Polls of the American people regularly show that the most valued and admired part of the Constitution is the Bill of Rights. Given that fact, it may seem strange that these treasured amendments almost did not make it into our governing document. Yet on September 17, 1787, when the delegates signed the Constitution, the draft contained no bill of rights.

Why this was so has been the subject of much speculation over the years. Perhaps the most straightforward explanation is that the delegates simply ran out of time. In fact, a few days before they were set to adjourn, one delegate pointed out that they had forgotten to add a bill of rights. But when put to a vote, the idea of staying on to prepare one lost by a vote of 10 states to zero.

To be fair, the delegates had been working since May, through a stifling Philadelphia summer, with the windows of Independence Hall boarded up so that passersby couldn’t eavesdrop on their proceedings. (When we think back to their accomplishments, we really should appreciate just how much they sweated — both figuratively and literally — on behalf of their countrymen.) By that point, let’s just say the delegates were eager to go home and bathe.

But during the efforts to win approval of the Constitution, the state ratifying conventions raised the absence of a bill of rights as a major concern. Many supporters of the Constitution feared this agitation would sabotage their efforts, either directly by leading to a vote against the ratification or indirectly by requiring a new convention that might deadlock
over the terms of the amendments. So they worked out a compromise in which the state conventions would ratify the Constitution as written but submit proposals for amendments to be considered promptly once the new government came into being.

When the government finally commenced, there was much urgent business to be done—setting up the revenue system, establishing executive departments, and initiating the federal judiciary, among other tasks. Then, about a year after the Constitution was ratified, James Madison finally attempted to turn Congress’s attention to the bill of rights. But at that point, something strange occurred—or, rather, did not occur: There was no push to take up the promised amendments. In fact, there was a good deal of resistance to the idea. Since the Federalists—those who supported ratifying the Constitution—had never been particularly enthusiastic about a bill of rights, the dearth of interest among this group was not unexpected. More surprising was the reluctance of congressional Anti-Federalists, who had cried out most loudly against the Constitution in part because it lacked a bill of rights. With neither the Federalists nor the Anti-Federalists eager to take up the issue, it appeared the Constitution would remain unaltered.

The only party who seemed at all eager to discuss the issue was Madison himself. Hypothetical historiography is always risky, and yet it appears that if he had not promoted a bill of rights as vigorously as he did at the time, it might never have made it into the Constitution at all—at least not during the 18th century.

Perhaps the most remarkable aspect of Madison’s decision to take a stand was the fact that he had spoken out against adding a bill of rights to the Constitution during the ratification struggle, and he seemed at best lukewarm toward the idea shortly thereafter. So why, having rejected the notion in 1787 and questioning it in 1788, did Madison rise to his feet in June of 1789 as the lone advocate of a bill of rights?

To discover the answer, we must break down and analyze Madison’s evolving views on the subject during that fateful period. Untangling his stages of thought and delving into the rationales behind them will help reveal how Madison’s change of heart—so far as it was a change of heart—came to pass. It may also help us gain a better appreciation of what the Bill of Rights has to teach Americans in modern times.
Madison’s stance on the Bill of Rights appears to have undergone three distinct phases: opposition, lukewarmth, and advocacy. His opposition phase occupied the time of the ratification debates—roughly from September 1787 to June 1788—and he was most outspoken on the matter during the 1788 ratifying convention in Virginia. The Constitution “in its present form,” he declared on that occasion, is “infinitely more safe... than it would be after introducing into it that long train of alterations which [its opponents] call amendments.”

Two complicating factors had much to do with this stridently negative stance, the first of which was timing. As discussed above, one of the major themes of Anti-Federalist opposition to the Constitution was the absence of a bill of rights—a concern shared by many citizens who otherwise favored the Constitution. The Anti-Federalists used these misgivings to press for altering the Constitution before it was ratified.

Yet as Madison charged at the Virginia convention, “previous amendments are but another name” for “rejection.” He explained that those with complaints about the Constitution did not agree on what was objectionable about the document, nor did they agree on what should be done to address their criticisms. Madison was convinced such disagreements would make it impossible to reach a consensus on any proposed revisions, which threatened to thwart ratification altogether. His tactical sense, in other words, told him that true friends of the Constitution should give no countenance to prior amendments. Thus he never argued in favor of—and often spoke out forcefully against—adopting a bill of rights before the Constitution was ratified.

His strategy here was a conscious one, as he explained in a January 1789 letter:

[W]hilst [the Constitution] remained unratified, and it was necessary to unite the States in some one plan, I opposed all previous alterations as calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution.
But, he went on:

Circumstances are now changed: The Constitution is established…and amendments pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well-meaning opponents, and of providing additional grounds in favor of liberty.

Madison’s early opposition to amending the Constitution had another basis as well. The absence of a bill of rights was surely a chief target of the Anti-Federalists’ criticisms, but there were other features of the Constitution they also wished to see changed. The Massachusetts ratifying convention, for example, called for such reforms as barring Congress from laying direct taxes, creating monopolies, or regulating elections. Other states called for amendments that would limit Congress’s powers on such crucial matters as military affairs and commercial regulation. As scholar Herbert Storing summarizes, the Anti-Federalists, in offering various amendments, sought “to revise the basic structure and powers of the new federal government.”

For his part, Madison “made clear that he had no intention of proposing, or accepting, any amendments along these lines.” And in the end, the first Congress never seriously considered any of them, since it was comprised of an overwhelming Federalist majority. But in the early days of Anti-Federalist agitation, Madison had no way of knowing his refusal would work in his favor so decisively; he feared only that opening the debate up to amendments of a bill-of-rights sort could lead to alterations he did not want to consider at all.

Madison’s early opposition was thus connected not to any misgivings he had about bills of rights per se, but to his concerns about other matters—namely ensuring ratification and maintaining the fundamentally new structure embodied in the Constitution. It is possible, in other words, that despite his interventions against bills of rights at the Virginia convention, Madison viewed them more favorably than his speeches would suggest. If this was the case, then Madison’s writings during his lukewarm stage—which occurred after the Constitution was ratified—should reveal his unvarnished opinions on bills of rights more generally.
The best expression of Madison’s lukewarmth came in a letter he wrote to Thomas Jefferson in October 1788—about four months after ratification. This letter was one in a series of exchanges between Madison and Jefferson, the latter of whom was a strong proponent of bills of rights. As Jefferson had written in an earlier letter to Madison, “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”

In his response, Madison noted that he did not consider this absence “a material defect.” Though he acknowledged that “if properly executed,” a bill of rights “could not be of disservice,” he also noted that an improperly constructed bill of rights might do serious harm.

A bill of rights was commonly thought to pose several dangers to the constitutional order. The first lay in the fact that the Constitution as drafted authorized the federal government to exercise only a limited set of powers. Powers not enumerated in the text were thought not to be granted to government, and therefore were not to be exercised by it. For instance, the First Amendment of what became the Bill of Rights declares, “Congress shall make no law...abridging the freedom of speech.” Many Federalists argued that such a provision was unnecessary; since the Constitution itself did not grant Congress the power to abridge or otherwise interfere with the freedom of speech, there was no need to prohibit it from doing so.

Worse than the concern over superfluity was the fear that a bar on the exercise of non-enumerated powers might tacitly authorize Congress to claim a theoretically unlimited array of implied powers. That is, forbidding Congress from exercising powers it did not possess might be taken to imply that Congress possessed the authority to wield powers beyond those explicitly granted to it. If the limited grant of powers to the federal government was crucial to preserving liberty—as the founders believed it was—then, paradoxically, precluding the government from using powers not granted to it could endanger that very same liberty.

There was yet another, parallel threat that a bill of rights was believed to pose—one concerning the specific rights outlined. Bills of rights inherently single out particular rights as worthy of protection: the right to peaceably assemble, the right to bear arms, and the right to be tried
by a jury of one’s peers, to name a few that appear in ours. But some at
the time feared that this explicit recognition of certain rights in a bill of
rights could be read to imply that any rights not expressly identified had
no claim to protection. And yet, they wondered, are there not additional
rights that deserve protection from infringement, rights that are simply
too numerous to enumerate? What about the right to walk on the side
of the road one prefers? Or the right to wear a hat of a style one finds
attractive? Singling out specific rights for protection seemed to suggest
that rights not mentioned were fair game for government intrusion.

Bills of rights were thus thought to threaten the constitutional order
in two respects: by suggesting government could wield powers it does
not possess—that is, by implying powers—or by denying the existence
of rights not explicitly identified—that is, by denying implied rights.

Madison acknowledged these concerns as legitimate dangers, but
he also saw ways to address them. His solution was ingenious: He of-
fered two additional amendments that would head off—in principle,
at least—the potentially pernicious consequences of adopting a bill of
rights. The first became what we know today as the 10th Amendment,
which declares: “The powers not delegated to the United States by the
Constitution, nor prohibited by it to the States, are reserved to the States
respectively, or to the people.” This provision affirms that the Bill of
Rights should not be taken to suggest that Congress has implied powers
to legislate where it has none. Madison’s second solution became today’s
Ninth Amendment, which reads: “The enumeration in the Constitution,
of certain rights, shall not be construed to deny or disparage others re-
tained by the people.” That is to say, the explicit identification of certain
rights in the Bill of Rights is not to be taken to imply that other rights
do not exist or deserve protection.

Madison was thus able to draw out the poison that a bill of rights
might inject into the constitutional order. Even so, he was not yet an en-
thusiastic supporter of the idea. Unlike those who put forth the criticisms
mentioned, Madison was primarily concerned with three additional is-
issues, which included context, enforcement, and sources of power.

His views on bills of rights were grounded in the fact that Americans
had borrowed the notion from their English heritage. In England, rights
reserved by declaration operated as checks against the monarchy. Bills
of rights were effective in this context, Madison told Jefferson, because
there, “the latent force of the nation is superior to that of the sovereign,
and a solemn charter of popular rights must have a great effect, as a... signal for rousing & uniting the superior force of the community” against intrusions by the Crown. But the American founders had not established a monarchy; they had founded a republic. “[T]here is too great a difference,” Madison would later observe, “to warrant the comparison: therefore, the arguments drawn from [the monarchical context are] in a great measure inapplicable” to a republic.

The Anti-Federalists, Jefferson, and others who favored bills of rights were aware that the Constitution had established a republic. Nonetheless, they continued to contemplate the danger to private rights based on the model of a monarch ruling the people. Thus, even in the republican context, they tended to believe that the real threat to liberty would come not from the people themselves, but from “acts of Government contrary to the sense of its constituents,” as Madison put it. Without a mechanism to keep governing officials on a short leash, Jefferson and the Anti-Federalists insisted there would be a constant danger of them slipping their tethers and becoming oppressors of the people.

Madison acknowledged this threat, and yet he doubted that even under such a scenario, a bill of rights would do much good. More than a “parchment barrier,” he insisted, was necessary to provide an effective check on government—some device with teeth to it.

Here, Jefferson made a real contribution to Madison’s thinking. A bill of rights, Jefferson wrote, could acquire efficacy through “the legal check which it puts into the hands of the judiciary.” That is, the courts could protect private rights against the whims of errant rulers, and a bill of rights could serve as a basis for judicial decision-making. Madison adopted Jefferson’s suggestion with gratitude, making it a key point in a speech he delivered some months later to the House of Representatives:

The judges will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Jefferson’s argument thus elevated what had been a mere “parchment barrier” to a law enforceable against political actors. But Madison was not fully satisfied with judicial review as a safeguard against tyranny.
For starters, he harbored reservations about judicial review itself, as he believed it to violate a key principle of republican government: rule by the people. He also expressed concerns that authorizing the courts to strike down laws duly enacted by the political branches might establish something like judicial supremacy.

Perhaps most significant of all, Madison believed that the real threat to liberty in a republic lay not with oppressive rulers, as it did in a monarchy, but with majority factions of the people. As he said in one of his most telling analyses:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Thus a bill of rights, which was meant to appeal to the majority in forfending oppression by a ruling elite, would be of little value in protecting against majority tyranny. “Experience,” Madison observed, “proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”

At this point, then, Madison remained convinced that a bill of rights would be less effective in securing the rights of the people than the structural protections provided by the constitutional order. And yet despite these initial hesitations, Madison would soon become the lone engine that pulled the train up the hill in June of 1789.

**Advocacy**

Given Madison’s apparent opposition to bills of rights early on and his lukewarm toward them in the months following ratification, it would have seemed far more natural for him to have let the whole project collapse once enthusiasm for it had waned. So what accounts for his shift in thinking?

There were, it seems, two reasons behind Madison’s transition from doubt to advocacy. The first was his realization that a bill of rights would cement the public’s support for the Constitution. As Madison was keenly aware, many Americans remained suspicious that the Constitution’s
sponsors had been eager to establish a strong and potentially dangerous national government. So long as such belief persisted, it was clear that the people would not be committed wholeheartedly to the new Constitution. It would therefore be “highly politic,” Madison argued in his 1789 speech to Congress, “for the tranquility of the public mind, and the stability of the government,” that the Constitution’s supporters offer some concessions to those who remained apprehensive of their motives. Adopting a bill of rights, in other words, would set his countrymen’s minds at ease—and he appears to have been correct in that regard.

Thus Madison had his “politic” reasons for persisting in the project. More important, though, were his substantive reasons. During his lukewarm phase, Madison had believed “the body of the people, operating by the majority” could render bills of rights superfluous. Yet after contemplating the matter, he came to see how the power of the majority was also a reason to favor a bill of rights.

Why should Madison think bills of rights could succeed in curbing the majority’s inclinations toward tyranny, especially when he had been rather more impressed with how little they seemed to do so in actuality? The answer lies, I believe, in his pondering the situation he was facing at the time.

In October 1788, Madison was still considering bills of rights in structural terms—and he found them wanting. But in June the following year, he admitted that the American people had shown themselves to be attached to the idea:

The people of many States have thought it necessary to raise barriers against power in all forms and departments of Government, and I am inclined to believe, if once bills of rights are established in all the States as well as the Federal Constitution, we shall find, that, although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency.

That “salutary tendency” was their propensity “to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.”

In acknowledging those benefits, Madison shifted from viewing the matter in structural terms to pedagogical ones. Bills of rights in the republican context, he had come to believe, should not be thought of
primarily as a means to appeal to the people against an oppressive master, but rather a means to convince the people not to become oppressive masters. After all, if republicanism means government by the great body of the people, why shouldn’t some effort be made to teach them to respect the rights their rule should secure, and to train them to use their power rightly and wisely? Why not take more seriously the idea of rule by the people and work to shape the people into a body fit to rule?

Of course, as committed as Madison was to the principle of popular sovereignty, he was still wary of the tendency of republics to produce tyrannical majorities. To address that problem, he turned once again to the institutional solutions—enumerated powers, federalism, and the realities of our extended republic—embedded within the American constitutional order. These mechanisms, he insisted, would encourage the formation of non-tyrannical majorities—and a bill of rights might even contribute to the same end. It might even become something the people look to as a first principle of their political belief and action. Recent polls of Americans suggest that this was precisely what occurred.

**Hearts and Minds**

Is there a moral to this story of the near accidental origin of the Bill of Rights? I will mention two here. One has to do with Madison, the other with the Bill of Rights itself.

Madison’s about-face on the subject appears to be a clear example of what has prompted a “healthy controversy,” in the words of Professors Robert Cooper and Keith Dougherty, “over whether his policy positions remained consistent throughout his career.” Cooper and Dougherty quote scholar Alan Gibson in noting that perceived inconsistencies in Madison’s thinking “challenge his role as our guide to the Constitution and the theoretical foundations of the American political system.”

Yet in this case, we can see that Madison’s change of mind was hardly the product of faulty reasoning. Rather, it was the result of his coming to view bills of rights not as structural barriers to tyranny, but as supplements to the institutional protections embedded in the Constitution and the realities of our extended republic.

This moral is perhaps of most interest to scholars. Of broader interest is the moral concerning the Bill of Rights itself.

The protection of our basic rights, as Madison came to realize, depends not only on clever political structures, nor on government actors,
but on us. We must hold these rights most dear; we must assert ourselves in their defense. As Learned Hand would write a century after Madison’s passing, “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”

Rights in our republic are thus not merely matters of self-assertion and self-defense, but of self-restraint. Americans today would do well to take this lesson to heart.