Just as there ultimately was no decisive victor in the political and pamphlet battle, so, too, there was none in the paradigm battle. No one paradigm cleared the field in 1788 and obtained exclusive dominance in the American political discourse. There was no watershed victory of liberalism over republicanism. These languages were heard on both sides during the "great national discussion." So, too, were the two other paradigms available to the framers' generation, the Protestant ethic and the ideals of sovereignty and power. So it has remained. American political discourse to this day tends to be articulated in one or another of these distinguishable idioms.

The Politics of the Bill of Rights

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The Bill of Rights consists of the first ten amendments to the Constitution of the United States. Congress submitted those amendments to the states for ratification on September 25, 1789, and the requisite number of state legislatures had ratified them by December 15, 1791. The triumph of individual liberty against government power, as epitomized by the Bill of Rights, is one of our history's noblest and most enduringly important themes. Yet James Madison, justly remembered as the "father" of the Bill of Rights, privately referred on August 19, 1789 to the "nauseous project of amendments." He had proposed the Bill of Rights, in part, because "It will kill the opposition everywhere. . . ." In this attitude lies a suggestion that party politics saturated the making of the first ten amendments. . . .

The omission of a bill of rights was a deliberate act of the Constitutional Convention. . . . On September 12, 1787, George Mason of Virginia remarked that he "wished the plan had been prefaced by a Bill of Rights," because it would "give great quiet" to the people. Mason thought that with the states' bills of rights as models, "a bill might be prepared in a few hours." He made no stirring speech for civil liberties in general or any rights in particular. He did not even argue the need for a bill of rights or move the adoption of one, although he offered to second a motion if one were made. Elbridge Gerry of Massachusetts then moved for a committee to prepare a bill of rights, and Mason seconded the motion. Roger Sherman of Connecticut observed that the rights of the people should be secured if necessary, but because the Constitution did not repeal the bills of rights of the states, the Convention need not do anything. Without further debate the delegates, voting by states, defeated the motion 10–0. Two days later, after the states unanimously defeated a motion by Mason to delete from the Constitution a ban on ex post facto laws by Congress, Charles Pinckney of South Carolina, seconded by Gerry, moved to insert a declaration "that the liberty of the Press should be inviolably observed." Sherman laconically replied, "It is unnecessary. The power of Congress does not extend to the Press," and the motion lost 7–4. Three days later the Convention adjourned.

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In the Congress of the Confederation, Richard Henry Lee of Virginia moved that a bill of rights, which he had adapted from his own state's constitution, be added to the federal Constitution. Lee was less interested in the adoption of a bill of rights than in defeating the Constitution. Amendments recommended by Congress required ratification by all the state legislatures, not just nine state ratifying conventions. Lee's motion was defeated, but it showed that, from the start of the ratification controversy, the omission of a bill of rights became an Antifederalist mace with which to smash the Constitution. Its opponents sought to prevent ratification and exaggerated the bill-of-rights issue because it was one with which they could enlist public support. Their prime loyalty belonged to states' rights, not civil rights. . . .

Why did the Constitutional Convention omit a bill of rights? No delegate opposed one in principle. As George Washington informed Lafayette, "there was not a member of the Convention, I believe, who had the least objection to what is contended for by the advocates for a Bill of Rights. . . ." All the framers were civil libertarians as well as experienced politicians who had the confidence of their constituents and the state legislatures that elected them. Even the foremost opponents of ratification praised the make-up of the Convention. . . . How could such an "assembly of demigods," as Jefferson called them, neglect the liberties of the people? . . .

The overwhelming majority of the Convention believed, as Sherman succinctly declared, "It is unnecessary." Why was it unnecessary, given the fact that the Convention recommended a new and powerful national government that could operate directly on individuals? The framers believed that the national government could exercise only enumerated powers or powers necessary to carry out those enumerated, and no provision of the Constitution authorized the government to act on any natural rights. A bill of rights would restrict national powers; but, as Hamilton declared, such a bill would be "dangerous" as well as unnecessary because it "would contain various exceptions to powers 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?"

Hamilton expressed a standard Federalist position, echoing other framers and advocates of ratification. Excluding a bill of rights from the Constitution was fundamental to the constitutional theory of the framers. . . .

Civil liberties, the supporters of the Constitution believed, faced real dangers from the possibility of repressive state action, but that was a matter to be guarded against by state bills of rights. They also argued, inconsistently, that some states had no bills of rights but were as free as those with bills of rights. They were as free because personal liberty, to Federalist theoreticians, depended not on "parchment provisions," which Hamilton called inadequate in "a struggle with public necessity," but on public opinion, an extended republic, a pluralistic society of competing interests, and a free

and limited government structured to prevent any interest from becoming an overbearing majority.

The fact that six states had no bills of rights, and that none had a comprehensive list of guarantees, provided the supporters of ratification with the argument, made by Wilson among others, that an imperfect bill of rights was worse than none at all because the omission of some rights might justify their infringement by implying an unintended grant of government power. The record was not reassuring; the states had very imperfect bills of rights, which proved to be ineffective when confronted by "public necessity," and the state governments did in fact abridge rights that had not been explicitly reserved.

Virginia's Declaration of Rights, for example, did not ban bills of attainder. In 1778 the Virginia assembly adopted a bill of attainder and outlawry, drafted by Jefferson at the instigation of Governor Patrick Henry, against a reputed cutthroat Tory, one Josiah Philips, and some fifty unnamed "associates." By legislative enactment they were condemned for treason and murder, and on failure to surrender were subject to being killed by anyone. At the Virginia ratifying convention, Edmund Randolph, irked beyond endurance by Henry's assaults on the Constitution as dangerous to personal liberties, recalled with "horror" the "shocking" attainder. When Henry defended the attainder, John Marshall, who supported ratification without a bill of rights, declared, "Can we pretend to the enjoyment of political freedom or security, when we are told that a man has been, by an act of Assembly, struck out of existence without a trial by jury, without examination, without being confronted with his accusers and witnesses, without the benefits of the law of the land?"

The framers of the Constitution tended to be skeptical about the value of "parchment barriers" against "overbearing majorities," as Madison said. He had seen repeated violations of bills of rights in every state. Experience proved the "inefficacy of a bill of rights to those occasions when its control is most needed," he said. In Virginia, for example, despite an explicit protection of the rights of conscience, the legislature had favored an establishment of religion, which was averted only because Madison turned the tide of opinion against the bill. As realists the framers believed that constitutional protections of rights meant little during times of popular hysteria; any member of the Constitutional Convention could have cited examples of gross abridgments of civil liberties in states that had bills of rights.

Virginia's bill was imperfect not just because it lacked a ban on bills of attainder. The much vaunted Declaration of Rights of Virginia also omitted the freedoms of speech, assembly, and petition; the right to the writ of habeas corpus; the right to grand jury proceedings; the right to counsel; separation of church and state; and freedom from double jeopardy and from *ex post facto* laws. The rights omitted were as numerous and important as those included. Twelve states, including Vermont, had framed constitutions, and the only right secured by all was trial by jury in criminal cases. Although all protected religious liberty, five either permitted or provided for an establishment of religion. Two states passed over a free press guarantee. Four neglected to ban excessive fines, excessive bail, compulsory self-incrimination, and general search warrants. Five ignored protections for the rights of assembly, petition, counsel, and trial by jury in civil cases. Seven omitted a prohibition of *ex post facto* laws. Nine failed to provide for grand jury proceedings, and nine failed to condemn bills of attainder. Ten said nothing about freedom of speech, while eleven were silent on double jeopardy. Whether omissions implied a power to violate, they seemed, in Federalist minds, to raise dangers that could be prevented by avoiding an unnecessary problem entirely: omit a bill of rights when forming a federal government of limited powers.

That the framers of the Constitution actually believed their own arguments purporting to justify the omission of a bill of rights is difficult to credit. Some of the points they made were patently absurd, like the insistence that the inclusion of a bill of rights would be dangerous and, on historical grounds, unsuitable. The last point most commonly turned up in the claim that bills of rights were appropriate in England but not in America. Magna Carta, the Petition of Right of 1628, and the Bill of Rights of 1689 had been grants wrested from kings to secure royal assent to certain liberties, and therefore had "no application to constitutions . . . founded upon the power of the people" who surrendered nothing and retained everything. That argument, made in *Federalist* number 84 and by leading ratificationists as sophisticated as Wilson and Oliver Ellsworth of Connecticut, was so porous that it could persuade no one. . . .

To imply that bills of rights were un-American or unnecessary merely because in America the people were the source of all power was unhistorical. Over a period of a century and a half America had become accustomed to the idea that government existed by consent of the governed; that people created government; that they created it by written compact; that the compact constituted fundamental law; that the government must be subject to such limitations as are necessary for the security of the rights of the people; and, usually, that the reserved rights of the people were enumerated in bills of rights. Counting Vermont (an independent republic from 1777 until its admission to the Union in 1791), eight states had bills of rights, notwithstanding any opinion that such bills properly belonged only in a compact between a king and his subjects. . . .

Abroad, two wise Americans serving their country in diplomatic missions coolly appraised the proposed Constitution without the obligation of having to support a party line. John Adams, having received a copy of the document in London, wrote a short letter to Jefferson in Paris. The Constitution seemed "admirably calculated to preserve the Union," Adams thought, and he hoped it would be ratified with amendments adopted later. "What think you," he asked, "of a Declaration of Rights? Should not such a Thing have preceded the Model?" Jefferson, in his first letter to Madison on the subject of the Constitution, began with praise but ended with what he did not like: "First the omission of a bill of rights. . . ." After listing rights he thought deserved special protection, starting with freedom of religion and of the press, Jefferson dismissed as campaign rhetoric Wilson's justification for the omission

of a bill of rights and concluded, "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

Adams and Jefferson in Europe were much closer to popular opinion than the framers of the Constitution, who had worked secretly for almost four months and, with their supporters, became locked into a position that defied logic and experience. During the ratification controversy, some Federalists argued that the Constitution protected basic rights, exposing them to the reply that they had omitted the liberty of the press, religious freedom, security against general warrants, trial by jury in civil cases, and other basic rights. . . .

If it was unnecessary, Antifederalists asked, why did the Constitution protect some rights? The protection of some opened the Federalists to devastating rebuttal. They claimed that because no bill of rights could be complete, the omission of any particular right might imply a power to abridge it as unworthy of respect by the government. That argument, in effect that to include some would exclude all others, boomeranged. The protection of trial by jury in criminal cases, the bans on religious tests, ex post facto laws, and bills of attainder, the narrow definition of treason, and the provision for the writ of habeas corpus, by the Federalists' own reasoning, were turned against them. . . .

Henry cleverly observed that the "fair implication" of the Federalist argument against a bill of rights was that the government could do anything not forbidden by the Constitution. Because the provision on the writ of habeas corpus allowed its suspension when the public safety required, Henry reasoned, "It results clearly that, if it had not said so, they could suspend it in all cases whatsoever. It reverses the position of the friends of this Constitution, that everything is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved." . . . [Richard Henry] Lee objected to leaving the rights of the people to "logical inferences," because Federalist principles led to the implication that all the rights not mentioned in the Constitution were intended to be relinquished. . . .

In sum, the usually masterful politicians who had dominated the Convention had blundered by botching constitutional theory and making a serious political error. Their arguments justifying the omission of a bill of rights were impolitic and unconvincing. Mason's point that a bill of rights would quiet the fears of the people was unanswerable. Alienating him and the many who agreed with him was bad politics and handed to the opposition a stirring cause around which they could muster sentiment against ratification. The single issue that united Antifederalists throughout the country was the lack of a bill of rights. No rational argument—and the lack of a bill of rights created an intensely emotional issue because people believed that their liberties were at stake—could possibly allay the fears generated by demagogues like Henry and principled opponents of ratification like Madison. . . . The Antifederalists capitalized on the Federalist blunder, hoping to defeat the Constitution or get a second convention that would revise it in order to hamstring the national government.

In Pennsylvania, the second state to ratify, the minority demanded a comprehensive bill of rights similar to that in their state constitution. Massachusetts, the sixth state to ratify, was the first to do so with recommended amendments. Only two of the recommended amendments, dealing with jury trial in civil suits and grand jury indictment, belonged in a bill of rights. Supporters of the Constitution in Massachusetts had withdrawn a proposed bill of rights on the supposition that Antifederalists would use it as proof that the Constitution endangered liberty. Maryland too would have recommended a bill of rights, but the Federalist majority jettisoned it when the Antifederalists tried to insert curbs on national powers to tax and regulate commerce. Nevertheless, Federalists grudgingly accepted ratification with recommended amendments to ward off conditional ratification or the defeat of the Constitution. New Hampshire, whose approval as the ninth state made ratification an accomplished fact, urged a comprehensive bill of rights for adoption by amendments after the new government went into operation. Virginia and New York, whose ratification was politically indispensable, followed suit. North Carolina was the fourth state to ratify with a model bill of rights among its recommendations. But the states also recommended crippling restrictions on delegated powers.

Thus, the Constitution was ratified only because crucial states, where ratification had been in doubt, were willing to accept the promise of a bill of rights in the form of subsequent amendments to the Constitution. State recommendations for amendments, including those of the Pennsylvania minority, received nationwide publicity, adding to the clamor for a bill of rights. Every right that became part of the first ten amendments was included in state recommendations except the clause in the Fifth Amendment requiring just compensation for private property taken for public use.

James Madison was one of the Federalists who finally realized that statecraft and political expediency dictated a switch in position. At the Virginia ratifying convention in June 1788 Madison had upheld the usual Federalist arguments for the omission of a bill of rights but finally voted to recommend such a bill in order to avoid previous amendments. He later conceded that the Constitution would have been defeated without a pledge from its supporters to back subsequent amendments. In Virginia, Madison's own political position deteriorated because he had opposed a bill of rights. The Antifederalists, who controlled the state legislature, elected two of their own, Richard Henry Lee and William Grayson, as the state's first United States senators. Madison faced a tough contest for election to the House of Representatives, and he feared that the Antifederalists might succeed in their call for a second constitutional convention. He needed to clarify his position on a bill of rights.

Although Madison had periodically apprised Jefferson, in Paris, on ratification developments, he had not answered Jefferson's letter of December 1787 supporting a bill of rights. On October 17, 1788, the eve of his campaign for a House seat, Madison faced the issue. He favored a bill of rights, he wrote, but . . . also worried about the difficulty of adequately protecting the most important rights; experience proved that a bill of rights was a mere

no immediate support in Congress. Indeed, every speaker who followed him, regardless of party affiliation, either opposed a bill of rights or believed that the House should attend to far more important duties. Six weeks later Madison "begged" for a consideration of his amendments, but the House assigned them to a special committee instead of debating them. That committee, which included Madison, reported in a week. It added freedom of speech to the rights protected against state abridgement, deleted Madison's reference to no "unreasonable searches and seizures," made some stylistic revisions, but otherwise recommended the amendments substantially as he had proposed them. The committee's report was tabled, impelling Madison on August 3 to implore its consideration.

On August 13 the House finally began to consider the reported amendments, and in the course of debate it made some significant changes. Madison had proposed to "incorporate" the amendments within the text of the Constitution at appropriate points. He did not recommend their adoption as a *separate* "bill of rights," although he had referred to them collectively by that phrase. Members objected that to incorporate the amendments would give the impression that the framers of the Constitution had signed a document that included provisions not of their composition. Another argument for lumping the amendments together was that the matter of form was so "trifling" that the House should not squander its time debating the placement of the various amendments. Ironically, Roger Sherman, who still believed that the amendments were unnecessary, deserves the credit for insistently arguing that they should be appended as a supplement to the Constitution instead of being interspersed within it. Thus, what became the Bill of Rights achieved its significant collective form over the objections of its foremost proponent, Madison, and because of the desire of its opponents in both parties to downgrade its importance.

The House recast the free exercise of religion clause and its allied clause banning establishments of religion, improving Madison's original language. The House also confined to criminal cases Madison's broad phrasing that no person should be compelled to give evidence against himself. On the other hand the House restored the extremely important principle against unreasonable searches and seizures, dropped by the committee. In another major decision the House decisively defeated Gerry's motion, for the Antifederalists, to consider not just the committee's report but all amendments that the several states had proposed; the Antifederalists thus failed to intrude crippling political amendments. Finally the House added "or to the people" in the recommendation by Madison that the powers not delegated to the United States be reserved to the states. On the whole the House adopted Madison's amendments with few significant alterations during the course of its ten-day debate on the Bill of Rights.

In the midst of that debate Madison wrote a letter to a fellow Federalist explaining why he was so committed to "the nauseous project of amendments" that some of the party supported reluctantly. Protecting essential rights was "not improper," he coolly explained, and could be of some influence for good. He also felt honor-bound to redeem a campaign pledge to his constituents, mindful that the Constitution "would have been certainly *rejected*" by Virginia without assurances from its supporters to seek subsequent amendments. Politics, moreover, made proposing the amendments a necessity to beat the Antifederalists at their own game. If Federalists did not support the amendments, Antifederalists would claim that they had been right all along and gain support for a second convention. And, Madison wrote, the amendments "will kill the opposition everywhere, and by putting an end to disaffection to the Government itself, enable the administration to venture on measures not otherwise safe."

Madison had, in fact, upstaged and defeated the Antifederalists. That is why Congressman Aedanus Burke of South Carolina cried sour grapes. . . . Later, after the Senate had approved the amendments that became the Bill of Rights, [Virginia senator] Grayson reported, "they are good for nothing, and I believe, as many others do, that they will do more harm than benefit."

The Senate, which kept no record of its debates, had deliberated on seventeen amendments submitted by the House. One the Senate killed, the proposal Madison thought "the most valuable": protection against state infringement of speech, press, religion, or trial by jury. The motion to adopt failed to receive the necessary two-thirds vote, although by what margin is unknown. The Senate also weakened the House's ban on establishments of religion. Otherwise the Senate accepted the House proposals, although the Senate combined several, reducing the total number from seventeen to twelve. The first of the twelve dealt with the relation of population to the number of representatives from each state, and the second would have prevented any law going into effect that would have increased the salaries of members of Congress until after the next election.

The House adamantly refused to accept the Senate's version of its ban on establishments. A conference committee of both houses met to resolve differences. The committee, which included Madison, accepted the House's ban on establishments but otherwise accepted the Senate's version. On September 24, 1789, the House voted for the committee report; on the following day the Senate concurred, and the twelve amendments were submitted to the states for ratification.

Within six months nine states ratified the Bill of Rights, although of the twelve amendments submitted for approval, the first and second were rejected. The four recalcitrant states by mid-1790 were Virginia, Massachusetts, Connecticut, and Georgia. The admission of Vermont to the Union made necessary the ratification by eleven states. Connecticut and Georgia refused to ratify. Georgia's position was that amendments were superfluous until experience under the Constitution proved a need. Connecticut believed that any suggestion that the Constitution was not perfect would add to the strength of Antifederalism.

In Massachusetts, Federalist apathy to the Bill of Rights was grounded on a satisfaction with the Constitution as it was, and the Antifederalists were more interested in amendments that would strengthen the states at the expense of the national government. Nevertheless the Massachusetts lower

house adopted all but the first, second, and twelfth amendments, and the upper house adopted all but the first, second, and tenth. Thus both houses of the Massachusetts legislature actually approved what became the First through Seventh Amendments and the Ninth; but a special committee, dominated by Antifederalists, urged that all amendments recommended by Massachusetts should be adopted before the state concurred in any amendments. As a result the two houses never passed a bill promulgating ratification of eight amendments. Jefferson, the secretary of state, believed that Massachusetts, "having been the 10th state which has ratified, makes up the three-fourth [sic] of the legislatures whose ratification was to suffice." He wrote to a Massachusetts official, asking for clarification. The reply was, "It does not appear that the Committee ever reported any bill." In 1939, Massachusetts joined Connecticut and Georgia when they belatedly ratified on the sesquicentennial anniversary of the Constitution.

Ratification of the Bill of Rights by Vermont, in November 1789, left Virginia the last state to act. Its ratification as the eleventh state was indispensable, although the hostility of its Antifederalist leaders presaged a doubtful outcome. . . . The Federalists of Virginia, however, eagerly supported the Bill of Rights in the knowledge that its adoption would appease public fears and stymie the amendments supported by the Antifederalists. Virginia's lower house, controlled by the Federalists, acted quickly, but the opposition dominated the state senate. . . . As a member of the lower house reported to Madison, the senate inclined to reject the Bill of Rights, not because of opposition to its guarantees, but from an apprehension "that the adoption of them at this time will be an obstacle to the chief object of their pursuit, the amendment on the subject of direct taxation." For that reason, Randolph reported to Washington, the Federalists meant to "push" the Bill of Rights; passage would "discountenance any future importunities for amendments."

Virginia's senate at the close of 1789 rejected what became the First, Sixth, Ninth, and Tenth Amendments, at least until the next session, thereby allowing time for the electorate to express itself. The Antifederalists still hoped to drum up support for "radical" amendments, as Lee called them. The senators in the majority also issued a statement grossly misrepresenting the First Amendment (then the third). Madison confidently expected that this Antifederalist tactic would backfire, and it did. For the senators' statement was not only inaccurate on its face; it came from men who with a single exception did not go before the electorate with clean hands. Like Henry and Lee, who planned the senators' statement, the senators had records of having voted against religious liberty and in favor of compulsory taxes for the support of religion. By contrast Madison had led the fight in Virginia against a state establishment of religion and for religious liberty, and his supporters in the Virginia senate had aided him. In the end Madison's confidence proved justified. Jefferson made his influence felt on behalf of the Bill of Rights, and the Antifederalists grudgingly gave ground before public opinion. On December 15, 1791, after two years of procrastination, the senate finally ratified without record vote, thereby completing the process of state ratification and making the Bill of Rights part of the Constitution.

The history of the framing and ratification of the Bill of Rights indicates slight passion on the part of anyone to enshrine personal liberties in the fundamental law of the land. We know almost nothing about what the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent. But for Madison's persistence the amendments would have died in Congress. Our precious Bill of Rights, at least in its immediate background, resulted from the reluctant necessity of certain Federalists to capitalize on a cause that had been originated, in vain, by the Antifederalists for ulterior purposes. The party that had first opposed the Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, whereas the party that had at first professedly wanted it discovered too late that it was not only embarrassing but disastrous for those ulterior purposes. The Bill of Rights had a great healing effect, however; it did, as Madison originally proposed, "give great quiet" to people. The opposition to the Constitution, Jefferson informed Lafayette, "almost totally disappeared," as Antifederalist leaders lost "almost all their followers." The people of the United States had possessed the good sense, nourished by traditions of freedom, to support the Constitution and the Bill of Rights.

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