

UNENUMERATED RIGHTS

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

RIGHTS RETAINED BY THE PEOPLE

The Federalists contended that a bill of rights was unnecessary. They responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that, inasmuch as it would be impossible to list all rights, it would be dangerous to list some and thereby lend support to the argument that government was unrestrained as to those rights not listed.¹ Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."² It is clear from its text and from Madison's statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas not enumerated, and that it does not contain within itself any guar-

¹ THE FEDERALIST No. 84 (Modern Library ed. 1937).

² 1 ANNALS OF CONGRESS 439 (1789). Earlier, Madison had written to Jefferson: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." 5 WRITINGS OF JAMES MADISON, 271–72 (G. Hunt ed., 1904). See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1898 (1833).