

James Madison and the Bill of Rights

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James Madison went to the Federal Convention of 1787 convinced that it faced no greater challenge than finding some means of checking "the aggressions of interested majorities on the rights of minorities and of individuals." He left it still fearful that the new Constitution would not effectually "secure individuals against encroachments on their rights." in his best known contribution to American political theory, *The Federalist*, No. 10, Madison again voiced his great concern that majorities were enacting laws "adverse to the rights of other citizens," and he went on to define the protection of the individual "faculties" of men as "the first object of government."

These and other statements suggest that Madison should have welcomed the addition of a Bill of Rights to the Constitution. And in fact Madison can rightly be regarded as the principal framer of the Bill of Rights which the First Federal Congress submitted to the states in 1789. Many congressmen felt that he was acting with undue haste in calling for quick action on the subject of amendments. Had Madison not pressed them to consider the amendments he had introduced early in the session, the Bill of Rights might never have been added to the Constitution. Yet even as he was shepherding the amendments through Congress in August 1789, Madison privately described his efforts as a "nauseous project." His acceptance of the need for a Bill of Rights came grudgingly. When the Constitution was being written in 1787, and even after it was ratified in 1788, Madison dismissed bills of rights as so many "parchment barriers" whose "inefficacy" (he reminded his good friend, Thomas Jefferson) was repeatedly demonstrated "on those occasions when [their] control is most needed." Even after Jefferson's entreaties finally led him to admit that bills of rights might have their uses, it still took a difficult election campaign against another friend, James Monroe, to get Madison to declare that, if elected to the House of Representatives, he would favor adding to the Constitution "the most satisfactory provisions for all essential rights."

To trace the evolution of James Madison's thinking about the virtues and defects of a bill of rights, then, is to confront the ambiguous mix of principled and political concerns that led to the adoption of the first ten amendments. Today, when disputes about the meaning of the Bill of Rights and its lineal descendant, the Fourteenth Amendment, have become so heated-when, indeed, we often regard the Bill of Rights as the essence of the Constitution-it is all the more important to fix the relation between the Constitution of 1787 and the amendments of 1789. To do this there is no better place to begin than with the concerns that troubled James Madison.

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Enumerating Rights

Much of the contemporary debate and controversy about the rights-based decisions that the Supreme Court has made over the past three decades centers on the question of whether the judiciary should protect only those rights that enjoy explicit constitutional or statutory sanction, or whether it can act to establish new rights-as in the case of abortion-on the basis of its understanding of certain general principles of liberty. We cannot know how Madison would decide particular cases today. But one aspect of his analysis of the problem of rights seems highly pertinent to the current debate. Madison's deepest reservations about the wisdom of adopting any bill of rights reflected his awareness of the difficulty of enumerating all the rights that deserved protection against the "infinite of legislative expedients" that could be deployed to the disadvantage of individuals and minorities. Madison's notion of rights was thus open-ended, but his ideas about which kinds of rights were most vulnerable changed over time. In 1787 he felt that the greatest dangers to liberty concerned the rights of property. The passage of paper money laws in various states revealed the depths of "injustice" to which these populist forces were willing to descend. Worse might be yet to come. At the Federal Convention, Madison

told his fellow delegates that he foresaw a day when power will slide into the hands" of "those who labour under all the hardships of life, and secretly sigh for a more equal distribution of its blessings." And even if the Constitution succeeded in checking the danger from a dispossessed proletariat, Madison thought that almost any act of legislation or taxation would affect rights of property. "What are many of the most important acts of legislation," he asked in *Federalist* 10, "but so many judicial determinations . concerning the rights of large bodies of citizens?"

But the development of Madison's ideas of liberty long predated the specific concerns he felt about the economic legislation of the 1780s. His first known comments on political issues of any kind expressed his abhorrence at the persecution of religious dissenters in pre-Revolutionary Virginia; and his first notable action in public life had been to secure an amendment to the Virginia . Declaration of Rights, the most influential of the bills of rights that had been attached to the state constitutions written at the time of independence. In 1785 Madison led against a bill to provide p, for all teachers of the religion in Virginia; the and Remonstrance *Against Religious Assessments* that he published in conjunction with this campaign treated rights of conscience as a realm of behavior entirely beyond the regulation of civil authority.

Majority Misrule We thus cannot doubt Madison's commitment to the cause of protecting private rights and civil li ties against improper intrusion the government. But all orthodox republicans in Revolutionary America shared such beliefs. What carried Madison beyond the conventional thought Of his contemporaries was, first, his analysis of the sources of the dangers to individual and minority rights, and second, the solutions and remedies he offered.

Traditional republican theory held that the great danger to liberty lay in the relentless efforts of scheming rulers to aggrandize their power at the expense of ordinary citizens. The great safeguard against such threats was believed to lie in the virtue and vigilance of the people.

The skeptical Madison sought to overturn this received wisdom. In the weeks preceding the gathering of the Federal Convention in May 1787, Madison collected his thoughts in a memorandum on the "Vices of the Political System of the United States." As he saw it, the "multiplicity," "mutability," and most important, "the injustice" of the laws of the states had called "into question the fundamental principle of republican Government, that the majority who rule in such Governments are the safest Guardians both of public Good and of private rights." The experience of the states demonstrated, Madison concluded, that neither legislative majorities nor the popular majorities whom they represented could be expected to refrain "from unjust violations of the rights and interests of the minority, or of individuals," whenever "an apparent interest or common passion" spurred such majorities to act. Religion, honor, a sense of the public good all the virtues a good republican might hope to see operate as restraints-seemed ineffective.

It is crucial to note that Madison directed his criticism against the character of lawmaking *within the individual states*; and the logic of his analysis further led him to conclude that the greatest dangers to liberty would continue to arise within the states, rather than from a reconstituted national government. The ill effects of majority rule far more likely would emerge within the small compass of local communities or states, where "factious majorities" could easily form, than in the extended sphere of a national republic that would "be broken into a greater variety of interests, of pursuits, of passions," whose very diversity and fluidity would check each other.

A Proposal for a National Veto The solutions Madison offered to this problem operated at two levels. He reserved his most radical proposal-an absolute national veto over state laws "in all cases whatsoever"-for the continuing need to protect individual rights against majority misrule within the states. In effect, Madison hoped the national government would serve as a "disinterested and dispassionate umpire in disputes between different passions and interests" within the states.

But Madison was also prepared to concede that the wrong kinds of majorities might still coalesce within the new Congress that the Federal Convention would create. "Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex," he reminded the Convention on July 21. Who could say whether Congress might not prove equally "impetuous"? To protect citizens against the danger of unjust national legislation, Madison favored establishing a joint executive-judicial council of revision armed with a veto over acts of Congress; he was also attracted to the idea of an independent and powerful Senate, insulated from both the state legislatures and the electorate, to counteract the excesses of the House of Representatives.

Madison justified all of these proposals in terms of the protection they would extend to individual and minority rights. But he went to the Convention convinced that bills of rights could add little if anything to the defense of civil liberty. None of the existing state bills of rights provided an effective check against legislative or popular excess. The problem was that bills of rights were not self-enforcing. The actual protection of the lofty principles they espoused required the existence of well-constituted governments. But if such governments did exist-or could be created-what need would they have for bills of rights?

Most of the framers at Philadelphia agreed that there was no need for adding a bill of rights to the new Constitution, but they rejected Madison's two pet proposals for a national veto and a Council of Revision. The Convention protected individual liberty only by placing a handful of prohibitions on the legislative authority of the states (notably laws impairing the obligation of contracts) or Congress (habeas corpus, ex post facto, bills of attainder). When George Mason belatedly insisted that the new Constitution required a much longer list of enumerated rights, his arguments were ignored.

The rejection of his pet scheme for a national veto on all state laws greatly disappointed Madison. During the first weeks after the Convention's adjournment, he seems to have feared that the new Constitution was fatally flawed because the new government would still lack the authority to deal with the problem of "vicious" popular and legislative majorities in the states. Even though the supremacy clause of the Constitution established a basis for state and federal judges to overturn laws violating individual rights, he doubted whether the judiciary could ever muster the will or political strength to withstand majoritarian excesses or the ingenuity of ambitious legislators.

When it came to the dangers that liberty might face from the national government, however, he was far more optimistic. Though not entirely happy with the system of checks and balances that would shape relations among the three branches, Madison thought it would discourage the enactment of harmful legislation. Moreover, he continued to rely confidently on the theory of the advantages of multiple factions he had derived just prior to the Convention. "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces," he wrote in *The Federalist*, No. 51, "a coalition of a majority of the whole society could seldom take place upon any other principles than those of justice and the general good." State laws might still work wholesale injustice; national laws, he believed, would not.

Anti-Federalist Clamor As Madison threw himself into the campaign to ratify the Constitution, however, he was forced to take seriously the growing clamor for the addition of a bill of rights especially after Jefferson wrote him to affirm his conviction "that a bill of rights is what the people are entitled to against every government on earth, general or particular [i.e., national or local], and what no just government should refuse or rest on inference." Had the issue of amendments been confined to matters of rights alone, Madison might have readily agreed. But fearing that many diehard Anti-Federalists hoped to exploit the call for amendments to propose major changes in the Constitution or even to promote a second convention, Madison balked at accepting Jefferson's correction.

In October 1788-more than a year after the adjournment of the Convention, and a good four

months after Virginia became the tenth state to ratify the Constitution-Madison wrote Jefferson to explain why, though now willing to see a bill of rights added to the Constitution, he found no other solid reason to support it than the fact "that it is anxiously desired by others." With other Federalists-notably James Wilson of Pennsylvania-he still thought that a bill rights was superfluous because the federal government could exercise only those powers that were expressly delegated to it-and those powers did not extend to violating individual liberties. Moreover, Madison confessed his "fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." Better (in other words) not to have any bill of rights than to incorporate in the Constitution weak statements that might actually leave room for the violation of the very liberties they were meant to protect.

Again, however, Madison drew his greatest doubts about the value of a bill of rights from his analysis of the problem of majority tyranny. In a monarchical regime, Madison noted, such declarations might serve as "a signal for rousing and uniting the superior force of the community" against the government. But in a republic, where the greatest dangers to liberty arose not from government but from the people themselves, a bill of rights could hardly serve to rally the majority against itself. The most Madison would concede was that a bill of rights might help to instill in the people greater respect for "the fundamental maxims of free government," and thus "counteract the impulses of interest and passion." He was willing to entertain, too, the idea that a bill of rights would be useful in case "usurped acts of the government" threatened the liberties of the community- but in his thinking, that problem remained only a speculative possibility.

Like any intellectual, then, Madison valued consistency too highly to renounce ideas to which he was deeply and personally committed. But Madison, for all his originality as a political theorist, was also a working politician. His early disappointment with the Constitution had quickly given way to the belief, as he wrote in *The Federalist*, No. 38, that "the errors which may be contained in the Constitution . [were] such as will not be ascertained until an actual trial shall have pointed them out." Amendments taking the form of a bill of rights might serve a vital political function-even though unnecessary on their merits-if they could be framed in such a way as to reconcile the moderate opponents of the Constitution without opening an avenue to a radical assault on the essential structure of the new government.

This sensitivity to the need to assuage popular opinion was reinforced by Madison's own experience in the first congressional elections of 1788-89, when he faced a difficult fight against James Monroe. With reports abroad that Madison "did not think that a single letter of [the Constitution] would admit of a change," he found it necessary not only to return to Virginia from his seat in the Confederation Congress at New York and to travel around the district debating with Monroe, but more important, to issue public letters affirming his willingness to propose and support is amendments guaranteeing such "essential rights" as "the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants etc." Even then, however, he was careful to note that he had "never seen in the Constitution . those serious dangers which have alarmed many respectable Citizens."

Political Exigencies Madison carried the election by a margin of 336 votes out of 2,280 cast. Four weeks into the first session of Congress, he informed his colleagues of his intention to bring the subject of amendments forward, but another month passed before he was at last able to present a comprehensive set of proposals on June 8, 1789.

Some congressmen thought that Madison was acting from political motives alone. Senator Robert Morris of Pennsylvania scoffed that Madison "got frightened in Virginia 'and wrote a Book'" -a reference to his public letters on amendments. But there was nothing disingenuous about Madison's June 8 speech introducing his plan of amendments. Having reconciled himself to political exigencies, Madison sought to achieve goals consistent with his private beliefs.

In typical scholarly fashion, he had culled from over two hundred amendments proposed by the

state ratification conventions a list of nineteen potential changes to the Constitution. Two of his proposals concerned congressional salaries and the population ratio of the House; two can best be described as general statements of principles of government. The remaining amendments fell under the general rubric of "rights."

The most noteworthy aspects of Madison's introductory speech of June 8 is that it faithfully recapitulates the positions he had taken not only in his election campaign against Monroe but also in his correspondence with Jefferson. He took care to deal with the objections that could come from AntiFederalists and Federalists alike, noting his reasons for originally opposing amendments, explaining why he had changed his mind, yet also leaving his listeners and readers with a clear understanding that he was acting on a mixture of political and principled motives. The central elements of his analysis of the problem of protecting rights in a republican government were all there: the difficulty of enumerating rights, the emphasis on the greater danger from popular majorities than acts of government, the risks of trusting too much to "paper barriers."

Two of his proposals deserve special notice. The first is the forerunner of the Ninth Amendment. In its graceless original wording, it read: "The exceptions here or else- where in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or a inserted merely for greater caution." Here Madison sought to prevent the enumeration of specific rights from relegating other rights to an inferior state concern that was consistent with both his open-ended notion of rights and his fear that any textually specific statement might inadvertently or otherwise create loopholes permitting the violation of liberties. As finally adopted by Congress and ratified by the states, this amendment came to read: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Among all the provisions of the Bill of Rights, this somewhat mysterious formula has had perhaps the most curious history. Long ignored and disparaged because it did not identify the additional rights it implied should be protected, it was resurrected in the critical 1965 case of *Oswald v Connecticut*. In his concurring opinion, Justice Arthur Goldberg invoked the Ninth Amendment to support the claim that state prohibition on contraception even for married couples violated a fundamental right of privacy that did not need to be specifically identified to be deserving of constitutional protection. If interpreted in Madisonian terms, this "forgotten" provision is immediately and enormously relevant to the current controversy over the extent to which judges can recognize claims of rights not enumerated in the text of the Constitution itself.

No State Shall Violate The second proposal of particular interest-and arguably the most important to Madison-held that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." All the other amendments that Madison enumerated elsewhere in his speech imposed limitations on the power of the national government alone. This amendment, by contrast, proposed adding to the prohibitions on state legislative authority already found in Article VI of the Constitution these further restraints in the three critical areas of religion, speech, and criminal law. Here, in effect, Madison belatedly hoped to salvage something of his original intention of creating a national government capable of protecting individual rights within (and against) the individual states, in a manner consistent with his belief that the greatest threats to liberty would continue to arise there, and not at the national level of government.

On this proposal Madison again met defeat. Not until the adoption of the Fourteenth Amendment in 1868 would the Constitution contain provisions that would establish a firm foundation upon which the federal government could finally act as the James Madison of 1787-89 had hoped it would. But after a variety of procedural delays, Congress finally endorsed Madison's remaining provisions for the protection of individual liberty. All of the first ten amendments that we collectively describe as the Bill of Rights appeared, in seminal form, in Madison's speech of June

8. Among the rights he then insisted upon recognizing, Madison included: free exercise of religion; freedom of speech, of the press, and the right of assembly; the right to bear arms; and the protection of fundamental civil liberties against the legal and coercive power of the state through such devices as restrictions on "unreasonable searches and seizures," bail, "the right to a speedy and public trial" with "the assistance of counsel," and the right to "just compensation" for property.

Rethinking Because the states retained the major share of legislative responsibility for more than another century, the Bill of Rights had little initial impact. Arguably only during the past forty years has it emerged as a central pillar of American constitutionalism-and thus as a central source of political controversy as well, as the current debate over the legitimacy of judicial "activism" in the enforcement and even creation of rights readily attests. But question of what the prohibitions the Bill of Rights finally mean be answered only in part by appealing to the evidence of history.

Madison himself was one of the first to realize how ideas of rights had to be adjusted to meet changing political circumstances. His original breakthroughs in constitutional theory had rested on the conviction that in a republic the greatest dangers to liberty would arise "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." He had further predicted that the greatest dangers to liberty would continue to arise within the states. Within a decade of the writing of the Constitution, however, the efforts of the Federalist administration of President John Adams to use the Sedition Act of 1798 to quell the opposition press of Madison's Republican party, in seeming defiance of the First Amendment, forced Madison to rethink his position. Now he saw more clearly how the existence of a bill of rights could serve to rally public opinion against improper acts of government; how dangers to liberty could arise at the enlightened level of national government as well as at the more parochial level of the states; and even how the political influence of the states could be used to check the excesses of national power.

Our ideas of rights and liberty have deep historical and philosophical roots which any good faith effort at interpretation must always take into account; and Madison's agency in drafting both the Constitution and its first ten amendments suggests that his views deserve particular attention and even respect. Yet just as his own efforts to understand both what the Constitution meant and how liberty was to be protected continued well after 1789-indeed literally to his death nearly a half century later-neither can ours be confined to recovering only some one meaning frozen at a mythical moment of supreme understanding. Such a moment never existed and never will.

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