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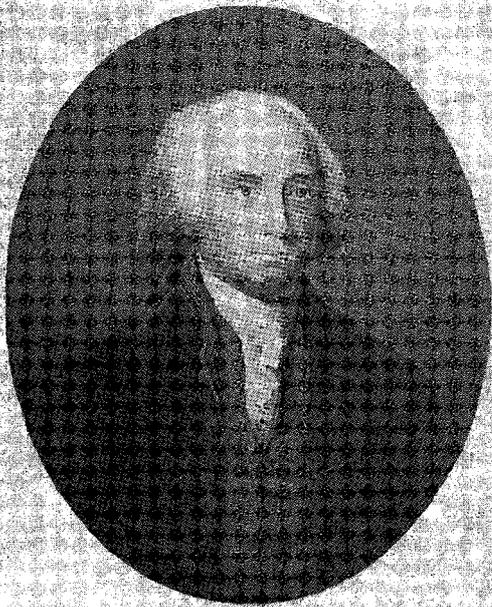
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Legacy

A
CONVERSATION
WITH
JAMES
MADISON

By Rodney A. Smolla

Rodney A. Smolla is the Arthur B. Hanson Professor of Law and director of the Institute of Bill of Rights Law at the College of William and Mary.

I was seated on a flight, the night before I was to address a conference on the Bicentennial of the First Amendment. It was a speech I knew so well I could practically deliver it by heart.

First, I would begin with an historic overview, touching on the Court's modern decisions on areas like national security, flag-burning and obscenity. Warming to my theme, I would stress the importance of a vigorous press and the need for a climate of tolerance on campus.

As I began nodding off, I felt a tug at my sleeve. A short man in a powdered wig was seated beside me.

"Throw away your prepared text," he commanded.

"Who are you?" I asked, rubbing my eyes.

"I am James Madison."

"What?"

"Throw away your speech. It's too long and too formal. People can't take a long speech at the end of a convention."

"But I worked so hard on it, and..."

"Don't argue. Trust me, I know *conventions*."

"That's true. But if I don't give my speech, what will I do? I have to say something tomorrow morning."

"Just make a few interesting points and sit down."

"Hmmm. Maybe you're right. Ah, Mr. Madison, as long as I have you here—maybe you could help me."

"Help you?"

"Answer a few questions."

"I don't know. I have a schedule."

"Just a few minutes of your time to clear up some current controversies. By the way, Mr. Madison, do you know very much about contemporary society?"

"Everything."

"Everything?"

"We get all the major newspapers. And of course, now, CNN."

"I see. Well, my audience is particularly interested in the First Amendment. Perhaps you can tell me what it really means: May cable television systems be subject to taxes not applicable to print media? May the Department of Defense deny journalists access to combat areas in foreign lands, forcing reporters to participate in a pool system?"

"And may the government obtain a prior restraint to prevent a newspaper from publishing material inimical to national security? Or may newspapers be punished for printing intimate facts about the private lives of public officials, or for identifying the names of rape victims?"

"And what about commercial speech? Should it get as much protection as speech on political matters? Is obscenity protected by the First Amendment? Flag-burning? And what about racist speech on campus?"

"May a state university require students and faculty to be 'politically correct'? May the government force artists who receive money from the National Endowment for the Arts to sign a decency pledge? May—?"

"Hold on! Hold on! Why are you asking *me* all these questions?"

"Well, you are James Madison."

"So?"

"You wrote the First Amendment."

"So what?"

"So what? You wrote it, so you know what it means. You can end these debates for us."

"I'm afraid you have this all backwards. It's not my intent that matters, or even the intent of my generation. It's yours."

"What do you mean?"

"Look, we couldn't possibly have known about all these questions in 1791. We had our own problems to deal with. Like slavery, central banks, and Great Britain. There *was* no National Endowment for the Arts. We couldn't anticipate how the world would change. And we couldn't write a constitution with specific answers to the conflicts that would be posed by those changes."

"But surely you had *something* concrete in mind when you wrote the First Amendment. Can't you at least give us some basic guiding principles?"

"No, not the kinds of principles that I think you want. Remember, I was only the original sponsor of the Bill of Rights. Many others were in on the process. Even I came to accept the notion of a declaration of rights only belatedly, after much thought, introspection, and political wheeling and dealing."

"Others who voted for the Bill of Rights, in Congress, and in the states that ratified it, had widely divergent opinions as to its meaning. So there was no single intent, no single meaning."

"Indeed, even in my own mind, my ideas on the meaning of the Constitution and Bill of Rights changed over time. It was a volatile period of great intellectual ferment. Ideas were evolving. Our national life was a magnificent new experiment."

"Is that why you kept your personal notes from the Constitutional Convention secret for 50 years?"

"Precisely. I did not want my notes to take on any special authority. The Constitution is not a set piece. Each generation must struggle with it, mediating past and future, resolving conflicts in the constitutional unconscious."

"So, Mr. Madison, you can't answer *any* of my questions?"

"I can give you my opinions. But you'll have to find your own answers."

"Fair enough. Let me start with commercial speech. Should we protect tobacco advertising in print media?"

"You know, I think your Supreme Court has gone a bit astray in this one. Back in my day, we didn't distinguish between political and commercial speech. Our papers were filled with advertising. Half the newspapers of the day bore the name 'advertiser' in the title. Even the special editions that contained the text of the Constitution were filled with pages of advertising."

"So you think tobacco ads should be protected by the First Amendment?"

"Well, I'm biased, of course. I come from a tobacco state. But yes. If the government wants to regulate the underlying economic transaction in reasonable ways, that's fine. But it should not abridge speech about a transaction that is legal other than to police advertising that is false or misleading. That's just my opinion."

"What about speech on college campuses? What about the 'politically correct' movement?"

"I really don't care for it. It's not my idea of what a university is all about."

"Yes. You know, Mr. Madison, on the campus where I teach, if I were to refer to you as a short person, I might be chastised. The politically correct term is 'vertically challenged.'"

"There you have it. You know, in my view, the mere fact that speech will cause emotional or intellectual disturbance should never be enough, standing alone, to justify its abridgment."

"What then, Mr. Madison, do you think of the Supreme Court's flag-burning decision? Should a citizen have a constitutional right to burn the American



First Amendment issues: Setting up the Robert Mapplethorpe exhibit in Boston; reporting by press pools in Saudi Arabia.



Burning the flag in Seattle.

AP PHOTOS

flag, as a symbol of protest?"

"That's not an easy question. At first I was skeptical, but I have come to agree with the Supreme Court."

"Really?"

"No clean line can be drawn between speech and conduct. All speech *is* conduct, after all. Freedoms of speech and press are constantly intertwined with physical action, whether it is writing on parchment or speaking from a soapbox or delivering newspapers with trucks, or sending electrons through wires.

"The same is true of freedom of assembly, whether marching en masse through Tiananmen Square, or the Washington Mall. And the consecration and desecration of symbols is one of the most powerful of all forms of expression, whether waving flags, or burning flags, in Warsaw or Prague, Washington or Dallas. Protest demonstrations and symbolic speech—even though graphic or offensive to many—are the poor man's mass media.

"The average citizen does not own a newspaper. He or she can effectively vent frustration and protest in only a limited number of ways. Joining in peaceful mass demonstrations and using symbols and signs are the essence of people power in the modern world."

"But, Mr. Madison, the flag embodies our national spirit, our unity as a people."

"No, the flag embodies our commitment to freedom. And that must include the freedom to attack even our most sacred symbols. The answer to flag-burning is flag-waving. We are a resilient people, and our resiliency comes from tolerating peaceful protest, not squelching it."

"Your friend Thomas Jefferson once said that if he had to choose between a government without newspapers, or newspapers without a government, he would not hesitate to choose the latter."

"Yes, well, you cannot take everything Thomas said at face value. He was better at turning a pithy phrase than thinking it through. But pith is no substitute for clear analysis. He still likes to hold forth all the time. I told him just the other day, 'Thomas, your rhetoric soars onward and upward, to higher and higher platitudes.'"

"Which would you choose, Mr. Madison? Newspapers or government?"

"I won't answer the question the way you put it. Quality thinking does not come from putting problems in stark, black-and-white terms. It comes from having the flexibility, subtlety and nuance to navigate in seas of gray. Now, give me an intelligent question."

What about media access?"

"One of my favorite topics. Again, I'm not totally satisfied with how things have progressed in this area. In my view, your Supreme Court has struck an 'access bargain.' It recognizes very little right of access by the average citizen to the institutional press. That's good for newspapers.

"In return, however, it recognizes very little right of access by the press to many governmental institutions and places, other than courts. That's bad for newspapers. That's what leads to such things as media pools in the Persian Gulf."

"How can the press win greater rights of access?"

"Fight to revive the Press Clause. Go back and

read the text. It says 'Congress shall make no law abridging the freedom of speech, or of the press.'"

"So you contemplated a Press Clause that had a meaning distinct from the Speech Clause?"

"Of course I did. I believed, you know, in economy of language. I neither minced words nor wasted them."

"Well, yes, that's true. The entire Bill of Rights fits easily on the side of a McDonald's cup."

"When I said 'or of the press,' I meant for the press to have protection in its institutional role, protection distinct from the more general protection embodied in the phrase 'freedom of speech.'"

"Really? But our Supreme Court has held just the opposite."

"Yes, I am aware of those decisions. But they are not what I intended."

"So the Supreme Court has gotten that part of the First Amendment wrong?"

"No. What I said, remember, cannot and should not control. The Court has simply interpreted the amendment in a manner different from what I would have preferred. But it may still come around some day."

"You say 'some day.' Can you see into the future?"

"In a manner of speaking, yes. We can't literally foresee the future. But we do have an acute vision of history up here. We have the ability to project the curve of events with much greater accuracy than you do. Sometimes I feel as if I am seeing what lies ahead."

"That's good enough for me. Look, here's what I want to know: Will the Soviet Union survive into the next century? Will democracy ever flourish in China? Will Dan Quayle ever be president? Will Bo Jackson play baseball again?"

"You're asking the wrong questions, though I will say, don't count Bo out."

"Really? His hip will heal?"

"I really can't say anymore."

"All right. Look, you say I am asking the wrong questions. What questions should I ask?"

You should ask the questions that define the fabric of human life. The questions from which the warp and woof of a nation are woven."

"Wow."

"You might ask yourself, for example, whether, in light of the inevitable pressures of the next 100 years, the Bill of Rights and the First Amendment will survive."

"What do you mean?"

"Well, take the First Amendment. New technologies will make America increasingly part of a global news village, an international marketplace of ideas."

"Isn't that good?"

"Sure, it's good in many ways, but it has its perils. The rest of the world does not embrace freedom of speech and press the way we do. In virtually all other societies freedom of the press is recognized, but it is always subject to reasonable regulation. And 'reasonable' usually means whatever laws the government chooses to pass—since all governments, particularly democratic governments, regard themselves as reasonable ones.

"Only in the United States have we embraced the rule that laws restricting the freedoms of speech and press may *not* be passed merely because they seem reasonable to the majority. We stand alone in our radical commitment to freedom of speech and the press."

"But how do new technologies affect this?"

"New waves of technology have always brought on



Far left: Rallying for racial equality at the University of Vermont. Left: Presenting opening statements at rape trial in the Central Park jogger case.

BURLINGTON FREE PRESS/JYM WILSON AND AP

new waves of censorship. It is no accident that censorship bureaus sprang up in Europe immediately following the invention of the printing press.

"But more importantly, as we become a unified speech and news market, America's interpretation of the First Amendment increasingly stands out in raised relief. The pressures of the market will make our unique position in the world more and more difficult to sustain."

"So what are you saying, Mr. Madison? Will the rest of the world begin to treat freedom of speech more like we do in America? Or will the United States begin to treat freedom of speech more like the rest of the world does, watering down our First Amendment rights, subjecting speech and the press to so-called 'reasonable' regulation?"

"That is the very type of question I want you to ask yourself, and to struggle with."

"I see. But can you give us any parting guidance?"

Only this: Our legacy to the world is not democracy. Democracy was an idea 2,000 years old when I helped create the Constitution. And today democracies exist throughout the world.

"No, our legacy to the world is not the concept of democracy, but the idea of rights. We Americans are unique in the history of the world in wagering our salvation on a profound national commitment to elemental human rights, rights that citizens enjoy by the very fact of their humanity, rights endowed by the Creator, rights that no government, not even a democratic government, may abolish or abridge. It is against that backdrop that you should search for the modern meaning of the 200-year-old proclamation, 'Congress shall make no law... abridging the freedom of speech, or of the press.'"

"Thank you, Mr. Madison. Those are stirring words. Thank you for dreaming them, for speaking them, for writing them. Thank you for everything." ■

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