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ENUMERATION AND OTHER CONSTITUTIONAL STRATEGIES FOR PROTECTING RIGHTS: THE VIEW FROM 1787/1791

Constitutional designers employ many strategies for securing what they believe are fundamental rights and vital interests.[1] Specifying in the constitutional text the rights and interests to be protected is a common device. In a constitution that relies solely on enumeration as a rights protective strategy, whether that constitution protects abortion rights depends on whether any provision in that constitution is best interpreted as granting women a right to terminate their pregnancies. Enumerating the powers government officials may exercise is a second rights protective strategy. Government may not constitutionally ban partial-birth abortions, although no constitutional provision properly interpreted protects a right to reproductive choice, when no constitutional provision properly interpreted authorizes government officials to interfere with reproductive decisions. Structuring government

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[1] As the example of slavery demonstrates, constitutions may be designed to secure immoral privileges as well as human rights. See Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (Cambridge University Press: New York, 2006).

institutions is a third rights protective strategy, one that does not rely primarily on enumeration or interpretation. Government officials do not ban abortion, even when at least some reasonable persons believe constitutional provisions are best interpreted as permitting legislative prohibitions, when the constitutional rules for staffing the government and passing laws consistently provide pro-choice advocates with the power necessary to prevent hostile proposals from becoming law. Equal protection is a fourth strategy for protecting fundamental rights. Elected officials are less inclined to ban abortion when they may not constitutionally confine that prohibition to certain social classes or racial groups.

Contemporary American constitutionalists typically treat enumeration as the primary, often only, constitutional strategy for protecting fundamental rights. The common terminological distinction between "enumerated" and "unenumerated" rights implies that rights not enumerated in the constitutional text are best characterized by virtue of what they are not, rather than as linked to alternative constitutional strategies for securing fundamental freedoms. Constitutional debate during the 1970s and 1980s was over whether justices ought to extend the same degree of protection they offered to the liberties enumerated in the Bill of Rights and post-Civil War Amendments to other fundamental freedoms not explicitly mentioned in those texts or in other constitutional provisions. "[T]he most fundamental question we can ask about our fundamental law," Thomas Grey declared in 1975, is whether when "reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution . . . [o]r may they also enforce principles of liberty and justice when the normative content of those principles is not to be found

within the four corners of our founding document?"[2]

Enumeration presently reigns supreme in the American constitutional universe. Leading progressive constitutional theorists at the turn of the twenty-first century insist that rights formerly thought unenumerated are actually enumerated. "The distinction . . . between enumerated and unenumerated rights," Ronald Dworkin declares when defending judicial solicitude for legal abortion, is "another misunderstood semantic device."[3] Dworkin and other prominent proponents of Roe v. Wade[4] maintain justices must strike down bans on abortion only because reproductive rights are explicitly protected by the due process and equal protection clauses of the Fourteenth Amendment, properly interpreted.[5] Grey, who helped coin the term "non-interpretivism," agrees with this emphasis on enumeration as the foundation of constitutional right. He now believes "[i]t is better to treat all approaches to constitutional adjudication as constrained to the interpretation of the sources of constitutional law, and then to

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[2] Thomas C. Grey, "Do We Have an Unwritten Constitution?" 27 **Stanford Law Review** 703, 703 (1975).

[3] Ronald Dworkin, "Unenumerated Rights: Whether and How Roe Should Be Overruled," The Bill of Rights in the Modern States (edited by Geoffrey R. Stone, Richard A. Epstein, and Cass Sunstein) (University of Chicago Press: Chicago, 1992), p. 386.

[4] 410 U.S. 113 (1973).

[5] See Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom (Alfred A. Knopf: New York, 1993), p. 160; Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," 63 **North Carolina Law Review** 375, 382-86 (1985).

argue about what those sources are and how much relative weight they should have."[6]

Constitutional analysis that privileges enumeration as the primary constitutional strategy for protecting fundamental freedoms interprets the constitution of 1787 in light of the constitution of 1791.[7] The original constitution, commentary that celebrates the Bill of Rights proclaims, was largely limited to delineating the structure and powers of the national government. That constitution sought to create institutions that would protect against foreign aggression, suppress internal rebellions, and regulate the national economy, but omitted vital protections against abusive official behavior. The first ten amendments to the constitution, on this account, guarantee that the national government will respect certain fundamental freedoms when securing the above constitutional ends. Contemporary pedagogy entrenches this distinction between the original and amended constitution by dividing the constitutional universe into a course on the structure of government, which focuses exclusively on the proper interpretation of constitutional provisions drafted in 1787, and a course on civil rights and liberties, which focuses exclusively on the proper interpretation of amendments ratified in 1791, 1865, and 1868.[8]

This sharp separation between constitutional questions associated with the structure of government and constitutional questions associated with fundamental freedoms distorts

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[6] Thomas C. Grey, "The Uses of an Unwritten Constitution," 64 **Chicago-Kent Law Review** 211, 220 (1988).

[7] and Section 5 of the Fourteenth Amendment in light of Section 1.

[8] See, i.e., Kathleen M. Sullivan and Gerald Gunther, Constitutional Law (15th ed.) (Foundation Press: New York, 2004).

constitutional history and practice. The framers of the original constitution failed to specify what rights the constitution protected because they did not believe enumeration was an effective strategy for securing fundamental freedoms. Vested property rights and the freedom of speech, in their view, were better protected by well-designed governing institutions than by paper guarantees. The more fundamental the right, the less likely that right was enumerated in 1787. Federalist 10 highlights "the rights of property" and worries that a "religious sect may degenerate into a political faction. "[9] Nevertheless, the original constitution provides no explicit textual protections for economic liberty or freedom of conscience. Madison instead insisted that the constitutional politics of the large republic would provide more secure guarantees for these rights than a pious textualism.[10] Framers who did not fully grasp Madison's analysis in Federalist 10[11] nevertheless endorsed Madison's more general commitment to institutional design as the best strategy for preventing tyranny.[12]

This paper interprets the constitution of 1791 in light of the constitution of 1787.[13] The persons responsible for the original constitution thought they had secured fundamental rights by a combination of representation, the separation of powers, and the extended republic. The Bill of

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[9] Alexander Hamilton, James Madison, and John Jay, The Federalist Papers (New American Library: New York, 1961), pp. 78, 84.

[10] Hamilton, Madison, and Jay, Federalist Papers, p. 78-84.

[11] See Larry D. Kramer, "Madison's Audience," 112 **Harvard Law Review** 611 (1999)

[12] See notes ___, below, and the relevant text.

[13] A future project may interpret Section 1 of the Fourteenth Amendment in light of Section 1.

Rights, in their view, was a minor supplement to the strategies previously employed for preventing abusive government practices. Madison in 1789 did suggest that enumeration might provide some additional security for the freedom of speech and related concerns. Nevertheless, his proposed amendments were less a list of fundamental freedoms than an enumeration of those rights likely to appease moderate anti-Federalists. That many vaguely phrased rights lacked clear legal meaning was of little concern to their Federalist sponsors, who trusted their cherished governing institutions to resolve ambiguities justly when controversies arose in the future. Madison and his political allies refused to accommodate their political rivals only when former anti-Federalists proposed enumerating a right to instruct representatives, a right Madison thought destructive of the constitutional politics he believed best secured fundamental freedoms.

Contemporary debates over whether the United States has an unwritten constitution and whether the judiciary (or any other institution) should protect unenumerated constitutional rights are rooted in the ways the framers from 1787 to 1791 juxtaposed different strategies for protecting fundamental freedoms. The Bill of Rights did not include a caveat stating that those amendments were a "sop" to the Anti-Federalists,[14] a minor supplement to more important institutional protections for fundamental rights, or a somewhat random collection of liberties spelled out for the sole benefit of persons unaware of how constitutions best protected rights. Persons reading the constitutional text after 1791 might well conclude that those rights enumerated were more central to the constitutional order than those omitted. Marbury v.

[14] Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution (Cambridge University Press: New York, 2005), p. 9.

Madison,[15] or rather the nineteenth century political movements that successfully reinvigorated the logic of Marbury, further promoted enumeration and judicial power as the only means for limiting republican government. If, as Madison claimed in 1789, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights,"[16] and, as a later Supreme Court justice asserted, "the Constitution is what the judges say it is,"[17] then the conclusion might follow that the constitution protected only those rights enumerated in the text, rights best protected by the federal judiciary. Such claims were made, however, only after Americans forgot the constitutional strategies for protecting fundamental rights adopted in 1787 and transformed the partisan strategy adopted in 1789 for appeasing political opponents into the best constitutional strategy for securing vital freedoms in the present.

I. The View from 1787

Conventional accounts of American constitutional development regard the Bill of Rights as correcting a defective constitution. Citizens are commonly taught that the persons who drafted the original constitution forgot to include textual protections for fundamental rights in their effort to "secure the blessings of liberty." Exhausted by months of "writ[ing] and rewrit[ing] sections" on "the frame of government," fatigued by the summer heat, and eager to

[15] 5 U.S. 137 (1803).

[16] **Annals of Congress**, 1st Cong., 1st Sess., p. 457.

[17] Merlo J. Pusey, Charles Evans Hughes (Macmillan Company: New York, 1952), p. 204.

return home, the framers' "impatience outweighed their judgment" when every state delegation rejected George Mason's proposal that the constitution be "prefaced with a Bill of Rights."[18] Subsequent rationalizations that a Bill of Rights was not necessary in a government of enumerated powers[19] were clearly inadequate. As numerous Anti-Federalists pointed out, the powers enumerated in Article I could easily be interpreted as granting the federal government unlimited authority. "The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution," Brutus complained, "leaves the legislature at liberty, to do every thing, which in their judgment is best."[20] The Bill of Rights supposedly cured the original constitution's failure to provide adequate textual protections for basic rights by providing legal guarantees that national officials would not violate fundamental freedoms when pursuing legitimate constitutional ends.

The better view is that the framers in 1787 were committed to protecting fundamental

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[18] Robert A. Rutland, "Framing and Ratifying the First Ten Amendments," The Framing and Ratification of the Constitution (edited by Leonard Levy and Dennis J. Mahoney) (Macmillan Publishing Company: New York, 1987), p. 305; Max Farrand, editor, The Records of the Federal Convention of 1787 (Volume II) (Yale University Press: New Haven, 1966), p. 587.

[19] See Merrill Jensen, editor, The Documentary History of the Ratification of the Constitution by the States: Ratification of the Constitution by the States: Pennsylvania (Vol. II) (State Historical Society of Wisconsin: Madison, 1976), pp. 167-68.

[20] "Essays of Brutus," The Complete Anti-Federalist (Vol. 2) (edited by Herbert J. Storing) (University of Chicago Press: Chicago, 1981), p. 421.

freedoms, but did not believe enumeration the best constitutional strategy for securing cherished individual rights. Identifying tyranny with class or partial legislation,[21] Federalists designed governing institutions they believed would enable the best men to gain public office and provide those distinguished representatives with incentives to secure the public welfare. Madison and his political allies were convinced that government abuses and majority tyranny would most likely be prevented by processes for staffing the government that privileged the selection of particularly wise and virtuous candidates, and by processes for making laws that privileged policies aimed at the common good rather than the benefit of particular classes or individuals. The large republic, Federalist 10 proclaimed, would yield a leadership class "whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[22] Federalist 51 explained why the constitutional separation of powers would enable "the private interest of every individual" to be "a sentinel over the public rights."[23] Structural considerations trumped parchment barriers in 1787. If governing institutions were designed correctly, the framers believed, enumerating individual rights was unnecessary. If governing institutions were designed poorly, enumerating individual rights was useless.

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[21] See Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Duke University Press: Durham, 1993), pp. 22-33.

[22] Hamilton, Madison, and Jay, Federalist Papers, p. 82.

[23] Hamilton, Madison, and Jay, Federalist Papers, p. 322.

A. Protecting Rights in 1787[24]

The persons responsible for drafting the constitution of 1787 were far more concerned with constitutional politics than constitutional law. They sought government institutions that privileged certain outcomes and were less interested in formulating textual definitions of government powers and individual rights. Madison famously proposed "republican remed[ies] for the diseases most incident to republican government."[25] The original constitution did not include a Bill of Rights because Madison and other prominent framers doubted the efficacy of legal limitations on government power. On matters as diverse as religious freedom and slavery, the framers consistently sought to establish a political process that would secure certain fundamental rights and interests, scorning the enumeration strategy they would later adopt in 1791.

Federalists in 1787 regarded legal restrictions on federal power as dangerous, inappropriate and useless. In their view, "a written declaration of rights" was "unnecessary in theory and ineffectual in practice."[26] Madison thought "the adoption of a federal bill of rights" was "an irrelevant antidote to the real dangers that republican politics would generate."[27]

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[24] Most of this section is a lightly edited version of Graber, Dred Scott, pp. 96-100.

[25] Hamilton, Madison, and Jay, Federalist Papers, p. 84.

[26] Colleen A. Sheehan and Gary L. McDowell, "Introduction," Friends of the Constitution: Writings of the "Other" Federalists 1787-1788 (Liberty Fund: Indianapolis, 1998), p. 161. See Sheehan and McDowell, "Introduction," p. 11.

[27] Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the

Government officials committed to the public good sometimes faced irresistible pressures to ignore textual limits on their powers. "[I]t is in vain," Federalist 41 asserted, "to oppose constitutional barriers to the impulse of self-preservation."[28] Past experience demonstrated that clear constitutional guidelines did not restrain officials bent on unconstitutional usurpations. Roger Sherman informed New Englanders that "[n]o bill of rights ever yet bound the supreme power longer than the honey moon of a new married couple, unless the rulers were interested in preserving the rights."[29] Federalist 48 commented, "a mere demarcation on parchment of the

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Constitution (Alfred A. Knopf: New York, 1996), p. 334.

[28] Hamilton, Madison, and Jay, Federalist Papers, p. 257. See Hamilton, Madison, and Jay, Federalist Papers, pp. 160, 167 ("how unequal parchment provisions are to a struggle with necessity").

[29] Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution by the States: Ratification of the Constitution by the States: Delaware, New Jersey, Georgia, Connecticut (Vol. III) (State Historical Society of Wisconsin: Madison, 1978), p. 433. See John P. Kaminski and Gaspare J. Saladino, eds., The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia [1] (Vol. VIII) (State Historical Society of Wisconsin: Madison, 1988), pp. 308, 438; John P. Kaminski and Gaspare J. Saladino, eds., The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia [2] (Vol. IX) (State Historical Society of Wisconsin: Madison, 1990), p. 975; John P. Kaminski and Gaspare J. Saladino, eds., The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia [3] (Vol. X) (State Historical Society of Wisconsin: Madison, 1993), pp. 1196-97, 1333-

constitutional departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hand."[30] Rights could not be defined in ways that adequately identified government oppression. "What signifies a declaration that `the liberty of the press shall be inviolably preserved?'" Hamilton asked. "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion."[31] Parchment declarations could also be rescinded. "Neither would a general declaration of rights be any security," Civic Rusticus wrote, "for the sovereign who made it could repeal it."[32]

Individual rights were best protected by well designed institutions. "(A)ll observations founded upon the danger of usurpation," Hamilton wrote, "ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."[33] Prominent proponents of ratification declared that the national government could be vested with substantial powers because the internal structure of that regime guaranteed that such authority would not be abused. "(T)he delegating of power to a government in which the people have so

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[30] Hamilton, Madison, and Jay, Federalist Papers, p. 313. See Hamilton, Madison, and Jay, Federalist Papers, p. 442 (noting "[t]he insufficiency of a mere parchment delineation of the boundaries of each" branch of the national government).

[31] Hamilton, Madison and Jay, Federalist Papers, p. 514.

[32] 8 Documentary History, p. 334. See 8 Documentary History, p. 337.

[33] Hamilton, Madison and Jay, Federalist Papers, p. 196. See Hamilton, Madison and Jay, Federalist Papers, pp. 196, 255-56.

many checks," James Bowdoin Dalton asserted, "will be perfectly safe, and consistent with the preservation of their liberties."[34] When Madison at the drafting convention emphasized the need to "introduce the checks . . . for the safety of a minority in danger of oppression from an unjust and interest majority," he proposed such procedures as a national veto on state legislation rather than specific limits on government power.[35] Hamilton regarded "[t]he Constitution" as "A BILL OF RIGHTS" in part because it "specif[ied] the political privileges of the citizens in the structure and administration of the government."[36]

Basic republican institutions provided the most important structural protection against tyranny. Officials "dependent on the suffrage of the people for their appointment to, and continuance in office," were thought "a much greater security than a declaration of rights, or

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[34] Jonathan Elliot, ed., The Debates in the Several State conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 (Vol. II) (J.B. Lippincott Company: Philadelphia, 1836), p. 103.. See 9 Documentary History, pp. 987-88.

[35] Max Farrand, ed., The Records of the Federal Convention of 1787 (Vol. I) (Yale University Press: New Haven, 1966), p. 108.

[36] Hamilton, Madison, and Jay, Federalist Papers, pp. 514-15. See Walter Berns, "Judicial Review and the Rights and Laws of Nature," 1982: The Supreme Court Review (edited by Philip B. Kurland, Gerhard Casper, and Dennis J. Hutchinson) (University of Chicago Press: Chicago, 1983), p. 66 (the framers recognized that "the most effective way to limit power was not to withhold powers--although they did that too--but to organize power in a particular way").

restraining clauses upon paper."[37] The "security" for rights, Hamilton bluntly stated, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."[38] Benjamin Rush informed Pennsylvanians that "there is no security but in a pure and adequate representation."[39] George Mason agreed that "the democratic principle . . . was the only security for the rights of the people."[40]

When considering the processes for staffing the national government and making laws, the framers consistently selected those republican practices they believed would best protect fundamental freedoms. The constitution established relatively large election districts and relatively long terms of office because the framers thought these practices would "obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society."[41] The Senate was similarly structured to privilege the selection of "men of integrity

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[37] John P. Kamininski and Gaspare J. Saladino, eds., The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution: Public and Private [2] (Vol. XIV) (State Historical Society of Wisconsin: Madison, 1983), p. 387.

[38] Hamilton, Madison, and Jay, Federalist Papers, p. 350.

[39] 2 Documentary History, p. 433.

[40] Farrand, 1 Records, p. 359.

[41] Hamilton, Madison and Jay, Federalist Papers, p. 350. See Mark A. Graber, "Conflicting Representations: Guinier and Madison on Electoral Systems," 13 **Constitutional Commentary** 291, 299-304 (1996).

and abilities."[42] Such persons because of their superior political fibre would tend to exercise power prudently, protect fundamental freedoms, respect constitutional compromises, and generally adhere to the spirit of the constitution. Madison thought religious freedom would be protected primarily by electoral arrangements that ensured the diversity necessary to prevent any sect or combination of sects from establishing the control over the national legislature necessary to oppress rival sects. He famously declared, "in the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principle than those of justice and the general good."

The constitutional provisions crafted in 1787 are better conceptualized as guidelines for elected officials than as poorly drafted or intentionally vague legal rules to be enforced by the federal judiciary. The constitution of 1787 does contain some legal rules. The American constitution requires congressional elections to be held every two years and insists that war be declared only by the national legislature. These rules, however, are not the most important source of limits on government powers. Rather than specify fundamental freedoms and vital interests in advance and for all time, the framers designed institutions that let states, government officers, various religious sects, and other entities at any given time determine and protect their rights. Whether governing institutions are functioning as originally designed depends on the extent to which the officers making decisions have the requisite abilities and interests, and not on the precise decisions they make. Herbert Storing's influential analysis of framing thought aptly concluded that "the substance [of the constitution] is a design of government with powers to act

[42] "A Federalist," "Essay," Friends of the Constitution, p. 41.

and a structure arranged to make it act wisely and responsibly." "It is in that design, not in its preamble or its epilogue," he emphasized, "that the security of American civil and political liberties lie."[43]

B. The Rights Protected in 1787

Institutional strategies for protecting natural and civic rights were particularly appropriate given the nature of the liberties Americans sought to secure in 1787. Constitutional institutions were expected to secure fundamental rights, and not simply those rights thought to be fundamental during the late eighteenth century. Many fundamental rights were conceptualized as rights against partial or class legislation, laws intended to benefit or enrich some persons at the expense of others. The framers thought official measures aimed at the common good did not violate liberty, no matter what the constraint on individual action. Governing officials were even authorized to waive the rights of their constituents when doing so was clearly in the public interest. Characterizing rights in this way, the persons responsible for the constitution sought to craft rules for staffing the national government and making national laws that would motivate voters and governing officials to pursue the general welfare. They rejected fixed legal limitations on government power that might in the future prove inconsistent with the common

[43] Herbert J. Storing, "The Constitution and the Bill of Rights," How Does the Constitution Secure Rights? (American Enterprise Institute for Public Policy Research: Washington, 1985), p. 35. See Walter Berns, "The Constitution as Bill of Rights," How Does the Constitution Secure Rights?, especially, pp. 51, 59-65.

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The framers recognized that enumeration was a poor vehicle for securing the full panoply of fundamental rights. Listing the freedoms considered fundamental in 1787 was impossible. "[A]n enumeration which is not complete is not safe," James Madison informed the Virginia Ratification Convention, and "[s]uch an enumeration could not be made, within any compass of time."[44] James Iredell asserted that the effort "to enumerate a number of rights which are not intended to be given up" was "dangerous."

> [I]t would be implying, in the strongest manner, that every right not included in this exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.[45]

Present enumerations risked disparaging rights recognized by future generations.[46] The framers believed that their descendants might better understand fundamental freedoms than they. "[T]he law of nature," James Wilson declared, "though immutable in its principles, will be progressive in its operations and effects." In his view, "the law, which the divine wisdom has approved for

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[44] Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution As Recommended by the General Convention at Philadelphia in 1787 (Vol. III) (J.B. Lippincott Company: Philadelphia, 1836), p. 626.

[45] Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution As Recommended by the General Convention at Philadelphia in 1787 (Vol. IV) (J.B. Lippincott Company: Philadelphia, 1836), p. 167.

[46] The rest of this paragraph relies heavily on Suzanna Sherry, "The Founders' Unwritten Constitution," 54 **University of Chicago Law Review** 1127, 1162-64 (1987).

man, will not only be fitted, to the contemporary degree but will be calculated to produce, in future, a still higher degree of perfection."[47] Federalists worried that textual guarantees for presently acknowledged liberties might inhibit protection for liberties acknowledged in the future. Edmund Pendleton thought proposed bills of rights failed to anticipate that "in the progress of things, [we may] discover some great and Important [right], which we don't now think of."[48]

Well designed governing institutions were better means for protecting all the fundamental rights Americans recognized in 1787 and might recognize in the future. When the federal government was functioning as the framers expected, governing officials would not violate whatever fundamental rights most Americans believed they had because all governing officials were elected by the people or appointed by officials elected by the people. "Frequent elections of the representatives of the people," John Dickinson stated, "are the sovereign remedy of all grievances in a free government."[49] These governing officials were likely to make wise decisions when future disputes over fundamental rights arose because they were selected by a process thought to guarantee as distinguished a class of governing officials as republicanly

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[47] James Wilson, The Works of James Wilson (Vol. I) (edited by James DeWitt Andrews) (Callaghan and Company: Chicago, 1896),.

[48] Edmund Pendleton, The Letters and Papers of Edmund Pendleton, 1734-1803 (Vol. II) (edited by David John Mays) (University Press of Virginia: Charlottesville, 1967), pp. 532-33. See generally, Terry Brennan, "Natural Rights and the Constitution: The Original 'Original Intent,'" 15 **Harvard Journal of Law and Public Policy** 965, 1006-07 (1992).

[49] "Fabius" (John Dickinson), "The Letters," Friends of the Constitution, p. 62.

possible.[50] "The danger in all cases of interested coalitions to oppress the minority" will "be guarded against," Madison maintained when discussing the Senate, "by the establishment of a body in the Govt. sufficiently respectable for its wisdom & virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale."[51] As Americans gained greater knowledge of their fundamental rights, prominent framers were confident that institutions staffed by virtuous governing officials could be trusted to respect those newly acknowledged liberties.

Many fundamental liberties the framers sought to protect were rights against legislation directed at particular persons or classes. Antebellum Americans did not regard laws aimed at safeguarding the public welfare, health, safety or morals as violating fundamental rights.[52] In their view, government officials did not limit liberty when they forbade actions thought to threaten harm to others or self. The emphasis was on legislative ends, not on legislative means. As Howard Gillman perceptively notes, pre-New Deal "jurisprudence . . . focused on the *character of the legislation* rather than the *importance of the restricted liberty* (emphasis in original)."[53] Justice Stephen Field articulated this consensual view when asserting that "[c]lass

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[50] See notes ___, above, and the relevant text.

[51] Farrand, 1 Records, p. -423.

[52] See Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Civil Liberties Jurisprudence," 47 **Political Research Quarterly** 623, 624 (1994).

[53] Howard Gillman, "Regime Politics, Jurisprudential Regimes, and Unenumerated Rights," p. 7. For the seminal analysis of class legislation in pre-New Deal American

legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not [prohibited by the fourteenth] amendment."[54] The Supreme Court in Lochner v. New York articulated this consensus when holding that states could not restrict the hours that bakers worked. Such measures benefitted employees at the expense of employers and "involve[d] neither the safety, the morals, nor the welfare of the public."[55] Antebellum Americans similarly yoked the freedom to possess and carry weapons to the public good. As originally understood, the Second Amendment protected "a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia." Such a conception of liberty, Saul Cornell documents, was quite consistent with any "intrusive gun regulation" thought necessary to serve the commonweal.[56] Committed to this distinction between public and private purposes, Americans before the New Deal regarded laws transferring property from one person to another as the paradigmatic violation of a fundamental right,[57] but thought government could take

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constitutionalism, see Gillman, The Constitution Besieged.

[54] Barbier v. Connolly, 113 U.S. 27, 32 (1885).

[55] Lochner v. New York, 198 U.S. 45, 57 (1905).

[56] Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (Oxford University Press: New York, 2006), pp. 2-3.

[57] John V. Orth, "Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm, 14 **Constitutional Commentary** 337, 341-44 (1997).

property from anyone for public purposes as long as compensation was paid.[58] Common law in the nineteenth century permitted state officials to destroy the value of private property without compensation when that property in its natural state or as used was causing harm to others.[59]

Well designed governing institutions best secured this fundamental right not to be a victim of private or class legislation. What was crucial, Federalists insisted, was that government pursue the common good, not that government pursue the common good by means that did not interfere with individual autonomy. The eighteenth century constitution protected this notion of fundamental right by establishing government arrangements that thought to provide citizens and elected officials with incentives to promote the general welfare.[60] The framers believed the combination of elections, large electoral districts, and the separation of powers would maximize the probability that all legislation had a public purpose. Federalist 10

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[58] See Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2661 (2005).

[59] See William Aldred's Case, 9 Coke's Reports 308 (K.B. 1610); Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). This emphasis on public purpose explains why many antebellum Americans thought constitutional practices that are presently regarded as clearly unconstitutional. Congressional payments to missionaries, for example, were thought constitutional means of civilizing native Americans. As the purpose was public, the direct payments to religion were constitutional.

[60] David Brian Robertson, The Constitution and America's Destiny (Cambridge University Press: New York, 2005), p. 108 ([o]nly the constitutional rules for choosing policy makers, defining their authority, and organizing the policy process" were thought to "stand between . . . ambitious politicians and the pursuit of bad economic policies").

declared that by "extend[ing] the sphere" of constitutional politics, "you will make it less probable that a majority of the whole will have a motive to invade the rights of other citizens." "The genius of the system," Federalist 57 maintained, was that governing officials could "make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society."[61] If this analysis was correct, then a Bill of Rights was not necessary. Government officials could benefit themselves and their friends only by pursuing the general welfare. Should malfunctioning constitutional institutions enable governing officials to enrich themselves at the expense of others, prohibitions on paper would not provide an adequate deterrent. The framers saw "history" as "prov[ing] that no formal constraints on authority or process could constrain indefinitely the power of a political leader who did not depend on other political actors."[62] "The sole question," Sherman insisted, "ought to be, how are Congress formed? How far are the members interested to preserve your rights?"[63]

Conceptualizing tyranny as rule dedicated to private interests, members of the framing generation believed that the people's representatives could waive fundamental rights of their constituents when doing so promoted social ends. Private property rights, in particular, were subject to legislative waiver when the public welfare required all individuals to make common sacrifices. Government could take private property by taxation, but only when given permission by electorally accountable officials who could be trusted to exercise taxing and spending powers only in the public interest. "Taxation of the subject," Grey details, "required consent–at least in

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[61] Hamilton, Madison, and Jay, Federalist Papers, pp. 352-53.

[62] Robertson, The Constitution, p. 113.

[63] 3 Documentary History, p. 473.

the . . . sense that it required approval by a body in which the subject was represented."[64] The people through their elected representatives determined what portion of their private property would be dedicated to the public good. Daniel Dulany regarded this right of "self-taxation" to be "an essential principle of the English constitution."[65] "It is an essential unalterable right in nature," Samuel Adams asserted,

> ingrafted into the British Constitution, as a fundamental Law and ever held sacred and irrevocable by the Subjects within the Realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent.[66]

Taxation with representation reflected a communal decision to abandon certain claims of individual right. Taxation without representation was theft.

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[64] Grey, "Origins of the Unwritten Constitution," p. 870.

[65] Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," 30 **Stanford Law Review** 843, 875 (1978) (quoting Daniel Dulany, "Considerations on the Propriety of Imposing Taxes in the British Colonies").

[66] Samuel Adams, The Writings of Samuel Adams (Vol. 1) (edited by Henry Alonzo Cushman) (G.P. Putnam's Sons: New York, 1904), p. 185. See "Declarations of the Stamp Act Congress," Prologue to Revolution: Sources and Documents on the Stamp Act Crisis (edited by Edmund Sears Morgan) (University of North Carolina Press: Chapel Hill, 1959), p. 63 ("no Taxes ever have been or can be Constitutionally imposed on ["the people of these colonies"], but by their respective Legislature"); Rakove, Original Meanings, p. 294 ("[o]f the rights that representative legislatures protected, the most important was that of a people to be taxed only with their freely given consent").

Properly designed governing arrangements were better vehicles that parchment guarantees for realizing the eighteenth century understanding of taxation as voluntary donation. Individuals had no right against any tax on any item in any amount. Whether a tax violated property rights depended on the nature of the institution doing the taxing, the nature of the tax imposed, and the purposes for which that revenue might be used. The people's representatives could tax whatever they pleased however much they pleased, as long as the tax was general and the revenue directed toward public purposes. Property rights were protected in this regime by governing institutions designed to ensure that taxation burdens were fair and no more than necessary to secure public purposes, not by paper rules limiting the means by which the state could obtain needed revenues.

II. Toward Enumeration

The participants in the constitutional convention sought to design institutions that would be controlled by persons capable of exercising power wisely and respecting fundamental freedoms. With rare exceptions, debate was limited to the structure of the national government. Once agreement was reached on the composition of the national legislature, agreement on national powers was achieved fairly easily. "From the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted," Madison remembered, "they . . . exceeded all others in zeal for granting powers to the general government."[67] Responsibility for

[67] Max Farrand, ed., The Records of the Federal Convention of 1787 (Vol. IV) (Yale University Press: New Haven, 1966), p. 322. See Farrand, 1 Records, p. 255. See also, Kramer,

the precise delineation of federal powers was given to the aptly named "Committee on Detail." Little debate took place after that committee chose to enumerate specific federal powers rather than retain the Virginia Plan's proviso that the federal government be authorized "to legislate in all cases to which the separate States are incompetent."[68] Three delegates aside, no one worried about the absence of a bill of rights.[69] What mattered were the rules for staffing the national government and the rules for making national laws, not legal limitations on national power.

These constitutional understandings changed between 1787 and 1791. The debate over the Bill of Rights led many leading proponents of ratification to place greater emphasis than they had at the Philadelphia convention on enumerated powers as a legal protection for fundamental rights. Madison and other prominent framers also promised amendments enumerating rights in order to assure ratification in New York, Massachusetts and Virginia. Prominent Federalists, however, continued insisting that fundamental freedoms were better protected by the structure of constitutional politics than by rules of constitutional law. The paucity of debate over the shift to enumerated powers combined with the mixed motives Federalists had for championing enumerated rights left unclear whether this increased reliance on enumeration changed the nature of constitutional protections for fundamental rights.

"Madison's Audience," pp. 621-22, 643; Rakove, Original Meanings, pp. 63-65.

[68] See John C. Hueston, "Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers," 100 **Yale Law Journal** 765, 779 (1990).

[69] See Farrand, 2 Records, pp. 587-88; 13 Documentary History, p. 348.

A. Toward Enumerated Powers

Whether many delegates thought basic constitutional principles were affected when the Committee on Detail provided a specific enumeration of national powers is doubtful.[70] The Committee on Detail was instructed to transform a series of resolutions into a constitution. One of those resolutions, proposed by Gunning Bedford of Delaware, asserted that the national government should be vested with the power "to legislate in all Cases for the general Interests of the Union."[71] Committee members were not authorized to deviate from these sentiments. George Washington asserted that the committee was "to arrange, and draw into method & form the several matters which had been agreed to by the Convention."[72] No debate on the merits of enumeration took place after the Committee on Detail replaced the general language of Bedford's Resolution with an enumeration of powers augmented by the necessary and proper clause,[73] even though the framers had previously regarded enumeration as unnecessary.[74] Some

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[70] For a contrary argument, see Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Princeton University Press: Princeton, 2004), pp. 274-76.

[71] Farrand, 2 Records, pp. 26, 131

[72] Max Farrand, ed., The Records of the Federal Convention of 1787 (Vol. III) (Yale University Press: New Haven, 1966), p. 65. See Hueston, "Altering the Course," pp. 768-69.

[73] See Joseph M. Lynch, Negotiating the Constitution: The Earliest Debates over Original Intent (Cornell University Press: Ithaca, 1999), pp. 19-20.

[74] See Farrand, 1 Records, pp. 53-54; Farrand, 2 Records, pp. 25-27; Hueston, "Altering the Course," pp. 767-68.

members of the convention, most notably Pierce Butler of South Carolina, did hope that the broad language of the Virginia Plan would eventually be replaced by a particular specification.[75] Nevertheless, no member of the ratifying convention who championed federal power perceived a substantial difference between the enumerated powers listed by the Committee of Detail and the original proposal to vest the national government with the authority to regulate all national concerns. Had the committee "meant to disregard the proposal to confer on Congress the power to legislate in the general interests of the United States," Joseph Lynch observes, "we should expect to read of a discontented Bedford protesting the committee's betrayal of his handiwork, and of a happy Butler[76] supporting the report. That . . . was not the case."[77]

Federalist rhetoric during the ratification debates further indicates that few notables thought the Committee on Detail had altered the original constitutional design. Proponents of ratification in 1787 and 1788 indiscriminately combined assertions that federal powers were limited with assertions that Congress was authorized to regulate all matters of national importance. Federalist 39 insisted that federal "jurisdiction extends to certain enumerated objects only."[78] "The powers delegated by the proposed Constitution to the federal government," Publius later stated, "are few and defined."[79] Other papers scorned efforts to place legal limits on national power. Federalist 31 declared that as a general rule "there ought to be no

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[75] See Farrand, 2 Records, p. 17.

[76] For Butler's reservations about vague powers, see 2 Farrand, Records, p. 17.

[77] Lynch, Negotiating the Constitution, p. 20.

[78] Hamilton, Madison, and Jay, Federalist Papers, p. 245.

[79] Hamilton, Madison, and Jay, Federalist Papers, p. 292.

limitation of a power destined to effect a purpose which is itself incapable of limitation."[80] Alexander Hamilton in Federalist 23 wrote that the powers "essential to the common defense ought to exist without limitation because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."[81] Hamilton added that "a complete power . . . to procure a regular and adequate supply of revenue," as well as an absolute power "to borrow as far as necessities might require" were vital to the constitution.[82] Enumeration, these passages suggest, restricted the ends the national government could constitutionally pursue, but not the means by which the national government could pursue constitutional ends.

Many Federalists during the ratification debates disparaged enumerated powers. "Is it, indeed, possible," Jasper Yeates challenged the members of the Pennsylvania ratifying convention, "to define any power so accurately, that it shall reach the particular object for which it was given, and yet not be liable to perversion and abuse?"[83] When Federalists spoke about

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[80] Hamilton, Madison, and Jay, Federalist Papers, p. 193.

[81] Hamilton, Madison and Jay, Federalist Papers, p. 153. See Hamilton, Madison and Jay, Federalist Papers, p. 257. See 2 Documentary History, p. 417; 8 Documentary History, p. 395; 9 Documentary History, pp. 999, 1011, 1016, 1134-35, 1144; 10 Documentary History, pp. 1197, 1396.

[82] Hamilton, Madison and Jay, Federalist Papers, pp. 188, 192. See Hamilton, Madison, and Jay, Federalist Papers, pp. 194-95; 3 Documentary History, p. 548.

[83] 2 Documentary History, p. 438. See 8 Documentary History, pp. 101-02; 10 Documentary History, p. 1501.

federal authority, they consistently asserted that the federal government had the power to meet all national concerns. John Jay described the constitution as forming a "national government, competent to every national object."[84]

Few Federalists thought seriously about the legal significance of enumerated powers because they still preferred constitutional politics to constitutional law as the best means for restraining national officials. Proponents of ratification consistently emphasized how national electoral institutions were structured to guarantee that the vast majority of oppressive proposals would not become the law of the land.[85] Federalism was safeguarded by government institutions designed to ensure that all national decisions were made by officials dependent for their offices on local governments or on a local electorate, not by judicial review. "The construction of the Senate," Tench Coxe asserted, "affords an absolute certainty, that the states will not lose their present share of separate powers."[86] The federal judiciary, by comparison, was primarily

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[84] John Jay,"A Citizen of New-York," The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution: Public and Private (Vol. XVII) (edited by John P. Kaminski and Gaspare J. Saladino) (State Historical Society of Wisconsin: Madison, 1995), p. 111. See Calvin H. Johnson, "The Dubious Enumerated Power Doctrine," 22 **Constitutional Commentary** 25, 47-48 (2005).

[85] See notes ___, above, and the relevant text.

[86] Tench Coxe, "A Freeman III," The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution: Public and Private (Vol. XVI) (edited by John P. Kaminski and Gaspare J. Saladino) (State Historical Society of Wisconsin: Madison, 1986), p. 50. See Hamilton, Madison, and Jay, The Federalist Papers, pp. 289, 297.

responsible for ensuring that states respected constitutional mandates.[87] Federal justices were authorized to declare federal laws unconstitutional, but were expected to use that power sparingly. Rakove observes that while "the framers intended judicial review to apply to the realm of national legislation. . . ., (t)heir decisions on the structure of the national government gave the framers little reason to worry that Congress would enact or the president approve constitutionally improper statutes that the federal judiciary would feel compelled to overturn."[88]

The general understanding that elected officials, with the approval of their constituents could waive legal limits on their power when an "ultra vires" action was clearly in the public good, further diminished the practical difference between a government of enumerated powers and one "competent to every national object." Jefferson claimed such extra-constitutional authority to act in the national interest when authorizing the Louisiana Purchase.[89] John Nicholas in 1794 informed Congress that while "he had not been able to discover upon what authority the House" had "to grant" money to French refugees,

> he had resolved to give his voice in favor of the sufferers; but when he returned to his constituents, he would honestly tell them that he would consider himself as

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[87] See Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," 49 **Stanford Law Review** 1031, 1041-50 (1997).

[88] Rakove, Original Meanings, p. 175. See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press: New York, 2004), pp. 73-92.

[89] See Thomas Jefferson to John C. Breckinridge, August 12, 1803, Thomas Jefferson: Writings (edited by Merrill D. Peterson) (Library of America: New York, 1984).

having exceeded his powers, and so cast himself on their mercy.[90]

The long run functioning of the constitutional system in which representatives and executives could plausibly assert this power to transgress constitutional limitations depended on the people having the capacity to elect governing officials with the requisite combination of abilities and interests, not on the legal maintenance of well defined enumerated powers.

B. Enumerated Powers and Unenumerated Rights

The decision to enumerate powers did have the unexpected consequence of enabling proponents of ratification to propose a more legal supplement to the original institutional strategy for protecting basic rights. Although no evidence suggests that the Committee on Detail was very concerned with such matters as the freedom of speech and religious liberty, prominent framers when responding to anti-Federalist demands for a bill of rights quickly transformed enumerated powers into a strategy for guaranteeing fundamental liberties. Led by James Wilson, Federalists during the ratification process insisted that the constitution of 1787 protected fundamental rights by authorizing the federal government to act only in a few defined circumstances. Enumerating powers, they insisted, made enumerating rights unnecessary. Wilson famously claimed that "(c)onstitutional authority is to be collected . . . from positive grant expressed in the instrument of the union." "Everything which is not given," he concluded, "is reserved."[91] Anti-Federalists were wrong to insist on provisions asserting a right to free

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[90] **Annals of Congress**, 3rd Congress, 1st Sess., p. 172.

[91] 2 Documentary History, pp. 167-68.

speech because no constitutional provision permitted Congress to regulate expression. "If I have one thousand acres of land, and I grant five hundred acres of it," George Nicholas asked, "must I declare that I retain the other five hundred?"[92] Of course, government might impose some restrictions on advocacy when doing so was necessary to secure such constitutional ends as national security. Such restraints, however, did not violate fundamental rights as fundamental rights were understood in 1787. No one was thought to have a right to threaten national security or otherwise cause harm. Fundamental rights were primarily rights against partial or class legislation.[93] By strictly enumerating government powers, the framers detailed what constituted the public good and ruled out numerous illegitimate justifications for violating fundamental rights.

Anti-Federalists rejected these claims that enumerated powers provided adequate protections for unenumerated rights. They feared that the enumerated powers in Article I were so vaguely worded that political actors could easily pass off rights violations as efforts to secure national interests. "Who can overrule the[] pretensions" of Congress that any particular "law is

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[92] 10 Documentary History, p. 1038. See 2 Documentary History, pp. 190. 384, 430, 471, 542, 570; 3 Documentary History, pp. 154, 247, 489-90, 525; John P. Kaminski and Gaspare J. Saladino, eds., The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Massachusetts [1] (Vol. X) (State Historical Society of Wisconsin: Madison, 1997), p. 331; 8 Documentary History, pp. 213, 311, 369; 9 Documentary History, pp. 661, 715, 767, 996, 1012, 1080, 1099-1100, 1135; 10 Documentary History, pp. 1223-24, 1350, 1502.

[93] See notes ___, above, and the relevant text.

necessary and proper," "Old Whig" asked. "No one, unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power."[94] Moreover, and more important, anti-Federalists feared that the national government was likely to be staffed by elites prone to violate the liberties of more ordinary persons.[95] Hence, prominent anti-Federalists combined calls for enumerating rights with calls for changes in the structure of the national government that would privilege the elected of national officials less inclined to violate fundamental freedoms. "If there ever was a case for an explicit reservation of individual rights," opponents of ratification believed, "the proposed constitution provided one, with its very extensive powers, its shadow of genuine representation, and its weak and dubious checks on the encroachments of the few."[96] As concerned with the structure of the national government as with the lack of a bill of rights, the fundamental anti-Federalist challenge to the constitution was more directed at the original institutional strategy for protecting fundamental freedoms than to the legal addendum jerryrigged during the ratification process.

Madison responded to these Anti-Federalist concerns by severing their legal analysis from their more vital political analysis. He and his political allies were more than willing, after the constitution was ratified, to enumerate some fundamental rights if that would appease more moderate opponents of ratification. That enumeration, however, was justified only as a

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[94] "Essays of an Old Whig," The Complete Anti-Federalist (Volume 3: Pennsylvania) (edited by Herbert J. Storing) (University of Chicago Press: Chicago, 1981), p. 33.

[95] Herbert J. Storing, The Complete Anti-Federalist (Volume 1: What the Anti-Federalists Were For) (University of Chicago Press: Chicago, 1981), p. 48

[96] Storing, 1 Complete Anti-Federalist, p. 69.

supplement to the more fundamental institutional protections for basic liberties. Madison was unwilling to make any constitutional change that might affect what he believed were the best governing arrangements for protecting rights. By consciously adding some constitutional law without consciously changing the underlying constitutional politics, Madison inadvertently laid the ground for the contemporary distinction between enumerated and unenumerated rights.

III. The View From 1791

The persons responsible for the Bill of Rights regarded enumeration as a minor supplement to the institutional strategies crafted in 1787 for protecting fundamental liberties. When commenting on Madison's proposed constitutional amendments, prominent framers were most likely to praise their tendency to alleviate anti-Federalist fears without vitiating Federalist principles. This desire to pacify political opponents better explains what liberties were specified by the Bill of Rights than founding beliefs that the rights enumerated were more fundamental than the rights not explicitly mentioned. Proponents of the Bill of Rights, thinking that well-designed governing institutions best secured fundamental freedoms, expressed little concern when confronted with claims that many enumerated rights were too vague to have clear legal meanings. Madison and his political allies, however, responded aggressively and decisively when former Anti-Federalists proposed amendments that would alter what Federalists believed were governing arrangements particularly conducive to protecting fundamental freedoms.

A. Why Enumerate?

James Madison in his less than moving speech introducing the Bill of Rights proclaimed that enumerating rights in a constitution "was neither improper nor altogether useless."[97] Enumeration might foster public support for fundamental freedoms. Constitutional provisions protecting various liberties, Madison declared, "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community."[98] Local officials would find constitutional declarations of rights useful when they sought to restrain the national power. Madison stated, "such a declaration in the federal system would be inforced; because the state legislatures will jealously and closely watch the operations of this government."[99] Enumerated rights would enable the federal judiciary to protect the people's liberties. "If" individual rights provisions "are incorporated into the Constitution," Madison informed the first Congress, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[100]

Madison's proposed Bill of Rights, with the exception of several provisions later rejected,[101] was not designed to add rights to those that the original Constitution was expected to protect. The problem with the constitution, he believed, was the perception that "it did not

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[97] **Annals of Congress**, 1st Cong., 1st Sess., pp. 453.

[98] **Annals of Congress**, 1st Cong., 1st Sess., pp. 455.

[99] **Annals of Congress**, 1st Cong., 1st Sess., pp. 457.

[100] **Annals of Congress**, 1st Cong., 1st Sess., pp. 457.

[101] These exceptions were the proposed amendment on congressional apportionment, the proposed amendment on congressional pay raises, and the proposed amendment limiting state power to infringe the fundamental rights. **Annals of Congress**, 1st Cong., 1st Sess., pp. 457-58.

contain **effectual** provisions against encroachments on particular rights" (emphasis added).[102] Enumeration provided that additional security. As Madison asserted, "it is possible the abuse of the powers of the general government may be guarded against in a more secure manner that is now done."[103] His goal was to "fortify the rights of the people against encroachments by the Government."[104] A textual ban on general warrants, for example, by plainly stating in the constitutional text that such practices were not legitimate means for pursuing constitutional ends might prevent the passage of oppressive laws that Madison believed under the unamended constitution were "neither necessary nor proper."[105]

B. Enumeration From the Perspective of 1787

The leading proponents of the federal constitution in the first Congress wanted a Bill of Rights that would alleviate public anxieties about fundamental rights while maintaining intact the constitutional politics envisioned in 1787. Tench Coxe urged his political allies to propose amendments that would enable them to "gain strength & respectability without impairing one essential power of the constitution."[106] Other Federalists endorsed similar conciliatory and

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[102] **Annals of Congress**, 1st Cong., 1st Sess., pp. 450.

[103] **Annals of Congress**, 1st Cong., 1st Sess., pp. 449-50.

[104] **Annals of Congress**, 1st Cong., 1st Sess., pp. 459

[105] **Annals of Congress**, 1st Cong., 1st Sess., pp. 455-56.

[106] Tench Coxe to George Thatcher, March 12, 1789, Creating the Bill of Rights: The Documentary History From the First Federal Congress (edited by Helen E. Veit, Kenneth R.

preservationist goals when urging constitutional reform. Paine Wingate informed Timothy Pickering that proposed amendments might "quiet the fears & jealousies of the well designing & not affect the essentials of the system."[107] Benjamin Hawkins urged James Madison to "do something by way of amendments without any material injury to the system."[108]

Madison's proposed Bill of Rights was aimed at simultaneously appeasing anti-Federalists and preserving Federalist institutions. His plan, Madison told Jefferson, was to provide those "alterations most called for by the opponents of the Government and least

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Bowling, and Charlene Bangs Bickford) (Johns Hopkins University Press: Baltimore, 1991), pp. 217-18.

[107] Paine Wingate to Timothy Pickering, March 25, 1789, Creating, p. 223. See Henry Gibbs to Roger Sherman, July 16, 1789, Creating, p. 263 (endorsing amendments that "without giving umbrage to the friends of the new plan of Government tend greatly to conciliate the minds of many of it-s Opponents").

[108] Benjamin Hawkins to James Madison, June 1, 1789, Creating, p. 243. See James Madison to Thomas Jefferson, March 29, 1789, Creating, p. 225 ("some conciliatory sacrifices will be made"); Tench Coxe to James Madison, April 21, 1789, Creating, p. 231 (a Bill of Rights would "remove[] fears"); Nathan Dane to George Thatcher, May 31, 1789, Creating, p. 242 ("[w]ill not declaring the rights expressly and fortifying the liberties of the Country more explicitly induce confidence and there by in fact add Strength to the government"); John Dawson to James Madison, June 28, 1789, Creating, p. 256 (urging Madison to propose amendments "most of which will not materially effect the system, but will render it more secure, and more agreeable in the eyes of those who were oppos'd to its establishment").

objectionable to its friends."[109] Madison informed Samuel Johnston that what became the Bill of Rights "aims at the twofold object of removing the fears of the discontented and of avoiding all such alterations as would . . . displease the adverse side."[110] Proponents of the Bill of Rights praised Madison for securing both goals. "[T]he great Principles of the Constitution are preserved," Thomas Hartley asserted, "and the Declarations and Explanations will be acceptable to the People."[111]

Many prominent Federalists regarded the Bill of Rights as little more than a meaningless "sop" to their political opponents.[112] Theodore Sedgwick, while opposed in principle to Madison's proposed amendments, thought their ratification politically necessary only if the liberties enumerated were politically sterile. We "must adopt them in every instance," he asserted, "in which they will not shackle the operations of the government."[113] George

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[109] James Madison to Thomas Jefferson, May 27, 1789, Creating, p. 240.

[110] James Madison to Samuel Johnson, June 21, 1789, Creating, p. 253. See James Madison to Tench Coxe, June 24, 1789, Creating, p. 254 ("[i]t is much to be wished that the discon[ten]ted part of our fellow Citizens could be reconciled to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution in its present form"); James Madison to James Madison, Sr., July 5, 1789, Creating, p. 259 ("will end in such a recommendation as will satisfy moderate opponents"); James Madison to Richard Peters, August 19, 1789, Creating, p. 282 ("[i]t will kill the opposition every where").

[111] Thomas Hartley to Tench Coxe, August 23, 1789, Creating, p. 286.

[112] Johnson, Righteous Anger, p. 9.

[113] Theodore Sedgwick to Benjamin Lincoln, July 19, 1789, Creating, p. 264.

Washington approved such efforts to appease the moderate opposition. While he concluded some amendments were "importantly necessary," many others were "necessary" only "to quiet the fears of some respectable characters and well-meaning men."[114] Similar sentiments were articulated by numerous leading actors in the First Congress. Fisher Ames thought Madison's proposals "may do good towards quieting men who attend to sounds only, and may get the mover some popularity."[115] Enumeration as a strategy for protecting fundamental rights, however, was silly. Ames believed specifying "[t]he rights of conscience, of bearing arms" and "[f]reedom of the press" in the constitutional text would "stimulate the stomach as little as hasty-pudding."[116]

Ames's political allies agreed that the proposed constitutional amendments were largely symbolic. "[T]he addition of a little Flourish & Dressing without injuring the substantial part or adding much to its intrinsic value," Samuel Johnston wrote, "may have a happy effect in complimenting the Judgment of those who have themselves up in Opposition to [the

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[114] George Washington to James Madison, May 31, 1789, Creating, p. 242. See Fisher Ames to George R. Minot, July 23, 1789, Creating, p. 269 ("[i]t is necessary to conciliate, and I would have amendments").

[115] Fisher Ames to Thomas Dwight, June 11, 1789, Creating, p. 247.

[116] Fisher Ames to George R. Minot, June 12, 1789, Creating, pp. 247-48. See George Clymer to Tench Coxe, June 28, 1789, Creating, p. 255 ("he has given his maladies imaginaries bread pills powder of paste & neutral mixtures to keep them in play"); Fisher Ames to Caleb Strong, September 15, 1789, Creating, p. 297 ("their sedative Virtue").

constitution]."[117] Roger Sherman observed that Madison's proposals "will probably be harmless & Satisfactory to those who are fond of Bills of Rights."[118] Abraham Baldwin thought that Madison was trying to "tranquillize the minds of honest opposers without injuring the system."[119] The Bill of Rights, Edmund Randolph concurred, was "an anodyne to the discontented."[120] Some crucial "discontented" were political leaders in the two states that in the

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[117] Samuel Johnston to James Madison, July 8, 1789, Creating, p. 260. See Lambert Cadwalader to George Mitchell, July 22, 1789, Creating, p. 268 ("tho little or no Consequences it will calm the Turbulence of the Opposition"); William L. Smith to Edward Rutledge, August 9, 1789, Creating, p. 272 (amendments "are thought inoffensive to federalists & may do some good on the other side").

[118] Roger Sherman to Henry Gibbs, August 4, 1789, Creating, p. 270.

[119] Abraham Baldwin to Joel Barlow, June 14, 1789, Creating, p. 250. See George Gale to William Tilghman, June 17, 1789, Creating, p. 252 ("most of them Innocent"); Pierce Butler to James Iredell, August 11, 1789, Creating, p. 274 ("milk-and-water amendments"); Peter Silvester to Peter Van Schaack, July 1, 1789, Creating, p. 258 ("I should like to say something clever in favor of it so far as it does not injure the system"); William Ellery to Benjamin Huntington, August 24, 1789, Creating, p. 287 ("[t]hose proposed are indeed very innocent, and the admission of them might gratify the pride of some opposers of the New Government"); Robert Morris to Richard Peters, August 24, 1789, Creating, p. 288 ("the Senate should adopt the whole of them by the Lump as containing neither good or harm being perfectly innocent").

[120] Edmund Randolph to James Madison, June 30, 1789, Creating, p. 256. See Benjamin Hawkins to James Madison, July 3, 1789, Creating, p. 258 ("will conciliate its opponents");

summer of 1789 had not yet ratified the new constitutional regime. Benjamin Goodhue when celebrating the "probability of giving quiet by so cheap a purchase"[121] hoped that meaningless amendments would "give general satisfaction and accelerate the adoption of the Constitution by the States of N. Carolina and R. Island."[122]

William L. Smith, the rare Federalist member of the First Congress who thought a Bill of Rights provided vital constitutional restrictions on national power, nevertheless regarded enumeration as a secondary means for securing fundamental freedoms and was far more concerned with gaining additional legal protections for southern interests than with providing better guarantees for basic human rights. As did northern Federalists, Smith favored amendments that would "more effectually secure private rights, without affecting the structure of

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Richard Peters to James Madison, July 5, 1789, Creating, p. 259 (you know more of the Necessity of such Accommodations than I do"); Frederick A. Muhlenberg to Benjamin Rush, August 18, 1789, Creating, p. 280 ("I hope it may restore Harmony & unanimity amongst our fellow Citizens"); William Ellery to Benjamin Huntington, July 13, 1789, Creating, pp. 262-63 ("take away this false ground, and if they then stand out, they will stand . . . upon nothing"); Edmund Pendleton to James Madison, September 2, 1789, Creating, p. 291 ("it will have a good effect in quieting the minds of many well meaning Citizens").

[121] Benjamin Goodhue to Michael Hodge, July 30, 1789, Creating, p. 269. See Benjamin Goodhue to Cotton Tufts, July 20, 1789, Creating, p. 264 ("good policy to propose such as will not injure the constitution and which may serve to quiet the honest part of the dissatisfied").

[122] Benjamin Goodhue to Michael Hodge, August 20, 1789, Creating, p. 283.

the Govt."[123] Slavery, however, was the "private right" Smith sought to "more effectually secure." The South Carolina Federalist supported a constitutional declaration that "the enumeration of certain rights shall not be so construed as to deny others retained by the people" because he believed that amendment "will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them."[124] Smith's claim that the amended constitution provided stronger protections for slaveholding rights was the only contemporaneous construction by a national official in 1789 of the liberties originally thought to be better secured by the Ninth Amendment.

The Federalist concern with appeasing their political opponents dictated the liberties specified in the Bill of Rights. Madison repeatedly asserted that the proposed amendments should be limited to those that were sufficiently uncontroversial as to guarantee passage. The particular freedoms he proposed enumerating, Madison asserted, would "reconcile" the "discon[*ten*]ted part of our fellow Citizens . . . to the Government they have opposed . . . by means as little as possible unacceptable to those who approve the Constitution." Controversial proposals were rejected simply because they were controversial. Madison sought to "avoid[] all controvertible points which might endanger the assent of 2/3 of each branch of Congs. and 3/4 of the State Legislatures."[125] Amendments submitted by state legislatures were included where possible because "the principle design of the[] amendments was to conciliate the minds of the

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[123] William L. Smith to Edward Rutledge, August 9, 1789, Creating, p. 273.

[124] William L. Smith to Edward Rutledge, August 10, 1789, Creating, p. 273.

[125] James Madison to Tench Coxe, June 24 1789, Creating, p. 254.

people" and not to list the most important rights of American citizens.[126] Madison proposed enumerating the freedom of religion because that "had been required by some of the state conventions," not because of any virtue inherent in enumerating that right. "[W]hether the words were necessary or not," he "did not mean to say."[127] Madison favored an amendment limiting federal appellate jurisdiction over state courts to cases worth more than one thousand dollars, even though he thought there was "little danger that any court in the United States will admit an appeal where the matter in dispute does not amount to a thousand dollars." Enumeration was politically valuable because "the possibility of such an event has excited in the minds of many citizens the greatest apprehension that persons of opulence would carry a cause from the extremities of the union to the supreme court."[128] Other Federalists urged their colleagues to support whatever liberties would conciliate former Anti-Federalists, no matter how fundamental or trivial they regarded the right in question. John Vining tolerated the decision to insert a right of assembly in the constitution because "the thing was harmless, and . . . would tend to gratify the states that had proposed amendments."[129] Thomas Hartley would "gratify" all state requests for specific constitutional provisions as long as the amendment "was not incompatible with the general good."[130]

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[126] **The Daily Advertizer**, August 15, 1789, Creating, p. 131 (reprinting speech of Madison made on August 14, 1789).

[127] **Annals of Congress**, 1st Cong., 1st Sess., p. 758.

[128] **Annals of Congress**, 1st Cong., 1st Sess., p. 784.

[129] **Annals of Congress**, 1st Cong., 1st Sess., p. 760.

[130] **Annals of Congress**, 1st Cong., 1st Sess., p. 760

No proponent of the Bill of Rights asserted that the rights enumerated by Madison's proposed amendments were more important than the rights not enumerated. When Theodore Sedgwick suggested that the right to assembly was to "trifl[ing] to be inserted" into "a declaration of rights,"[131] most representatives responded that such a provision had been demanded by the states and was unlikely to cause trouble.[132] Few claimed the right fundamental. John Page's assertion that "inserting the privilege [of assembly] in a declaration of rights" was necessary because "such rights have been opposed"[133] was the only recorded comment from the House debate in which a speaker explained why enumeration might be a particularly good means for protecting some freedoms rather than others. Madison may have hoped that enumerating restrictions on state power to violate certain fundamental rights would better secure various liberties against local violations. That proposal, however, was defeated.[134]

The conciliatory concerns that motivated Federalists to frame the Bill of Rights and their underlying commitment to securing fundamental rights through well-designed governing institutions explains why the political leadership of the First Congress ignored occasional assertions that proposed amendments lacked clear legal meanings. Many Federalists in 1787 had opposed a Bill of Rights in part because they insisted parchment declarations could not resolve disputes over the scope of the rights declared. James Wilson during the Pennsylvania ratifying convention stated, "[t]he cases open to a jury, differed in the different states; it was therefore

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[131] **Annals of Congress**, 1st Cong., 1st Sess., p. 760.

[132] See footnotes ___, above and the relevant text.

[133] **Annals of Congress**, 1st Cong., 1st Sess., p. 760.

[134] See **Journal of the Senate**, 1st Cong., 1st Sess., p. 72.

impracticable, on that ground, to have made a general rule."[135] These concerns with vagueness and ambiguity were repeated during the debates over the Bill of Rights without having any visible influence on the status of the proposed amendments. Samuel Livermore thought what became the Eight Amendment had "no meaning in it." "What is meant by the terms excessive bail," he asked. "What is understood by excessive fines?"[136] Immediately after that speech, the House of Representatives approved the proposed amendment by a large margin.[137] James Madison confessed that the right to a jury trial remained contested despite the Sixth Amendment. "The truth," he told Edmund Pendleton, "is that in most of the States the practice is different and hence the irreconcilable difference of ideas on the subject."[138] This "truth" that enumeration failed to settle ongoing legal disputes over what constituted a proper jury trial apparently did not even delay the decision to send the proposed amendment mandating jury trials to the states.

Federalists who thought political protections fundamental and enumeration a means of conciliating political rivals did not consider at any length whether the particular language

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[135] James Wilson, "Speech," Friends of the Constitution: Writings of the "Other" Federalists 1878-1788 (edited by Colleen A. Sheehan and Gary L. McDowell) (Liberty Fund: Indianapolis, 1998), p. 104. See "A Federalist," "Essay," "Other" Federalists, p. 41 ("it is well known that the cases which come before a jury, are not the same in all the States").; 4 Documentary History, p. 331; 9 Documentary History, p. 767; 10 Documentary History, p. 1352; Hamilton, Madison, and Jay, The Federalist Papers, p. 514.

[136] **Annals of Congress**, 1st Cong., 1st Sess., p. 782.

[137] **Annals of Congress**, 1st Cong., 1st Sess., p. 783.

[138] James Madison to Edmund Pendleton, September 14, 1789, Creating, p. 298.

Madison employed when enumerating rights encompassed particular practices. Rare questions about the scope of proposed constitutional provisions were brushed aside without resolution. No representative responded when Egbert Benson expressed concern that proposed constitutional protections for religious freedoms might be interpreted as requiring exemptions for those with religious scruples against engaging in military combat.[139] "[A]n enumeration of simple, acknowledged principles"[140] adequately served Federalist political needs. Madison and his political allies had no political reason to resolve ongoing controversies about the best application of those principles.

Contemporary efforts to uncover the original meaning of liberties secured by the Bill of Rights are, thus, largely futile because Federalists in 1789 consciously enumerated general principles whose practical applications they knew were contestable. Madison understood that the constitutional meaning of "free exercise," "an impartial jury," and other matters left legally undecided in 1787 and 1791 would be settled by "a series of [subsequent] discussions and adjudications."[141] Constitutional politics, not constitutional law, remained the primary line of defense against abusive official actions. Fundamental freedoms would be secure, Federalists thought, as long as constitutional processes yielded governing officials who had the combination of abilities and interests necessary to recognize the fundamental liberties of their fellow citizens and to act on that judgment.

Prominent supporters of the Bill of Rights expressed concern with substantive issues only

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[139] **Annals of Congress**, 1st Cong., 1st Sess., pp. 779-80.

[140] **Annals of Congress**, 1st Cong., 1st Sess., p. 766.

[141] Hamilton, Madison, and Jay, The Federalist Papers, p. 229.

when Anti-Federalists proposed amendments aimed at adjusting the constitutional politics Federalists thought would best protect fundamental rights. Federalist willingness to accommodate their political opponents came to an abrupt halt when Thomas Tudor Tucker moved that the House of Representatives add "to instruct their representatives" to what became the first amendment.[142] Critics of the original constitution regarded such a right as central to a popular regime. "Instruction and representation in a republic," John Page declared, "appear to me to be inseparably connected."[143] Elbridge Gerry regarded "[i]nstructions from the people" as "an additional check against abuses."[144] The leading proponents of the Bill of Rights vigorously rejected this effort to change the nature of constitutional representation. George Clymer declared, "independent and deliberative bod[ies]" were "essential requisites in the legislatures of free governments."[145] Hartley regarded instructions as a tool of faction, the greatest perceived threat to freedom in the late eighteenth century. "When the passions of the people were excited," he stated, "instructions have been resorted to and obtained, to answer party purposes."[146]

Federalists during the debate over instructions consistently proclaimed that fundamental freedoms were best protected by a national, republican aristocracy.[147] Sedgwick insisted that

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[142] **Annals of Congress**, 1st Cong., 1st Sess., p. 761.

[143] **Annals of Congress**, 1st Cong., 1st Sess., p. 762.

[144] **Annals of Congress**, 1st Cong., 1st Sess., p. 764.

[145] **Annals of Congress**, 1st Cong., 1st Sess., p. 763.

[146] **Annals of Congress**, 1st Cong., 1st Sess., p. 761

[147] See Gordon S. Wood, The Creation of the American Republic (W.W. Norton & Company: New York, 1969), p. 492.

congressmen were "representatives of the great body of the people," of "the whole nation." If national legislators began regarding themselves as representing a particular state or district, he stated, "the greatest security the people have for their rights and privileges is destroyed."[148] Other representatives emphasized how instructions substituted parochial visions for the deliberation about the public welfare Federalists thought essential to protecting rights. "The great end of meeting," Hartley asserted, "was to consult for the common good." In his view, the more "local or partial view" that was "likely to underlie instructions, does not enable any man to comprehend it."[149] Sherman condemned instructions for interfering with the "duty of a good representative to enquire what measures are most likely to promote the general welfare."[150] These comments expressed two core Federalist commitments: legislation aimed at the common good did not violate fundamental rights[151] and that the best way to secure the common good was to develop an electoral system that enabled particularly virtuous persons to deliberate about the general welfare.[152] Instructions threatened rights, Clymer thought, because "they prevent men of abilities and experience from rendering those services to the community that are in their power."[153]

Most anti-Federalists complained bitterly that the proposed constitutional amendments

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[148] **Annals of Congress**, 1st Cong., 1st Sess., p. 771.

[149] **Annals of Congress**, 1st Cong., 1st Sess., p. 762.

[150] **Annals of Congress**, 1st Cong., 1st Sess., p. 764.

[151] See footnotes ___, above, and the relevant text.

[152] See footnotes ____, above, and the relevant text.

[153] **Annals of Congress**, 1st Cong., 1st Sess., p. 763.

did not alter what they perceived of as the flawed original institutional protections for fundamental rights. Gerry declared that Madison's efforts would only "reconcile those who had no adequate idea of the essential defects of the Constitution."[154] These defects lay in the structure of the national government and the powers vested in that government. Richard Henry Lee and William Grayson remained "apprehensive for Civil Liberty" because the "impracticability . . . of carrying representation sufficiently near to the people . . . compels a resort to fear resulting from great force and excessive power in Government."[155] "Some valuable Rights are indeed *declared*," Lee fretted, "but the powers that remain are very sufficient to render them nugatory at pleasure."[156] Many Anti-Federalists echoed the Federalist critique of enumeration as symbolic politics. Parchment barriers were meaningless, Patrick Henry

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[154] Elbridge Gerry to John Wendell, September 14, 1789, Creating, p. 294.

[155] Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Delegates, September 28, 1789, Creating, p. 299. See Richard Henry Lee to Patrick Henry, September 14, 1789, Creating, p. 295 ("extended representation, know[*ledge of*] character, and confidence in consequence, [*are wanting to sway the*] opinion of Rulers, without which, *fear* the offspri[*ng of Tyranny*] can alone answer").

[156] Richard Henry Lee to Patrick Henry, September 14, 1789, Creating, p. 295. See Samuel Chase to Richard Henry Lee, May 16, 1789, Creating, p. 240. ("I fear that no Check will be placed on the Exercise of any of the powers granted"); Richard Henry Lee to Samuel Adams, April 25, 1789, Creating, p. 233 ("the safety of liberty depends not so much upon the *gracious manner*, as upon the *Limitation of Power*").

complained, "(f)or Right without her Power & Might is but a shadow."[157] Lee agreed that "right without power to protect it, is of little avail."[158] George Mason seems to have been the only leading Anti-Federalist who "received much Satisfaction from the Amendments to the federal Constitution."[159] The liberties enumerated in the Bill of Rights, most opponents of ratification concluded, were "mutilated and enfeebled,"[160] "good for nothing,"[161] and "calculated merely to amuse, or rather to deceive."[162]

The Federalists who sponsored the Bill of Rights were no more excited by enumeration. Madison complained of "the nauseous project of amendments."[163] His political allies spoke of "this disagreeable Business,"[164] "the unpromising subject of amendments,"[165] and "the wearisome business of amendments."[166] Richard Morris thought the effort a "[w]aste of precious

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[157] Patrick Henry to Richard Henry Lee, August 28, 1789, Creating, p. 289.

[158] Richard Henry Lee to Patrick Henry, Creating, September 27, 1789, p. 298

[159] George Mason to Samuel Griffin, September 8, 1789, Creating, p. 292.

[160] Richard Henry Lee to Francis Lightfoot Lee, September 13, 1789, Creating, p. 294. See Theodorcik Bland Randolph to St. George Tucker, September 9, 1789, Creating, p. 293 ('in my opinion they have not made one material [amendment]").

[161] William Grayson to Patrick Henry, September 29, 1789, Creating, p. 300.

[162] Thomas Tudor Tucker to St. George Tucker, October 2, 1789, Creating, p. 300.

[163] James Madison to Richard Peters, August 19, 1789, Creating, p. 281.

[164] Frederick A. Muhlenberg to Benjamin Rush, August 18, 1789, Creating, p. 280.

[165] Theodore Sedgwick to Pamela Sedgwick, August 20, 1789, Creating, p. 283.

[166] Benjamin Goodhue to the Salem Insurance Offices, August 23, 1789, Creating, p. 285.

time."[167] Most were happy that, after sending the proposed amendments to the states, Congress could finally return to substantive business. William Ellery expressed this common sentiment when he asserted, "I don't think the amendments will do any hurt, and they may do some good, and therefore I don't consider them as of much importance."[168] "God grant it may have the effects which are desired," an exhausted Benjamin Goodhue stated, "and that We may never hear any more of it."[169]

IV. Marbury and Enumeration Triumphant?

A. Enumerated Rights in Action

Americans would soon hear much more of the Bill of Rights, particularly when they paid more attention to legislative proposals than to judicial decisions. Federalists and Jeffersonians at the turn of the nineteenth century debated at great length whether the Sedition Act of 1798 was consistent with the First Amendment and the enumerated powers of the national government.[170]

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[167] Robert Morris to Richard Peters, August 24, 1789, Creating, p. 288.

[168] William Ellery to Benjamin Huntington, September 8, 1789, Creating, p. 291.

[169] Benjamin Goodhue to the Salem Insurance Offices, August 23, 1789, Creating, p. 286.

[170] See David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801 (University of Chicago Press: Chicago, 1997), pp. 260-62; Michael Kent Curtis, Free Speech, "The People's Darling Privilege:" Struggles for Freedom of Expression in American History (Duke University Press: Durham, 2000), pp. 52-79.

James Madison during the War of 1812 informed Joseph Story that a proposed ban on sedition was unconstitutional.[171] First Amendment protections for freedom of religion were invoked when presidents considered issuing calls for a day of prayer[172] and Congress debated appointing legislative chaplains.[173] Proponents and opponents of slavery before the Civil War debated at great length whether proposed national restrictions on antislavery advocacy were consistent with the First Amendment and the enumerated powers of the national government.[174] Whether the first ten amendments limited federal power in the territories was another subject of ongoing legislative debate in antebellum America.[175]

Federal justices before the Civil War were slower to invoke the individual rights enumerated by the first ten amendments to the constitution. The Marshall and Taney Courts more aggressively limited federal power than is commonly thought.[176] The justices when

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[171] See David P. Currie, The Constitution in Congress: The Jeffersonians 1801-1809 (University of Chicago Press: Chicago, 2001), p. 166.

[172] See Currie, The Jeffersonians, p. 5; David P. Currie, The Constitution in Congress: Democrats and Whigs 1829-1861 (University of Chicago Press: Chicago, 2005), pp. 143-45.

[173] See Currie, Democrats and Whigs, pp. 146-48. For other antebellum legislative debates over the constitutional meaning of religious freedom, see Currie, The Jeffersonians, pp. 318-29.

[174] See Curtis, Free Speech, pp. 155-93, 241-88

[175] See Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law (Princeton University Press: Princeton, 1996), pp. 73-81.

[176] See Mark A. Graber, "Naked Land Transfers and American Constitutional

restraining the national government, however, tended to base decisions on the unenumerated right not be divested of private property than on any specific constitutional provision. Chief Justice Marshall in Polk's Lessee v. Wendal & Al proclaimed as one of "the great principles of justice and law" that government could not give title to property that the government did not own. "[A] grant is absolutely void," he asserted without pointing to any constitutional text, when "the state has no title to the thing granted."[177] William L. Smith might have been pleased that the Supreme Court first invoked the Bill of Rights as a limit on federal power when providing protections for slavery in Dred Scott v. Sandford, although Chief Justice Roger Taney's opinion relied on the due process clause of the fifth amendment rather than on the ninth amendment.[178]

Federal justices more frequently cited the Bill of Rights after the Civil War. The Supreme Court at the turn of the twentieth century occasionally invoked the Fourth and Fifth Amendments when limiting national power.[179] Numerous judicial decisions handed down after 1950 asserted that state power to violate fundamental rights was limited by the Bill of Rights as incorporated by the due process clause of the Fourteenth Amendment.[180] Fulfilling a Madisonian

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Development," 53 **Vanderbilt Law Review** 73, 78-106 (2000).

[177] 13 U.S. 87, 98-99 (1815).

[178] 60 U.S. 393, 450 (1856).

[179] See, i.e., Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914). See Ken I. Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law (Cambridge University Press: New York, 2004), pp. 29-64.

[180] See, i.e., Duncan v. Louisiana, 391 U.S. 145 (1968); Mapp v. Ohio, 367 U.S. 643

hope thwarted in 1789,[181] the Stone, Vinson, and Warren Courts aggressively protected fundamental freedoms against hostile state action, while rarely finding that the federal government had violated the rights enumerated in the first ten amendments.[182] The Burger and Rehnquist Courts were the first tribunals in American history that with some frequency ruled that federal laws violated the expression rights enumerated by the Constitution.[183] The Supreme Court has never held that a federal law violates either the free exercise or establishment clauses of the First Amendment.

B. The Logic of Enumeration

The contemporary debate over unenumerated rights is more rooted in the logic of Marbury v, Madison than in the constitutional strategies for protecting fundamental freedoms employed by the persons responsible for the original constitution and the Bill of Rights. The rights specified in the first ten amendments were originally understood merely as examples of the

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(1961); Gideon v. Wainwright, 372 U.S. 335 (1963).

[181] Madison proposed an amendment requiring states to respect certain fundamental freedoms. **Annals of Congress**, 1st Cong., 1st Sess., p. 452. The Senate refused to endorse that proposal. **Journal of the Senate**, 1st Cong., 1st Sess., p. 72.

[182] See Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservativism (University of Chicago Press: Chicago, 2004), pp. 40-41.

[183] See , i.e., Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Eichman, 496 U.S. 310 (1990); Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

individual liberties that the constitution would protect when governing institutions were functioning as the framers anticipated. Enumerated rights were no more constitutionally fundamental than those rights not enumerated.[184] Several framers asserted that enumeration facilitated judicial protection for the specified rights,[185] but justices before 1787 and until the Civil War protected both enumerated and unenumerated liberties.[186] No evidence exists that the proponents of the Bill of Rights sought to alter this ongoing judicial practice. John Marshall in 1803, however, proffered a very different conception of the constitutional strategies for limiting government than those adopted by the framers. Marbury asserted that the constitution limited government power primarily through written legal restrictions on legislative authority that were enforceable by a court of law. Marshall's Marbury opinion was the first major American state paper that privileged enumeration as the means for securing fundamental freedoms.

Marbury's emphasis on the writtenness of the constitution and the constitution as fundamental law began the process by which legal restrictions on federal power enforced by the federal judiciary became understood as the primary constitutional strategy for protecting individual rights and limiting official authority. Constitutions restricted government, Marshall asserted, by enumerating specific restrictions on government power. "The powers of the

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[184] See notes ___, above,and the relevant text.

[185] See **Annals of Congress**, 1st Cong., 1st Sess., p. 457; Thomas Jefferson, The Writings of Thomas Jefferson (Vol. V) (edited by Paul Leicester Ford) (G.P. Putnam's Sons: New York, 1895), pp. 80-81.

[186] Suzanna Sherry, "The Founders' Unwritten Constitution," 54 **University of Chicago Law Review** 1127, 1167-76 (1987).

legislature are defined, and limited," Marbury declared, and "that those limits may not be mistaken, or forgotten, the constitution is written."[187] In this altered constitutional universe, writing and only writing restrained government and prevented tyranny by providing legal grounds for courts to disregard unconstitutional laws. Written constitutional provisions were "the fundamental and paramount law of the nation,"[188] and it was "emphatically the province and duty of the judicial department to say what the law is."[189]

The only constitutional limits on national power this textualist logic recognized were those enumerated in the original constitution and subsequent amendments. When providing examples of appropriate exercises of judicial power, Marshall emphasized laws inconsistent with such textual provisions as the declaration in Article I, Section 9 that "no bill of attainder or ex post facto law shall be passed."[190] At no point did Marbury suggest that the constitution might have been designed to protect fundamental freedoms other than those enumerated or that the framers may have relied on alternative constitutional strategies for limiting government. Constitutional strategies for protecting fundamental freedoms that abandoned enumeration in favor of institutions structured to provide all governing officials with incentives to pursue the general welfare, Marbury implied, "abolished" the "distinction . . . between a government with limited and unlimited powers."[191]

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[187] Marbury, at 176.

[188] Marbury, at 177.

[189] Marbury, at 177.

[190] Marbury, at 179.

[191] Marbury, at 176.

Marshall's claim that all provisions of the constitution had independent legal significance further privileged enumeration as the constitutional strategy for protecting fundamental rights. Marbury holds that the congressional power to "make exceptions" to the appellate jurisdiction of the Supreme Court does not license the national legislature to add to that tribunal's original jurisdiction. Marshall defended this conclusion by claiming, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[192] The framers would not have specifically enumerated the conditions under which the Supreme Court could exercise original jurisdiction, he maintained, if the "exceptions" clause of Article III empowered Congress to alter federal jurisdiction at will.[193] This presumption that all constitutional provisions are legally significant implicitly undercuts previous Federalist assertions that the Bill of Rights was largely declaratory, that the first ten amendments are best understood as merely enumerating examples of the rights that the original constitution was designed to secure.[194] If every constitutional provision has "[legal] effect," and only some rights are enumerated, then the inference is near overwhelming that government officials are constitutionally obligated to respect only those rights enumerated in the constitutional text. Had the constitution of 1787 protected all fundamental freedoms, there would have been no reason, by Marshall's logic, to enumerate only some liberties in 1791.

Marbury's teachings did not immediately bear fruit. As several commentators have

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[192] Marbury, at 174.

[193] Marbury, at 174.

[194] See footnotes ____, above, and the relevant text.

noted, the decision was "born out of political defeat."[195] Judicial power to enforce the constitution was no greater immediately after 1803 than immediately before. At most, Marbury preserved whatever judicial power had previously existed.[196] Many antebellum judicial opinions failed to distinguish between enumerated and unenumerated rights.[197] The Marshall Court relied on both natural law and the contracts clause in Fletcher v. Peck.[198] Federal justices as late as 1862 insisted that both federal and state officials were obligated to respect the "obligation of contract," even though the constitutional text explicitly limits only state power. Justice Nathan Clifford in Rice v. Railroad Co. asserted, "if the legal effect of the act of Congress" at issue "was to grant to the Territory a beneficial interest in the lands [in dispute], then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title."[199] No enumerated right was cited as authority for this proposition. Justice Nelson's dissent similarly disdained text as the primary source for fundamental freedoms. After citing Fletcher for the proposition that "[i]t is well settled in this court that grants [of land], when made by the Legislature of a State cannot be recalled," Nelson asserted, "we do not perceive any reason why the inviolability of the same class of grants should be less when made by the

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[195] James M. O'Fallon, "Marbury," 44 **Stanford Law Review** 219, 259 (1992).

[196] Mark A. Graber, "Establishing Judicial Review: Marbury and the Judiciary Act of 1789," 38 **Tulsa Law Review** 609, 626-27 (2003).

[197] Sherry, "The Founders' Unwritten Constitution," pp. 1167-76.

[198] 10 U.S. 87, 139 (1810); Fletcher, at 143 (Johnson, J. concurring).

[199] Rice v. Raiload Co., 66 U.S. 358, 374 (1862).

legislative power of the General Government."[200]

Enumeration became the central constitutional strategy for protecting fundamental rights only after the Civil War. An alliance of powerful lawyers and Republican party officials successfully promoted federal courts as the institution primarily responsible for enforcing constitutional limits on government power.[201] Their efforts revived both the Marbury precedent[202] and the textualist logic underlying Marbury. In opinions citing Marbury, late nineteenth century justices asked, "[o]f what avail are written constitutions whose bills of right for the security of individual liberty have been written, . . . if their limitations and restraints upon power may be overpassed with impunity."[203] The first Justice Harlan quoted Marbury at length when asserting judicial power, declaring, "[t]o what purpose . . . are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[204] When Thomas Cooley in Constitutional Limitations expressed his "full sympathy with all those restraints which the caution of the fathers had

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[200] Rice, at 382-83 (Nelson, J., dissenting).

[201] See Howard Gillman, "How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891," 96 **American Political Science Review** 511 (2002).

[202] Robert Lowry Clinton, Marbury v. Madison and Judicial Review (University Press of Kansas: Lawrence, Kansas, 1989), p. 120.

[203] Poindexter v. Greenhow, 114 U.S. 270, 291 (1885). For the reference to Marbury, see Poindexter, at 298.

[204] Mugler v. Kansas, 123 U.S. 623, 661 (1887) (quoting Marbury, at 176)..

imposed upon the exercise of the powers of government," he was referring to enumerated powers and enumerated rights, and not to a political process thought to provide governing officials with sufficient incentives to pursue the general welfare.[205] Rights, conservative commentators insisted, were better secured by legal interpretation than by constitutional politics. The "domain of individual liberty," John W. Burgess stated, was "protected by an independent unpolitical department,"[206] and not, as the framers had thought, by political institutions designed to privilege fundamental freedoms.

During the second half of the twentieth century, a new generation of liberal scholars and judicial activists articulated the same catechism, although frequently on behalf of a different set of rights than those previously championed by conservative proponents of judicial power. Justice Hugo Black, in particular, celebrated judicial protection of enumerated rights as the near exclusive constitutional strategy for protecting fundamental freedoms. "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree," he asserted in Adamson v. California, "is to frustrate the great design of a written Constitution."[207] Black in Reid v. Covert declared, "[t]he rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously

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[205] Thomas McIntyre Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (Little, Brown: Boston, 1868), p. iv.

[206] John W. Burgess, "The Ideal of the American Commonwealth," 10 **Political Science Quarterly** 404, 422 (1895).

[207] Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

preserved from the encroachments of Government by express provisions of our written Constitution."[208] The same textualist logic that committed Black to protecting all liberties enumerated by the written constitution led him to reject vehemently the notion of judicial protection for unenumerated constitutional rights. His dissent in Griswold v. Connecticut legitimated judicial power when "courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution," but not when "they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies."[209]

Two strategies were open for those who rejected Justice Black's constitutional vision. The first, championed by Thomas Grey and Suzanna Sherry, insisted that not all fundamental constitutional freedoms were enumerated. Grey endorsed "the court's additional role as expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."[210] "The framers," Sherry agreed, "intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals."[211] The second, championed by Ronald Dworkin, insisted that what Grey and Sherry regarded as unenumerated rights were, in fact, legitimate interpretations of such enumerated rights as due process and equal protection. "The Bill of Rights," Dworkin has

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[208] Reid v. Covert, 354 U.S. 1, 6-7 (1957) (opinion of Black, J.).

[209] Griswold v. Connecticut, 381 U.S. 479, 525-26 (1965) (Black, J., dissenting).

[210] Grey, "Do We Have an Unwritten Constitution," p. 706.

[211] Suzanna Sherry, "The Founders' Unwritten Constitution," 54 **University of Chicago Law Review** 1127, 1127 (1987).

claimed, "consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right." In his view, "[t]he key issue in applying these abstract principles to particular political controversies is not one of reference but of interpretation, which is very different."[212]

Both alternatives disparage the constitution of 1787. Dworkin's constitution is the constitution of 1791, a constitution that protects only enumerated rights, however broadly those enumerated rights are defined. "The right to burn a flag and the right against gender-discrimination" are constitutional rights, Dworkin asserts, only because they "are supported by the best interpretation of a more general or abstract right that is 'mentioned.'"[213] Grey and Sherry's constitution is the constitution of 1803, a constitution whose limits are expounded primarily by the federal judiciary. The first paragraph of Grey's seminal article declares, "the most fundamental question we can ask about our fundamental law" is what "our judges" should do.[214] Sherry concludes that "[t]he founding generation . . . expected the judiciary to keep legislatures from transgressing the natural rights of mankind, whether or not those rights found their way into the written Constitution."[215] Both positions ignore the original commitment to protecting fundamental rights by a series of well-designed government institutions, one of which,

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[212] Dworkin, "Unenumerated Rights," p. 387.

[213] Dworkin, "Unenumerated Rights," p. 389.

[214] Grey, "Do We Have an Unwritten Constitution?" p. 703.

[215] Sherry, "The Founders' Unwritten Constitution," p. 1177.

but only one of which, is the Supreme Court of the United States.[216]

The more institutional guarantees for fundamental freedoms underlying the constitution of 1787 may nevertheless determine what rights Americans enjoy at the turn of the twenty-first century. Madison understood that the numerous constitutional questions and questions of constitutional law left undecided by the framers would be resolved by the governing officials who were selected according the rules laid down by Articles I, II, and III.[217] These rules privilege some constitutional visions at the expense of others, although not necessarily the constitutional visions the persons responsible for the constitution hoped to privilege. The electoral college and state equality in the Senate, for example, help explain why the dominant Republican Party coalition is presently able to champion far more conservative positions than those held by the fictitious median national voter.[218] Howard Gillman correctly points out that the future of enumerated and unenumerated rights will depend as much on the predilections of this incumbent

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[216] For a rare contemporary meditation by a distinguished constitutional theorist on whether contemporary constitutional institutions are providing governing officials with sufficient incentives to protect fundamental rights, see Mark Tushnet, Taking the Constitution Away From the Courts (Princeton University Press: Princeton, 1999), pp. 95-128.

[217] See James Madison, The Writings of James Madison (Vol. 8) (edited by Gailliard Hunt) (Putnam's: New York, 1908), p. 450.

[218] See, i.e., Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (Oxford University Press: New York, 2006) (forthcoming); Jacob S. Hacker and Paul Pierson, Off Center: The Republican Revolution and the Erosion of American Democracy (Yale University Press: New Haven, 2005).

Republican majority as on what was and was not enumerated in 1787, 1791, and 1868.[219] Madison would not be troubled knowing that George Bush and his political allies may not defend those liberties Federalists thought fundamental in 1787. The constitution of 1787 was structured to incorporate progressive understandings of human flourishing. The real question from the perspective of 1787 is whether constitutional institutions can still be trusted to generate a political leadership with the capacity and incentives to pursue the common good and secure basic human rights.

[219] Gillman, "Regime Politics," p. 9-10.