelphia, in the Year 1787, for the Purpose of Forming the Constitution of the United States of America* (Birmingham, AL: Linn-Henley Research Center, 1987, Saturday, June 30, 197-9) (Emphasis in the original).

[80] Rexford G. Tugwell, *The Compromising of the Constitution* (Notre Dame, IN: Notre Dame Press, ——, 1-41).

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The document was written in order to expand the role of the central government while carefully limiting its powers and protecting the people's rights by explicitly enumerating the powers of that government. "In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty. This revolution in the practice of the world may, with an honest praise, be pronounced the most triumphant epoch of its history and the most consoling presage of its happiness."[81] A Bill of Rights was, however, submitted by Charles Pickney to the Committee of Detail on August 20, but it never emerged from committee.[82] The idea of a Bill of Rights was proposed once more, on September 12, but it was quickly dismissed:

> Col: Mason perceived the difficulty mentioned by M.r Gorham. The jury cases can not be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.
>
> M.r Gerry concurred in the idea and moved for a Committee to

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[81] James Madison, 1792, as quoted in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: The Belknap Press of Harvard University Press, 1967, 55). Russell Kirk, however, notes the differences between the American and the French revolutionaries, in that the Americans were "men of much experience in representative government,...political realists, aware of how difficult it is to govern men's passions and self-interest. Their debates in Federal Hall...were earnest but civil; and they stood in no danger of being intimidated by urban mobs...[unlike those leaders of] the French Enlightenment." Russell Kirk, *The Conservative Constitution* (Washington, D.C.: Regnery Gateway, 1990, 118).

[82] See Madison, *Notes on the Debates*, Monday, August 20, in convention, 485-7.

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prepare a Bill of Rights. Col: Mason 2ded the motion.

M.r Sherman, was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient. There are many cases where juries are proper which can not be discriminated. The Legislature may be safely trusted.

Col: Mason. The Laws of the U.S. are to be paramount to the State Bills of Rights.

On the question for a Com.e to prepare a Bill of Rights

N.H. no. Mas. abs.t C.t no. N.J. no. P.a no. Del no. M.d no. V.a no. N.C. no. S.C. no. Geo. no.[83]

Five days later the convention was adjourned and the document produced—the soon-to-be United States Constitution—was unveiled.

The Federalists and the Anti-Federalists : General Philosophies

The uproar which ensued consumed the nation; many were shocked that the convention had so greatly exceeded its mandate. Charged with "revising the Articles of Confederation,"[84] the convention had instead abandoned them and dramatically redesigned the federal government. Camps on both sides quickly formed, with those supporting the proposed Constitution dubbed "Federalists" and those opposing it "Anti-Federalists." The Federalists' *magnum opus* was, appropriately titled, *The Federalist Papers*, a series of newspaper article which appeared in New York. These "political polemics"[85] were written by Alexander Hamilton, James Madison,

[83] Madison, *Notes on the Debates*, Wednesday, September 12, in convention, 630.

[84] Jensen, 179.

[85] Murphy, 1765. As such, they sometimes tended more towards propaganda than towards exposition of the meaning of the Constitution. They are nonetheless among the most illuminated texts available on the U.S. Constitution.

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and John Jay, and were responses to the many criticisms written by Anti-Federalists in articles, pamphlets, and letters.[86]

The Anti-Federalists had many objections.[87] One was that the proposed Constitution was not sufficiently democratic.

> The proposed Constitution provided that the first House of Representatives should consist of sixty-five members, and that afterwards the ration of representation should not exceed one representative for thirty thousand people. This provision was vigorously criticized and was the chief component of the charge that the Constitution was not sufficiently democratic.[88]

Amos Singletary put it well:

> These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great *Leviathan*, Mr. President; yes, just as the whale swallowed up *Jonah*. This is what

[86] Many of the following arguments, by both the Federalists and the Anti-Federalists, appeared simultaneously, with little organization between them. In this next section, I will instead present them as an artificial chronology, ordering them so as to facilitate following the logical progression.

[87] The objections discussed are based on *arguments*, philosophical reasons against the Constitution. There were doubtless those who opposed the Constitution for personal reasons, such as those with a stake in the status quo, those standing to lose power in state governments, etc. For a discussion of the problems of establishing a Constitution over intrenched power groups, see Deane E. Neubauer, "Some Conditions of Democracy," 61 Am. Pol. Sci. Rev. 1002 (1967). Also see Giuseppe Di Palma, *To Craft Democracies* (Berkeley, CA: University of California Press, 1990, 27-43).

[88] Cecelia M. Kenyon, "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," included in Kermit L. Hall, ed., *The Formation and Ratification of the Constitution: Major Historical Interpretations* (New York: Garland Publishing, 1987, 355).

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I am afraid of.[89]

Hand-in-hand with this criticism came the claim that it would not work, that it was neither confederal (with the states having sovereignty) nor unitary (with the national government having sovereignty).

> [There is nothing] in the history of mankind or in the sentiments of those who have favoured the world with their ideas on government, to warrant or countenance the motley mixture of a system proposed: a system which is an innovation in government of the most extraordinary kind; a system neither wholly federal, nor wholly national—but a strange hotch-potch of both.[90]

They believed that sovereignty could not be shared,[91] so therefore the federal government would predominate and become oppressive, because a large republic could do no otherwise. As Montesquieu had argued, "republican governments were appropriate for small territories only."[92] Because of the distance of the center of government from the people and because of the lack of homogeneity, this proposed federal government would necessarily become oppressive.[93]

The Federalists responded in force. Numerous articles addressed the limits of the new federal government and the feasibility (and advantage) of a

[89] Amos Singletary, Speech at the Massachusetts Convention, Elliot, Vol. 2, 102.

[90] Luther Martin, as quoted in Charles F. Hobson, "The Tenth Amendment and the New Federalism of 1789," included in Jon Kulka, *The Bill of Rights: A Lively Heritage* (Richmond, VA: Virginia State Library and Archives, 1987, 155).

[91] Hobson, 157.

[92] Kenyon, 351.

[93] Kenyon, 351-4.

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large republic. The most famous of these is Madison's *Federalist No. 10*:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their strength and to act in unison with each other....[T]he same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the states composing it.[94]

Similarly, in *Federalist No. 14*, Madison explained:

> The error which limits republican government to a narrow district...seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy....[T]he natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand,...so the natural limit of a republic is that distance from the center which will barely allow the representatives of the people to meet as often as may be necessary....[The United States are well within that limit. Furthermore,]...[I]t 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 provisions 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.[95]

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[94] Madison, *Federalist No. 10*, 83.

[95] Madison, *Federalist No. 14*, 100-2.

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None of these issues, however, compared to the Anti-Federalists chief complaint: that the proposed Constitution had no Bill of Rights. "Antifederalists throughout the country opposed the Constitution for many reasons—some of them contradictory—but all the Antifederalists agreed that natural rights had to be protected by a Bill of Rights."[96] The Anti-Federalists demanded that these natural rights be protected in the form of Constitutional rights. "There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed—a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers."[97] Jefferson, who called himself neither Federalist nor Anti-Federalist,[98] agreed: "[A] Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or test on interference."[99]

The Anti-Federalists felt that a Bill of Rights was necessary to protect their rights against the federal government because governments and leaders

[96] John P. Kaminski, "Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment," included in Kulka, 145.

[97] *Letters from the Federal Farmer*, 9 October 1787, Storing, 40 (2.8.19).

[98] "I am not a Federalist,...but I am much farther from [the side] of the Antifederalists." Thomas Jefferson, Letter to Francis Hopkinson, 13 March 1789, included in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin Books, 1986, 435-43.

[99] Jefferson, Letter to James Madison, 20 December 1787, Peterson, 430.

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naturally grow and try to abuse power, and without explicit protection, the people would lose their rights.

> But the general presumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favourably for encreasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers [he should have used rights] reserved.[100]

Similarly, New York Anti-Federalist "Brutus"[101] wrote on the same subject:

> [R]ulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes, and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another. It is therefore proper that bounds should be set to their authority, as that government should have at first been instituted to restrain private injuries.[102]

The Federalists first responded to this by reemphasizing how limited the federal government was to be:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce....The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[103]

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[100] *Letters from the Federal Farmer*, 12 October 1787, Storing, 57 (2.8.50).

[101] The Essays of Brutus are generally believed to have been written by Robert Yates, mainly according to the scholarship of Paul Leicester Ford. Storing, however, questions Yates' authorship. Storing, 103.

[102] *Essays of Brutus*, 1 November 1787, Storing, 118 (2.9.24).

[103] Madison, *Federalist No.* 45, 292-3.

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They then elaborated upon the theory of enumerated powers and the harms of also enumerating rights. They claimed a) that it was unnecessary, b) that it would be ineffective, and c) that it would be harmful. They outlined three ways in which it would be harmful: 1) it would imply that government had powers over everything not enumerated (instead of the current presumption that the people had rights against the government for everything not enumerated), 2) it would imply that government had powers over the general areas mentioned in the rights and that it was only constrained from directly violating them,[104] and 3) because rights would probably be defined too narrowly, it would imply that all rights not mentioned did not exist.

Hamilton argued that it was unnecessary:

> [B]ills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince....[T]hey have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; as as they retain everything they have no need of particular reservations.[105]

James Wilson concurred:

> Even in a single government, if the powers of the people rest on the same establishment as is expressed in this Constitution, a bill of rights is by no means a necessary measure. In a government

[104] This is a harm upon which Wayne Moore elucidates in detail. Discussion of this particular harm is relatively uncommon in the literature. See Moore, 75-9.

[105] Hamilton, *Federalist No. 84*, 512-3.

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> possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous....South Carolina...ha[s] no bill of rights....New Jersey has no bill of rights. The state of New York has no bill of rights. The states of Connecticut and Rhode Island have no bill of rights....[T]his enumeration, sir, will serve to show by experience, as well as principle, that, even in single governments, a bill of rights is not an essential or necessary measure.[106]

He continued on this point:

> [W]e are told that there is no security for the rights of conscience. I ask the honorable gentleman, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defense.[107]

Madison agreed that it was unnecessary and went on to explain why it would be ineffective as well:

> I have not viewed [a Bill of Rights] in an important light—...3. Because the limited powers of the federal Government, and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. Because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed in every state....Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real 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 the Constituents....[I]n a monarchy the latent force of the nation is superior to that of the Sovereign, and a solemn charter of popular rights must have a great effect as a standard for trying the validity of public acts, and a signal for rousing and uniting the superior force of the community; whereas, in a popular Government, the political and physical power may be

[106] Wilson, Speech at the Pennsylvania Convention, Elliot, Vol. 2, 436.

[107] Wilson, Speech at the Pennsylvania Convention, Elliot, Vol. 2, 455.

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> considered as vested in the same hands, that is, in a majority of the people, and, consequently, the tyrannical will of the Sovereign is not to be controuled by the dread of an appeal to any other force within the community.[108]

Lack of necessity or effectiveness, however, was not enough to prevent a Bill of Rights. Yet for James Wilson, enumeration of rights also represented a danger:

> [S]uch a measure would be not only unnecessary, but...dangerous....A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.[109]

Hamilton elaborated on a second danger:

> [B]ill of rights...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 than were granted. For why declare that 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? 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 that 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.[110]

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[108] Madison, Letter to Thomas Jefferson, 17 October 1788, Meyers, 157.

[109] Wilson, Speech at the Pennsylvania Convention, Elliot, Vol. 2, 436.

[110] Hamilton, *Federalist No. 84*, 513-4.

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This danger is subtly different from the one feared by Wilson. Wilson saw the enumeration of certain rights as implying that government had power over everything else; Hamilton saw that enumeration as implying government had power over the area that was being putatively protected.

Madison saw a third danger:

> [T]here is great reason to fear that a positive declaration of some of the most essential rights could not 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 they are likely ever to be by an assumed power. One of the objections in New England was, that the Constitution, by prohibiting religious tests, opened a door for Jews,Turks, and infidels.[111]

Wilson echoed this thought succinctly: "Enumerate all the rights of men! I am sure, sir, that no gentlemen in the late Convention would have attempted such a thing."[112]

In response, the Anti-Federalists launched another salvo of arguments, each of which scored blood. The Federalists had argued that a Bill of Rights was unnecessary; the Anti-Federalists had already argued (and the Federalists had generally agreed) that governments naturally try to expand their power and therefore demand extensive checks. The Anti-Federalists now buttressed their position with the observation that the federal government could already

[111] Madison, Letter to Thomas Jefferson, 17 October 1788, Meyers, 157.

[112] Wilson, Speech at the Pennsylvania Convention, Elliot, Vol. 2, 454.

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violate fundamental rights (from a natural law perspective) within the range of *means* available to it to implement its enumerated powers. Hence they saw a need for these natural rights to achieve the formal protection of being recognized as Constitutional rights.

> Gentlemen who oppose a federal bill of rights, or further declaratory articles, seem to view the subject in a very narrow imperfect manner. These have for their objects, not only the enumeration of the rights reserved, but *principally to explain the general powers delegated in certain material points,* and to restrain those who exercise them by fixed and known boundaries....The constitution will give congress general powers to raise and support armies. General powers carry with them incidental ones, and the means necessary to the end. In the exercise of these powers, is there any provision in the constitution to prevent the quartering of soldiers on the inhabitants?...All parties apparently agree, that the freedom of the press is a fundamental right....By art. I. sect. 8. congress will have the power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have the power to lay and collect all kinds of taxes whatever—....Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.[113]

The *Essays of Brutus* made the same point:

> It has been said...that such declaration[s] of rights...are not necessary in the general constitution, because...every thing which is not given is reserved. It requires but little attention to discover, that this mode of reasoning is rather specious than solid.
>
> ...The powers vested in the new Congress extend in many cases to life; they are authorised to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the state where the said crimes shall have been committed." No man is secure of a trial in the county where he is charged to have committed a crime....What security is there, that a man shall be

[113] *Letters from the Federalist Farmer,* 20 January 1788, Storing, 81-6 (2.8.197-2.8.203).

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