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## JAMES MADISON, THE BILL OF RIGHTS, AND THE PROBLEM OF THE STATES

CHARLES F. HOBSON\*

As one who has been involved for some years in preparing annotated editions of the papers of two American founders (first James Madison and now John Marshall), I am delighted to see the excellent use Professor Rakove has made of the Madison edition<sup>1</sup> in this and in other recent articles that have established him as a leading Madison scholar.<sup>2</sup> It is perhaps not too much of an exaggeration to attribute the recent proliferation of Madison studies to the availability of the modern edition of the great statesman's papers. Most happily for the bicentennial, the volumes covering the origins and ratification of the Constitution were out some years before that event. Of course, the bicentennial itself would have sparked renewed interest in Madison, and Rakove and other scholars could have executed their studies without having this edition at their fingertips. I claim no more than that the edition has greatly facilitated their research and their quest for new insights into Madison's thought. Mr. Rakove's forte is close readings of texts, analyzing and comparing them to reveal subtleties and nuances, with a sensitive awareness of the circumstances in which they were written. This kind of intensive study of texts in context is precisely what these modern scholarly editions encourage students to undertake.

Having read the same texts as Professor Rakove, I find his interpretation of Madison persuasive. Emphasizing the changing, developmental quality of the founder's thought, Rakove sees Madison's as anything but a rigid, doctrinaire mind. He takes Madison's

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1. *THE PAPERS OF JAMES MADISON* (W. Hutchinson, W. Rachal, R. Rutland, C. Hobson, F. Teute & T. Mason eds. 1962-present).

2. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245 (1990); Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988); Rakove, *James Madison and the Bill of Rights*, THIS CONST., Spring/Summer 1988, at 4; Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC, Dec. 1986, at 77.

skepticism about bills of rights as a starting point for an illuminating inquiry into the statesman's thinking about rights and liberties. Madison, he notes, has the best claim of anyone to be called "father" of the American Bill of Rights, despite his doubts about the efficacy of what he termed "parchment barriers" in protecting fundamental rights.<sup>3</sup> Uncertain as Madison was about the value of a constitutional enumeration of rights, no one thought more deeply about the problem of safeguarding such rights in a republican society. Among the founding fathers, Madison is perhaps the only one who could be called a civil libertarian by the rigorous standards of the American Civil Liberties Union.

The bicentennial of the Bill of Rights will be the occasion of much inflated rhetoric commemorating the birth of our great charter of liberties. We will praise the framers for wisely, if belatedly, annexing these crucial amendments. For the sake of historical accuracy, however, we must avoid bestowing too much credit on the founders. The Bill of Rights that is justly celebrated and cherished by modern civil libertarians is largely a twentieth-century achievement, having only a tenuous connection with events 200 years ago. The original Bill of Rights arose less from a concern to protect individual liberty against governmental power than from a desire to promote political harmony. Its adoption was largely a historical accident, an unintended consequence of the debate over the ratification of the Constitution. The demand for a bill of rights by Anti-federalist opponents of the Constitution was but one part—and not the most important part—of a larger campaign to dilute if not abolish some of the substantive powers of the federal government. To them the essential purpose of a bill of rights was to protect state rights, not individual rights. Indeed, they saw no distinction between the two. They bitterly complained that a bill of rights without further substantive alterations was "little better than whip-syllabub, frothy and full of wind, formed only to please the palate."<sup>4</sup> A variant metaphor likened a bill of rights to "a tub

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3. Rakove, *The Madisonian Theory of Rights*, *supra* note 2, at 254 (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 11 THE PAPERS OF JAMES MADISON 295, 297 (1977)).

4. Speech by Aedanus Burke Before the U.S. House of Representatives (Aug. 15, 1789), reprinted in 1 ANNALS OF CONG. 745 (J. Gales ed. 1789).

thrown out to a whale, to secure the freight of the ship and its peaceable voyage."<sup>5</sup>

For more than a century after its enactment, the Bill of Rights remained a minor appendage to the original Constitution, a negligible source of constitutional adjudication. In this century the Supreme Court brought about a gradual yet revolutionary transformation of the Bill of Rights. Under its interpretation of the due process clause of the fourteenth amendment, the Court held that rights enumerated in the first eight amendments could operate as restrictions on state governments. Judicial interpretation in effect created a "Second Bill of Rights" that now operates almost exclusively against state and local legislation.<sup>6</sup> Its role in our constitutional system has become, for all practical purposes, the opposite of what those who clamored most loudly for the addition of a bill of rights in 1788 and 1789 intended it to be. I hasten to add that in saying that this unforeseen development was not part of the "original intention" of 1789, I do not mean to suggest that it lacks validity, historical or otherwise.

As a historian and student of Madison's thought, I instinctively recoil at attempts to enlist this eighteenth-century statesman on one side or another of our present-day debates. Nevertheless, at the risk of committing an anachronism, I would like to suggest that Madison would have looked with favor upon the modern judicial interpretation of the Bill of Rights as a restriction on the states. Modern Bill of Rights adjudication testifies to Madison's remarkable prescience, to the enduring validity of his insights 200 years ago. That violations of fundamental rights are more likely to be committed by state governments than the federal government remains as true today as it was then.

The problem of reconciling majority rule with individual and minority rights was the central theme of Madison's political thought. As Rakove points out, Madison first began to think deeply about this problem during the 1780s, when he served in the Virginia legislature.<sup>7</sup> He formulated then his brilliant insight that the danger

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5. *Id.*

6. See generally R. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* (1981).

7. Rakove, *The Madisonian Theory of Rights*, *supra* note 2, at 250-51.

to liberty lay not so much in the acts of an arbitrary government against the wishes of the people, "but, from acts in which the Government is the mere instrument of the major number of the constituents."<sup>8</sup> Because factions are endemic to free societies, legislation in the republican governments of the states frequently represented the selfish desires of interested majorities. A multiplicity of unwise and unjust laws was the bitter fruit of the establishment of independent republics in post-Revolutionary America.<sup>9</sup>

As Rakove says, this problem of the states, more than anything else, "drove the development of [Madison's] constitutional thinking in the mid-1780s."<sup>10</sup> The solution to the problem animated his plan to reform the national constitution. The novelty of his plan lay not so much in the means proposed to invigorate the general government but in his vision of a reconstituted national government as a bulwark against state government invasions of private rights. The chief advantage of a national government, Madison believed, was its negative capacity to prevent the abuse of power in the states. It would function as a steadying "anchor against the fluctuations which threaten shipwreck to our liberty."<sup>11</sup>

Madison realized that no amount of constitutional tinkering within the states themselves could solve the problem. As he explained in setting forth his theory of factions, the very smallness of the state jurisdictions facilitated the formation of factious majorities bent on carrying out their mischief under the guise of public law. The only way to control the states was by an external power—more precisely, by a power representing the entire nation of which the states were a part. Hence arose Madison's extraordinary proposal to vest the national legislature with a power to veto state laws "in all cases whatsoever."<sup>12</sup>

The Philadelphia Convention rejected the veto on state laws, and for that reason Madison believed the Constitution did not re-

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8. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 11 *THE PAPERS OF JAMES MADISON* 295, 298 (1977).

9. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 393-413 (1969).

10. Rakove, *The Madisonian Theory of Rights*, *supra* note 2, at 251.

11. Letter from James Madison to George Washington (Dec. 14, 1787), reprinted in 10 *THE PAPERS OF JAMES MADISON* 327 (1977).

12. See Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *WM. & MARY Q.* 215, 219 (1979).

ally solve the problem of the states. If he was less than enthusiastic about adding a bill of rights to the Constitution, it was because these amendments, as proposed by the various ratifying conventions, aimed at restricting the power of the federal government. The real danger to private rights, he continued to believe, lay in the states. Madison's original draft of amendments, submitted to Congress in June 1789, contained important restrictions on the states as well: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>13</sup> Of all the amendments he proposed, this one most truly represented his thinking. It was, he said, the "most valuable amendment on the whole list."<sup>14</sup> The amendment failed to get past the Senate, however, and its defeat is further proof that the main purpose of the Bill of Rights in 1789 was to appease states' rights sentiment. Almost alone among his fellow statesmen in 1789, Madison wished to extend the protections of a bill of rights to include protections against state governments.

Prescient as he was in so many ways, Madison in one important respect did not anticipate future developments. He did not foresee that the judiciary would become the principal expounder of the Constitution and the primary institution to guard against violations of fundamental rights. Judicial enforcement of the prohibitions and restrictions enumerated in the Constitution was at best a minor and probably ineffective means of protecting against legislative encroachments. In stating his arguments in favor of a bill of rights, Madison omitted one that had "great weight" with Jefferson, namely, "the legal check which it puts into the hands of the judiciary."<sup>15</sup> Prompted by Jefferson, Madison did include this point in his long speech introducing the amendments in June 1789, but clearly as a subsidiary argument.<sup>16</sup>

The problem with judicial protection of fundamental rights was that, even conceding that courts might be sufficiently powerful and independent to resist legislative invasions of rights, judicial inter-

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13. Amendments to Constitution (June 8, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 202 (1979).

14. Amendments to Constitution (Aug. 17, 1789), *supra* note 13, at 344.

15. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 13, 13 (1979).

16. Amendments to Constitution, *supra* note 13, at 207.

vention came too late, after the injury had already occurred. Moreover, judicial redress was cumbersome and costly. Madison believed it far better "to prevent the passage of a law, than to declare it void after it is passed."<sup>17</sup> Instead of judicial review, then, Madison favored a more radical approach, a constitutional design that would prevent bad or unjust laws from being enacted in the first place. Thus state laws would be subject to veto by the national legislature. Another pet proposal of Madison's, as Rakove points out, was designed to accomplish this purpose in regard to federal legislation.<sup>18</sup> The proposal was to bring together members of the executive and judiciary in a "[c]ouncil of revision" that would possess a limited veto power over bills passed by the national legislature. This limited veto would extend to Congress' negative on state legislation as well.<sup>19</sup> Although judges were to have an important share in the revisionary power, they would be acting here not in their judicial capacity but as ordinary legislators. Not only could they strike down legislation at its birth, but they could do so on grounds of bad policy as well as unconstitutionality.

If the negative on state laws and the council of revision had somehow made it into the Constitution, judicial review would not have been necessary. As Madison explained some years later, one purpose of allowing the judiciary to participate in the revisionary power over legislative bills was to preclude "the question of Judiciary annulment of Legislative Acts."<sup>20</sup> Revisionary power, indeed, was antithetical to the doctrine of judicial review. John F. Mercer, a supporter of the council of revision proposal at the Philadelphia Convention, "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable."<sup>21</sup>

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17. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 205, 211 (1977).

18. Rakove, *The Madisonian Theory of Rights*, supra note 2, at 264-65.

19. Resolutions Proposed by Mr. Randolph for the Virginia Plan (May 29, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 15, 16 (1977).

20. Letter from James Madison to James Monroe (Dec. 27, 1817), reprinted in 8 THE WRITINGS OF JAMES MADISON 403, 406-07 (1908).

21. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 298 (M. Farrand rev. ed. 1966).

As things turned out, Americans chose subsequent judicial review over prior legislative veto and judicial revision. While Madison, too, eventually accepted judicial review, privately, I submit, he never really abandoned his preference for either the negative or the council of revision. Still, while denying in 1787 that judicial review could replace a veto on state laws, Madison lived long enough to see the judiciary become a more powerful institution than he believed possible at the time the Constitution was formed.

As the nominal defendant in William Marbury's application for a writ of mandamus in 1803, Secretary of State Madison had a foretaste of what the judiciary might become in the hands of a creative jurist like John Marshall.<sup>22</sup> Although these two Virginians were at odds politically, after 200 years their similarities rather than their differences stand out, at least on fundamental questions touching the nature of the American federal system. Like Madison, Marshall believed the essential purpose of the Constitution was to be a check on state governments. Judicial review by the Marshall Court was exercised almost exclusively against state laws. A seemingly innocuous clause of the Constitution, prohibiting the states from impairing the obligation of contracts, became the Court's principal weapon for invalidating state laws.<sup>23</sup> Marshall's broad reading of that clause brought within the Court's purview a far larger class of state legislation than was contemplated by anyone at the time the Constitution was adopted. The contract clause was not a negative "in all cases whatsoever," but it was an effective means of accomplishing the same purposes Madison had in mind—notably, voiding laws that infringed the rights of property.

As noted above, the Bill of Rights amendments of 1789 were intended as restrictions on the power of the federal government. This view received official sanction in 1833 in John Marshall's opinion in *Barron v. Baltimore*.<sup>24</sup> In that case, the Supreme Court rejected the contention that the fifth amendment applied to the states as well as to the federal government. As a consequence, until the adoption of the fourteenth amendment after the Civil War, the

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22. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

23. U.S. CONST. art. I, § 10. See generally B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938).

24. 32 U.S. (7 Pet.) 243, 247-48 (1833).

original unamended Constitution had to suffice as a kind of bill of rights to keep the states in line. Marshall made this very point in *Fletcher v. Peck*:<sup>25</sup>

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.<sup>26</sup>

These words of Chief Justice Marshall, I believe, perfectly state the "original intention" of James Madison the framer.

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25. 10 U.S. (6 Cranch) 87 (1810).

26. *Id.* at 137-38.