

**How Historians Get It Wrong:
The American Constitution, For Example**

The Richard Gilder Lecture
The New-York Historical Society
February 8, 2007

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2007

History – that is, the study of history: what historians do – is never a science; it is sometimes an art, and it is always a craft. And as a craft it has its own professional values, its own accepted rules of procedure, its distinctive calibration of achievement, its venerated masterpieces and its notorious failures. And it has its own, distinctive problems – methodological problems, problems of authentication, interpretation, and style.

Most people know that knowledge of the past – accurate knowledge, free of bias, myth-making, and wish fulfillment – is as necessary for social sanity as personal memory is for individual sanity. The late Arthur Schlesinger, Jr., put it well when he wrote:

As persons deprived of memory become
disoriented and lost, not knowing where
they have been and where they are going,
so a nation denied a conception of the
past will be disabled in dealing with its
present and its future.¹

But is accurate, bias-free, myth-free history possible? Over the years that question has been debated again and again, by historians and by philosophers of history. For we know that no historian sits on some immaculate cosmic perch removed from the prejudices, assumptions, and biases of his or her own time, place, and personality. We know that facts are inert and meaningless until mobilized by an enquiring mind, hence that all knowledge of the past is interpretative knowledge, and that therefore there is no such thing as perfect objectivity. And furthermore we know that the sources, and the availability of sources, from which our stories are written are always to some degree suspect and incomplete, and that often they have survived as

documents simply because someone thought they would be useful to promote a particular, hence biased, view of what had happened.

These are traditional and familiar problems, and they have led to gloomy, even dismissive, views of the usefulness of historical study. But as a working historian I have never been discouraged by these problems. The impossibility of writing history with perfect objectivity and the fact that historical writing is, in the end, an act of imagination do not mean that history is inevitably a form of free-floating self-expression – fiction by another name – and that any version one comes up with is as good as any other. As the economist Robert Solow remarked in another connection, the fact that there is no such thing as perfect antisepsis does not mean that one might as well do brain surgery in a sewer. The correspondence to actuality in history, the struggle to describe what actually happened, however dimly we may perceive it, is the essence of history. I know bias when I see it, perhaps not always but often, and try to correct for it. And I marvel at what historians can do to locate unknown sources, to extract relevant information from seemingly irrelevant material, and even to create new sources altogether. Vital statistics have been extracted from crude medieval tax records, art forms prove to be sources for social and economic history. There are no written records of the demographic details of life among the North American natives, even after the arrival of Europeans. But, following the lead of archaeologists, historians have found that examination of skeletal remains of long dead natives can yield remarkably accurate accounts of the natives' nutrition, characteristic diseases, and life expectancy. Deep probes into ice and soil layers have revealed seasonal weather and atmospheric changes that took place centuries ago, hence historically significant shifts in disease environments and in the likelihood of waves of epidemics and famines. And digitization has turned whole libraries into searchable data bases. So while I recognize the importance of all of

the familiar limitations in the study of history, I believe that the reality of major phases of the past can be subjected to useful enquiries, that some views can be shown to be more accurate depictions of what actually happened than others, and that reasonably accurate accounts of many periods of the past, so vital to our collective sanity, can be given.

What troubles me more than these familiar problems, what I believe leads to systematic distortion and which explains how historians can get it wrong, is something simpler and more difficult to correct. It is simply that we as historians know how it all came out, and the people in the past did not, and could not have done, any more than we can know how our present dilemmas will come out. None of us knows what the outcome in Iraq will be – whether chaos lies ahead there and throughout the Middle East, or whether a stable, multi-ethnic, plural- confessional regime will emerge, or whether something altogether different will develop. But historians in the future will know, and they will trace the way that outcome came about. Logically, but fatally for accurate understanding of what really happened, they will concentrate on the train of events that in retrospect appear to have led, step by step, to the outcome they know so well. And in doing so, tracing back the antecedents of the outcome, they will imply a degree of inevitability and certainty in the outcome that did not exist. The contingencies, accidents, and unpredictable struggles of personalities that so beset the people of the time will fade away, as will the counter forces that failed but which nevertheless helped shape the outcome.

There is no way to completely overcome the distortions of past events and circumstances that result from approaching them with the outcome clearly in mind. The best we can do is to consider deliberately and seriously the accidents, the uncertainties, the dilemmas of the time, acknowledge the claims of the losers, even explore the dead ends – in an attempt to recover as much as possible of the complete context of the past, the cluttered, confused setting of those

distant lives that had no certain outcome, not only the lives of those who proved to be the winners and who, as Churchill said of himself, survived to tell the story heroically and to celebrate the outcome.

Of all of this I know of no better example than the writing of the Constitution and the difficulties of interpreting that vastly consequential event.

In 1878 the British Prime Minister William Gladstone declared that the American Constitution was “the most wonderful work ever struck off at a given time by the brain and purpose of man.”² Well, he got some of that right: it is a wonderful document, and it is the product of the human intellect. But it was not struck off at a given time. It grew incrementally. The writing of the Constitution stretched out through four stages, from the drafting phase in Philadelphia in 1787, to the long ratification struggle, to the fundamental amendments and supplements made by the first Congress, and to Washington’s creative implementation of the document in the years of his presidency. No one designed the document that resulted. It did not have to be the way it is. Nothing about it was inevitable; it could easily have had a quite different shape, or have failed altogether. Some of it was a failure from the start (the Electoral College, an extremely clever device, never once worked as it was supposed to). And Madison, who was responsible for so much of the document’s design, was disappointed in the final result; he felt it was “materially defective” on a fundamental point, which, as I will indicate, he tried again and again but failed to correct. Of the 71 proposals that Madison, the Father of the Constitution, strongly backed in the Philadelphia Convention, he was defeated on 40.³

The document is a compound of compromises, flashes of inspiration, deliberate omissions, and pragmatic deals. For four months the delegates in Philadelphia inched ahead,

turned back, revised, and then revised the revisions, and they compromised again and again to produce a document that would satisfy most, though not all, of the drafters' conflicting concerns. The document produced by the convention, Madison later wrote "was nothing more than the draft of a plan, nothing but a dead letter, until life and validity was breathed into it by the voice of the people, speaking through the several state [ratifying] conventions."⁴ "All the authority which it possesses," he insisted, derives not from the opinions and intentions of the writers "but in the sense attached to it by the people in their respective State Conventions." And indeed the state ratification process – a series of open, public conventions that stretched over 10 months and involved some 1500 participants – was one of the most extensive, intense and elevated public debates on political ideas ever recorded; but in the end its success turned on a rather sordid deal made by an opportunistic politician recovering from the gout in Massachusetts.

The immediate context of the writing of the Constitution almost guaranteed that it would be a failure, and that the fragile United States would be a failed state. The core, the heart, of the entire Revolutionary movement had been the effort to eliminate the power of a centralized government – indeed, to constrict the use of any power over people's lives that might be abused. Yet in 1787 they found themselves struggling to create precisely such a central power in order to overcome the fatal weaknesses of the federal government under the Articles of Confederation. They were not afraid of government, whose proper functions they welcomed. What they feared was the misuse of the power embedded in government, which appeared to be unavoidable in the system they were designing. There seemed no way out. To protect themselves and to provide the public services they needed, they would have to have a government that could control a vast area, could raise significant amounts of taxes, could mobilize and deploy an army and navy, and that would be directed by an effective executive authority. But at every stage of the writing and

ratifying of the Constitution there was fear that those who controlled such a government, given the innate propensities of humankind, would, if not somehow constrained, destroy the liberty that the government existed to preserve.

So they built into the document every practical limitation on possible abuses of power they could think of, not to satisfy a grand and intricate design, but to deal with specific dangers as they became clear, point by point. Some things were obvious, especially to those who had participated in writing the state constitutions. The main branches, the institutions, of government should be functionally distinct yet overlap and share in each others' powers, hence compete with each other and thereby constrain possible excesses. That was obvious. But just as important was one short sentence tucked in among the limitations on the Executive branch. It was fundamental. "No person," it reads, "holding an office under the United States shall be a member of either house during his continuance in office."⁵ A simple statement; but it prevented at a stroke the construction of a system in which while executive and legislative powers were institutionally separated, they might be joined in the plural office-holding of individuals who both sat in Congress and held office in the administration at the same time, a construction that in Britain had made possible the notorious corruption of the 18th-century House of Commons and that would prove to endow the modern Prime Minister with more power than any American president has ever had, at least in peace time.

But this crucial provision, modeled on England's extinct Act of Settlement of 1701, which lies at the heart of the modern American government, was by no means unanimously endorsed by the Convention. Introduced early in the proceedings, it hung fire through almost the entire four months of the convention, opposed by a phalanx of major figures. Charles Pinckney insisted that the exclusion of legislators from service in the executive branch would be

degrading, inconvenient, and impolitic; Hamilton argued persistently and deftly, invoking the authority of Hume, that what is called “corruption” in Britain was not only necessary for the recruitment of good men to public service but essential to maintaining “the equilibrium of [Britain’s] Constitution.” George Mason led an equally important group in insisting that “this clause [is] the corner-stone on which our liberties depend.” The arguments continued back and forth without resolution until shortly before adjournment, when the clause was suddenly, and without explanation, written into the Constitution.⁶

So many things which seem in retrospect to have been logically, inescapably necessary for what proved to be the ultimate construction emerged from uncertainty or were shaped by the sheer force of personalities; some seem to have been decided almost casually, or by unaccountable spurts of inspiration.

There would have to be an army. But how big should the peacetime army be, and what would prevent it from becoming the personal instrument of the president – an “engine,” as one delegate in Philadelphia put it, “of arbitrary power which has so often and so successfully been used for the subversion of freedom.” So they debated numbers. How many troops? In peacetime, said Elbridge Gerry (who in the end would refuse to sign the Constitution for fear of the powers, especially military powers, it created and its failure to protect people’s rights), two or three thousand troops should be the limit. But would such a limitation not mean, it was asked, that there could be no buildup of troops “until an attack should be made on us?” “Preparations for war,” it was pointed out, “are generally made in peace; and a standing force of some sort may, for ought we know, become unavoidable.” So they gave up trying to improve on Gerry’s numbers, switched their thinking, and having no idea what large scale, legitimate military demands the future might require yet fearful of a build-up of a military government, endowed

Congress with the power to monitor executive decisions on the size of the military through control of its financing and provided for the organization of state militias so that “the liberties of the people may be better secured against the danger of standing armies in time of peace.”⁷

Again and again problems were discovered as the delegates attempted simultaneously to create and constrain power. When problems seemed to have no solution, they gave up, hoping that when other provisions were in place the context would have changed sufficiently to make a solution possible. As a result the work of two special committees became crucial; the Committee on Postponed Parts, which resumed and attempted to resolve questions that had had no solution earlier, and the Committee of Detail, which blended the separate items that had been agreed on, and some that had not, into a single, seemingly integrated document, adjusting language, often rather creatively, for clarity and consistency.

There was boldness, imagination, excitement and enthusiasm in the writing of the Constitution, but there was also permeating fear as the delegates peered dimly into the future, attempting to anticipate the misuses of power that would destroy the delicately contrived balance. Some fears were strange. “I have just read a pamphlet,” James Iredell, the future Supreme Court Justice, reported in a speech in North Carolina,

In which the author states as a very serious danger, that the Pope of Rome might be elected President. I confess this never struck me before, and if the author had read all the qualifications of a President, perhaps his fears might have been quieted. No man but a native, and who has resided fourteen years in America, can be chosen President. I

know not all the qualifications for a Pope,
but I believe he must be taken from the
college of Cardinals... A native of
America must have singular good fortune, who
after residing fourteen years in his own
country, should go to Europe, enter into
Romish orders, obtain the promotion of
Cardinal, afterwards that of Pope, and at
length be so much in the confidence of his
own country, as to be elected President. It
would be still more extraordinary if he
should give up his Popedom for our Presidency...⁸

But if some fears were fanciful others were only too realistic, and none more so than that their free, self-governing republican nation, stretching across a thousand miles of coastal North America and clearly destined to expand westward to greater distances, would not be able to contain all the contending interests within it, and would be destroyed by bitter factional conflicts – conflicts between rival economic groups, conflicts among religious groups, conflicts between regional groups defending and promoting special interests and peculiar institutions. An authoritarian state - a monarchy, a dictatorship - could control, by force, a continent of such clashing interests, but a sprawling republic in which the contending people were themselves, at least indirectly, the rulers? That was something new under the sun, and dubious simply on the face of it.

To this Madison responded in his famous 10th Federalist Paper, arguing counter-intuitively that size would in fact have a moderating effect. The multitude of interests – parties, he called them – would neutralize each other, since no one interest would be able to dominate all others. The larger the territory, therefore, the more stable the political system. That much he could see – or imagine or hypothesize, though he, and everyone else in Philadelphia, recognized that the defense of slavery was unlikely ever to be peacefully neutralized. But what he could not see or imagine was a deeper danger that was then beyond his political horizon. That danger lay in the emergence of national political parties not as he and his contemporaries thought of parties, as unstable, ad hoc interest groups – factions, lobby groups in effect – but as nation-wide ideological organizations whose disciplined presence, when in a majority, spread through all three branches of government, could nullify, by agreement in the political views of their officeholders in all branches, the protections of checks and balances and trivialize the prohibition on plural office holding.

But they did what they could, not seeking to construct a theoretically perfect structure, but to satisfy their immediate needs and fears, as they understood them, consistent with the original principles of the revolution.

Two profound problems illustrate vividly the contingencies and uncertainties in the writing of the Constitution, the accidents of personality and timing, and the failures that shaped the event, all of which fade away in retrospective accounts oriented to ultimate outcomes. Both involve Madison. In one, he took a bold and rigorously logical stand, then completely reversed himself, seized the moment, and devised the foundational statement of basic American liberties. In the other, he struggled year after year, on one occasion after another, and failed completely to persuade his colleagues to correct what he considered to be the Constitution's most glaring and

damaging flaw. Thirty-two years after his death, and only as a consequence of America's bloodiest war, would that flaw finally be corrected.

As to the first: Madison's twisting and turning and ultimate success. The Constitution as it emerged from Philadelphia had no bill of rights. The issue had been brought up twice in the Convention, just before adjournment, and both times it had been defeated unanimously – 10 votes to 0.⁹ There were clear arguments against such a bill, in all of which Madison, and most of the other influential federalists, concurred. Besides the fact that seven states already had their own Bills or Declarations of rights and others had rights embedded in the text of their constitutions, and besides the fact that the federal government had not been granted authority to rule in the area of personal rights, there was the daunting logical problem of enumeration, which Madison considered “one of the most plausible arguments I have ever heard...against the admission of a bill of rights into this system.” For it was surely absurd to think that one could enumerate all human rights, yet to enumerate only the few that one happened to think of on this occasion would be not only arbitrary but also prejudicial to all the other rights that happened not to be mentioned, and which consequently might be construed to have been “intended to be assigned into the hands of the General Government, and were consequently insecure.”¹⁰

For many these were convincing arguments, but the majority of the public continued to believe, whatever the logic, that the deliberate protection of personal rights from the powers of the strengthened federal government was necessary, agreeing with Jefferson, that “a bill of rights is what the people are entitled to against every government on earth...and what no federal government should refuse or rest on inference.” The clamor for a bill of rights grew and dominated the arguments of the Constitution's opponents in the ratifying conventions. As the

pressure mounted weaknesses in the Federalists' reasoning began to appear. The states did have their own bills or statements of rights, but though these documents had much in common they had significant differences too, and some of the rights they protected were rather strange, even, in Madison's phrase, "absolutely improper." Pennsylvania, for example, enshrined in its Frame of Government the right "to fowl and hunt" on one's own and any unenclosed land and "to fish in all boatable waters" that were not private property. Further, the states' documents were mainly hortatory. The operative verb was usually "should" or "ought" ("all elections ought to be free and frequent" [Del.]) or simply statements of principles ("all men are born equally free and independent" [Pa]), statements that could have no legal force. And as for the limitations implied by enumeration, perhaps that might be overcome by a forthright statement that the rights enumerated were not meant to be inclusive or comprehensive, nor were they meant in any way to prejudice any of the other rights among the totality retained by the people.¹¹

But how could such enumerated rights be added to the Constitution? If they were inserted into the text of the Constitution the resulting document would not be what the signers had signed. If added by the states as prior conditions of ratification there would have to be some way of coordinating and unifying the various conditions and then gaining each state's approval of its own and all others' conditions before the Constitution could be ratified.

By January 1788, four months after the publication of the Constitution, it was clear that some formula would have to be found to solve this problem or the Constitution would not be accepted. Five states had ratified, but Massachusetts, New York, and Virginia had not, and the loss of any one of the three would doom the Constitution. In Massachusetts, where the crisis first became evident, the Federalists were badly outnumbered at the start and were still behind after three weeks of passionate debate in which they fought to avoid amendments as a condition

for ratification. Instead they proposed that the state ratify outright, without conditions, but that as part of its ratification it recommend that the first Congress adopt its proposed amendments which, together with those similarly recommended by the other states, would constitute a national Bill of Rights.

Somehow the opponents would have to be persuaded to accept the Constitution unconditionally while recommending amendments; but to the majority this seemed a dangerous gamble. Who knew that the first Congress would do? In desperation the Federalists in Boston called on the wavering governor, John Hancock, who, unclear which way the wind was blowing, had suddenly developed a severe case of gout and had been obliged to stay at home during the debates. In private conversations with Hancock, whom Madison described in a coded message to Jefferson as “weak, ambitious, a courtier of popularity given to low intrigues,” the Federalists promised to support his reelection as governor if he publicly advocated recommended as opposed to conditional amendments; and further, they suggested that his cooperation in this might gain him support for a bid for the Presidency if Washington failed to stand. This news had a healing effect on Hancock’s gout. On January 31, before a packed audience sitting in “the most profound silence” and “so anxious on this occasion,” an eyewitness reported, “to obtain good places in the gallery, that hundreds continued there the whole of the adjournment, and...had their dinners brought to them,” Hancock delivered the required speech. Massachusetts’ Convention ratified unconditionally but with recommended amendments, by a 19 vote margin out of 355 votes cast.¹²

It was a critical moment. That decision, wrenched almost coercively from an ambitious politician and replicated in the ratifications that followed, is rarely if ever mentioned in histories of the Constitution. But it was, a leading Virginia federalist wrote, “perhaps the most important

event that ever took place in America, as upon [it] in all probability depended the fate of the Constitution.” Hancock’s role, it was generally agreed, had been crucial. If Massachusetts had rejected the Constitution, “I am certain,” the Virginian wrote, “there would not have been the most remote chance for its adoption in Virginia.” Rejection by both Massachusetts and Virginia would have defeated the Constitution, and the outcome would have been a second Constitutional Convention, this one open and public and riven by severe regional, economic, and ideological conflicts.¹³

Just as uncertainty and the accidents of personality and of timing were the essence of the decisive events in Massachusetts, so too were they essential in the immense furor over ratification in New York, a struggle that was memorialized in, but not in fact influenced by, the frantically written Federalist papers.¹⁴ At the start the opponents of the Constitution outnumbered the proponents by more than 2 to 1, and they continued to dominate the convention despite Hamilton’s forceful speeches and all the pressure the Federalists could bring to bear. Ratification finally passed only because, just as the debate climaxed and the votes were about to be taken, news arrived that the ninth state had ratified, hence that the Constitution would be adopted, and any holdout states would be isolated outside the new union. At that point, the Anti-Federalists’ floor manager, Melancton Smith, a former Poughkeepsie shopkeeper turned politician and speculator in confiscated land, decided to switch his vote, and ratification passed - by a margin of three votes. It was barely in time to nullify the effect of a circular letter, insisted upon by the Anti-Federalists, calling on the other states to convene a second constitutional convention.¹⁵

To think that in any case the Constitution would have been ratified (it now seems so logical, so obvious, so necessary and inevitable) is to falsify the event. Personalities and

accidents played vital roles. A different outcome had not only been possible but at least as likely as what actually happened.

With the ninth state's ratification, the Constitution was adopted and electioneering began for seats in the first Congress. For Madison, but, strangely, not for all members, its first business had to be to satisfy the states' demand for enactment of the recommended amendments. When all the reports were in, there proved to be a total of no less than 186 of them. It fell to Madison, now a Congressman (he had been defeated for the Senate in part because some people felt he did not truly believe in a Bill of Rights) - it fell to Madison to begin the process of conflating and reducing the mass of people's concerns to the 25 provisions that were finally included in the first 10 Amendments.

Two points in Madison's devising of the amendments were vital to him and his contemporaries and were silently, without comment, adopted. Both reflect the deepest concerns of the time, and were taken for granted as unspoken assumptions. First, the amendments as Madison wrote them, and as Congress approved them, are flat-out prohibitions and empowerments not horatory or philosophical statements. The verbs are not optative, they are imperative, mandatory – "shall" not "should" ("Congress shall make no law . . ." "The right of the people to be secure . . . shall not be violated") - which makes the amendments litigable, matters on which the government could be legally challenged. And second, Madison included in his draft of the Bill of Rights, and Congress approved without challenge or the slightest question of meaning or wording, the provision that became the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."¹⁶

Until Justice Arthur Goldberg invoked this amendment explicitly in the Griswold contraception case in 1965, defining marital privacy as one of the unenumerated rights retained by the people, little attention had been paid to this provision; it had been invoked in only seven Supreme Court cases from 1789 to 1965. Since 1965 it has been cited repeatedly and has become the focus of heated debate by scholars and judges concerned over how in law or logic the amendment should properly be understood, and what the consequences would be if the Supreme Court were to have the right and authority to define and endorse what it took to be unenumerated rights.¹⁷ But whatever the long neglect and whatever the present intricate and heated controversy over its meaning and implications, for Madison and his contemporaries nothing could have been more obvious or important. He did not struggle over the meaning of this amendment or over its implications. For him, as for all who shared in devising the amendments, it flowed from the heart of the Revolutionary struggle. It at once eliminated the implication that enumeration exhausted the treasury of natural and inherent human rights and at the same time made clear, as nothing else could, that rights, not powers, exist primordially, and that, in a just and free state, power is a limited and defined gift granted to temporary custodians to serve the people's needs.

Thus Madison, once an opponent of a bill of rights, had seen a logic deeper than that of the arguments against it, had reversed course, had explained at length to Congress the reasons for his change, had taken on the burden of defining the rights to be appended to the Constitution, and had done so with great success.

But if he had succeeded in this, he failed in dealing with another basic problem, and bitterly regretted that despite all his efforts he had not managed to set the matter right.

Significantly, in this case he wanted more power for the federal government not less, but power to protect threatened liberties elsewhere.

The rights enumerated in the amendments, if adhered to and enforced, would help protect the people from the misuse of the powers of the federal government. But what protection did individuals have against the excesses of the state governments? That, Madison believed, was where the worst dangers lay. Populist majorities in the state legislatures, including his own, were sweeping away the rights of minorities and individuals, confiscating property, issuing weak paper money, repudiating debts, lowering or eliminating taxes necessary for government while imposing assessments to support religion, and passing badly drafted, vague, and redundant laws. Somehow the federal government would have to extend into the states the protection of the rights that had been enumerated in the Constitution. But for this there was no provision.

Madison had begun agitating for federal control over state laws even before the Constitutional Convention was convened. It was the heart of his important pre-Convention memo, “Vices of the Political System of the United States” and confirmed by his comparative study of “Ancient and Modern Confederacies.” The Virginia draft plan for the Constitution which Madison helped write and which was brought in at the start of the Convention as the basis for discussion, had stipulated that Congress together with the federal judges should review all state legislation in advance of its enactment, with the power to veto any laws that violated personal rights. That, in effect, would have created what has been called an “organic union of the general and the state governments,” with the federal government operating as “an essential branch of the State Legislatures.” The scheme was quickly dismissed as improper and unworkable. In the weeks of debates that followed in the Convention Madison proposed again and again that some kind of federal control over the state legislatures be enacted, and again and

again he was defeated. Explaining in letters and speeches how necessary federal protection of rights within the states was, he appealed to Congress, as a last resort, in its debates on adopting the amendments.¹⁸

In his great and uncharacteristically fervent speech of June 8, 1789, in which he presented to Congress the whole subject of a Bill of Rights, explaining the transformation of his own thinking on the subject, he proposed that a clause be included stipulating that “no state shall violate the equal right of conscience, freedom of the press, or the trial by jury in criminal cases.” It was a much weakened version of the broad federal veto he had hoped for, but limited as it was, he described it “as the most valuable amendment on the whole list.” It passed the House but was defeated in the Senate, devoted as that body was to defending the rights of the states, above all the rights of the southern states to protect the institution of slavery. It was only when that malignant core of states rights was obliterated in the Civil War that Madison’s deepest wish could be fulfilled. The 14th amendment (1868) enacts precisely what he had so passionately hoped for eighty years earlier, that

no state shall make or enforce any law which
shall abridge the privileges or immunities
of citizens of the United States, nor . . .
deprive any person of life, liberty or
property without due process of law, nor deny
to any person . . . the equal protection of
the laws.

The Civil War amendments, and especially the Fourteenth, the leading historian of the making of the Constitution has written, “are the most Madisonian elements of the American Constitution.”¹⁹

Yet the fact that Madison had failed in this is as revealing of the forces at work in the writing of the Constitution as any of his famous successes.

The passions aroused by the writing and ratification of the Constitution, the depth of the authors' realistic fear that the fragile nation might split apart and that the resulting chaos would lead here, as chaos had done throughout history, to authoritarian rule, or that their liberties would be destroyed by the misuse of powers of their own devising – none of that can be recaptured if one studies in isolation the antecedents of the outcome one knows so well. Nor can one grasp the desperation and nervous extemporization, the fears and gambles, that lay behind moves that in retrospect seem so clear-minded and prescient, or the importance of accidents, of coincidences of timing, of the quirks of personalities, and of the jealousies and rivalries that impelled seemingly impartial decisions.

They had no blueprint to follow, no overall design for the nation they were building. They could only seek guidance from the history and experience they knew, and cling to their basic beliefs – that power was necessary for a stable regime, but that power was inherently dangerous because it fed the appetites of those who held it and hence was dynamic and expansive; that therefore the use of power would have to be restrained to protect the liberties they enjoyed; and that provision would have to be made for the perpetuation of the Constitution's structure and purpose under future conditions that could not be anticipated.

How little the future could be anticipated, how strange the twists and turns would be, became clear within a decade of ratification. In 1798 the Federalist-controlled government was engaged in an undeclared war with France. With an estimated 30,000 French aliens living in America and such respectable Federalists as Harrison Gray Otis convinced that “French apostles

of sedition” were organizing here and elsewhere “to bring about their nefarious purposes,” threatening the nation’s survival, Congress greatly increased military appropriations and, fearing subversion, authorized the President to arrest, imprison, or banish aliens regarded as dangerous or suspected of treason, and to fine or imprison aliens or citizens who opposed the execution of national laws or who published writings that brought the government into disrepute. “It is patriotism” a Federalist newspaper declared, “to write in favor of our government, it is sedition to write against it.”²⁰

Identifying the administration with the government and the government with the Constitution, the Federalists conflated criticism of the administration’s war policy with efforts to sabotage the Constitution. For Madison, who once had led the effort to create a strong and stable national government and had sought federal control of the states, but who had come increasingly to fear that the Federalists were misusing the powers that had been created, these were climactic events. He called the Alien Bill “a monster that must for ever disgrace its parents”; he couldn’t believe that such a bill had even been proposed. Abandoning the syllogism to protect the major premise, he reversed course and took up the cause of the states which he had once sought so ardently to restrict.²¹

The powers of the federal government, he wrote in his famous Virginia Resolutions, are “limited by the plain sense and intention of the [Constitution]...as no farther valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states...have the right, and are in duty bound, to interpose for arresting the progress of the evil.” Faced now with the Federal government’s effort “to enlarge its powers by forced constructions of the constitutional charter which defines them,” one had no choice, he wrote, but to oppose these

constitutional distortions and so preserve the rights and liberties that had so recently been established. The evils were indeed palpable: 25 journalists were arrested for criticizing the government, 10 were convicted, 3 were fined and jailed. Beyond that, many newspapers were intimidated into silence or conformity; some simply disappeared under the government's pressure.²²

The implications were clear and threatening. If the government could infringe the rights of aliens during an undeclared war, Madison's spokesman in the Virginia House declared, it might equally infringe the rights of citizens. "One usurpation beget another. We ourselves might as well be the victims as others." And if foreign nationals residing in the country were to be deprived of common law rights "we should then have amongst us a body of men of whom the President would be the despot: they would be entirely in his power...if once we were to permit executive power to overleap its limits, where was it to stop?"²³

Resentments rose, resistance to the administration grew. But the system held. Within a year, the Federalists were voted out of office, and accepted the voters' decision. Jefferson, who had led the victorious opposition, declared in his inaugural address that "every difference of opinion is not a difference of principle...we are all Republicans we are all Federalists," and he rescinded what remained of the repressive laws of the undeclared war against France.

Madison's swings – from advocacy of a strong, indeed powerful, central government and opposition to specified protections against it, to authorship of the very protections he had opposed and to active hostility to the exercise of enlarged governmental powers – this oscillation reflects not the weakness of an indecisive politician but the heart of the creation of the nation. For the United States to survive as a nation, Madison and the Founders of the 1780s believed, the central government would have to be endowed with critical powers, real powers over the people

it governed, the power to tax and to mobilize the resources to maintain itself in a predatory world of warring states. But the outcome as we now see it in the superpower state is not what the Founders expected or intended, nor did it grow by inevitable stages.

In 2003, the year of America's invasion of Iraq, a young Swedish historian located in the writing of the Constitution the creation of a government of "unlimited" powers, "possessing all the important powers of the European 'fiscal-military' state" which would develop into the modern American global superpower.²⁴ The phrase "fiscal-military state," made fashionable in recent years by historians describing the build-up of the war-waging powers of France and Britain in the early modern period, describes a polity of limitless power to tax, to raise at will and deploy major armies and navies, and to engage as belligerents in all areas of international relations. And indeed the Constitution does provide for the federal government's power to impose taxes on people directly and to mobilize military forces including the state militias, and for its single executive to manage foreign affairs, including military engagements, limited only by Congressional concurrence. But if a global superpower is the modern outcome of the founding years, it was not the Founders' goal or accomplishment. To survive as a nation, and to secure the nation's strength and prosperity, they created the powers that the federal government needed, but they did so cautiously and carefully in the face of powerful antistatist forces, creating governmental powers parsimoniously as they felt their way at times almost blindly along a dark and dangerous path. In the context of the time – not in the retrospection of the outcome two centuries later - what is most striking is not that such powers were created but that they emerged so haltingly, so piecemeal, and so hedged about with external boundaries and internal contradictions.

In a reflective mood, after the Constitution and the amendments had been ratified and it was becoming clear that profound differences on major policy issues would lead to fierce party struggles, Madison felt the need to revisit, in a series of short topical essays, the essential principles that he believed had shaped the Revolutionary movement and the writing of the Constitution and that must, above all, be adhered to in the future. The topic of “Charters” went to the heart of the matter, and in that essay he described, with characteristic concision – in two sentences - everything essential that had been accomplished and what he believed America, in the end, stood for. In Europe, he wrote,

charters of liberty have been granted by
power. America has set the example...of
power granted by liberty. This revolution
in the practice of the world may...be
pronounced the most triumphant epoch
of its history and the most consoling
presage of its happiness.²⁵