

# William & Mary Law Review

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Volume 31 (1989-1990)  
Issue 2 *The Bill of Rights at 200 Years:  
Bicentennial Perspectives*

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Article 3

February 1990

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Jack N. Rakove, *The Madisonian Theory of Rights*, 31 Wm. & Mary L. Rev. 245 (1990),  
<https://scholarship.law.wm.edu/wmlr/vol31/iss2/3>

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## THE MADISONIAN THEORY OF RIGHTS

JACK N. RAKOVE\*

In April 1988, I paid my first visit to the estate of James Madison at Montpelier. The tour is far less elaborate than what one sees at Mr. Jefferson's house at Monticello—and in this, as in so many other things, our fourth president still lags a step or two behind his friend and immediate predecessor. The van that takes visitors from the mansion to the parking lot some distance away swings by the family plot where Madison is buried. I was the only passenger who took up the driver's invitation to view the grave; but then I was the only Madison biographer on the bus, and it was late in the afternoon. In any event, there was little to linger over. The stone simply reads, "James Madison, 1751-1836." Once again, I found it hard to ignore the contrast with another marker not so far away, where Thomas Jefferson, by his own wish, is remembered as the "Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia."

Any epitaph written for Madison today would probably recall him as the principal author of the Constitution of 1787, of *The Federalist*, and of the constitutional amendments we know as the Bill of Rights. Among these three achievements, Madison would doubtless be most proud of the first and most surprised by the great intellectual reputation he has gained from the second. But perhaps he would be most puzzled by the enormous influence that the Bill of Rights has acquired over modern American constitutionalism. For, although Madison the founder was very much the libertarian, he was highly skeptical of the value of bills of rights. Indeed, in August 1789, at the height of the congressional debates over his proposed amendments to the Constitution, he privately described his efforts as a "nauseous project"<sup>1</sup>—though by this he

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1. Letter from James Madison to Richard Peters (Aug. 19, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON 346, 346 (1979).

probably alluded to the feelings of his colleagues in Congress rather than his own.

Among the members of the First Congress, Madison was almost alone in believing that prompt action on amendments was a political necessity. Nearly everyone else favored postponing the entire subject until the new government was operating safely—by which point, many congressmen hoped, the perceived need for a bill of rights itself might have evaporated. Madison's insistence that Congress act sooner, not later, insured the incorporation of a bill of rights in the Constitution.

On balance, however, Madison's prior and subsisting doubts about the value of bills of rights seem far more interesting than his expedient reasons for proposing the amendments of 1789. He based his position on this question on considerations far more substantial than the standard Federalist argument that a bill of rights was unnecessary and even dangerous. Madison's reservations were rooted instead in his fundamental criticism of what he called the "Vices of the Political System of the United States"<sup>2</sup> and in his general theory of republican government—especially as that theory coalesced during the late 1780s, the Madisonian moment of American constitutionalism. Recognizing, as a good originalist should, that the intentions and understandings prevailing at the time of the legal adoption of the Constitution should guide later interpretations, I propose to pay particular attention to the conclusions Madison drew during this crucial period. At the same time, as a card-carrying historian concerned with describing change over time, I want to identify the evolutionary elements in his thought, and in doing so, to suggest something of the difficulty of trying to isolate a pure or pristine Madisonian understanding of the problem of rights.<sup>3</sup>

By way of introduction, one can identify three critical propositions that lie at the heart of Madison's thinking about bills of rights and the larger problem of the protection of individual and minority rights:

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2. Madison, *Vices of the Political System of the United States*, reprinted in 9 THE PAPERS OF JAMES MADISON 345 (1975).

3. For a more general discussion of Madison's political thought in the late 1780s, see Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988).

1. In a republic, claims of rights were to be asserted most directly not against the coercive authority of the state per se, but against the wishes and desires of interested popular majorities who could, in effect, control the uses to which the legal power of the state could be put.

2. Consistent with the arithmetical logic of his general theory of faction, Madison believed that the greater dangers to individual and minority rights would continually arise within the smaller compass of the states and local communities rather than within the extended sphere of the national republic itself.<sup>4</sup> Seen in this way, the most Madisonian element of the Constitution is arguably the fourteenth amendment, which was, of course, adopted a full three decades after his death.

3. Madison's reservations about the dangers inherent in any enumeration of rights rested on a profound perception of the plasticity of legislative power. The enumeration of rights was problematic because the delegation of specific powers was unlikely to restrain lawmakers who knew how to exploit the suppleness of legislative power itself.

## I

As we all know, it is no easy matter to define exactly what we mean by rights; but however open or complex our definitions, we think of rights as durable claims that individuals and groups may maintain against the political will of the community or the state. Rights are permanent and inalienable. New rights may be created, but old rights should never be abolished once their legitimacy is accepted. Yet we also know from our own experience that our particular conceptions of rights, and our conceptions of particular rights, vary all the time.

As it is today, so it was in the era of the American Revolution. Ideas of rights figured powerfully in the political movements that led to the writing of both the Declaration of Independence in 1776, and the Constitution and Bill of Rights in 1787 and 1789 respectively. Certain principled notions of rights and liberties remained fixed throughout the period. Yet no one could possibly claim that

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4. See Madison, *supra* note 2, at 353-57; Letter from James Madison to George Washington (Apr. 16, 1787), reprinted in 9 THE PAPERS OF JAMES MADISON 382, 383-84 (1975).

the Revolutionaries' understanding of rights was static and unchanging, or beyond the realm of political debate and heated controversy. Like every other element in the matrix of American constitutional thought, definitions of rights and notions of their protection shifted with the progress of the republican project.<sup>5</sup>

No one illustrates better the dynamic and nuanced character of American thinking about rights than James Madison. Precisely because Madison was such an original thinker, he may not be the most representative figure to single out in an effort to reconstruct the true "original understanding" of the Bill of Rights. As its principal mover in 1789, however, his intentions and ideas deserve special notice.

The evolution of Madison's thinking about the general problem of rights took place in four stages, which I will block out before going on to examine the distinctive elements of his general theory. The first phase is the easiest to describe. It dates roughly from the early 1770s, when Madison returned to Virginia from his collegiate studies at Princeton, to 1785-86, when he played the crucial political role in the defeat of the religious assessment bill and the subsequent passage of the celebrated Statute for Religious Freedom that his friend Thomas Jefferson had drafted in 1779. This was the Madison whose commitment to broad principles of religious liberty predated the development of his interest in either politics or constitutional theory. His first known comments on political issues of any kind expressed his abhorrence of the persecution of Baptist ministers for preaching without a license in pre-Revolutionary Virginia.<sup>6</sup> His early letters to his college friend William Bradford contain several comparisons between the enlightened condition of religious liberty in Bradford's Pennsylvania and the benighted situation in his own colony.<sup>7</sup> Madison's first notable action in public life was to secure an amendment to the Virginia Declaration of Rights of 1776, altering an article that originally proposed allowing

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5. The most important work on pre-Revolutionary conceptions of rights is J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986). See J. REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* (1988).

6. See Letter from James Madison to William Bradford (Apr. 1, 1774), reprinted in 1 *THE PAPERS OF JAMES MADISON* 111-13 (1962).

7. See Letters from James Madison to William Bradford (Dec. 1, 1773, Jan. 24, 1774, and Apr. 1, 1774), reprinted in 1 *THE PAPERS OF JAMES MADISON* 100, 104, 111 (1962).

the "fullest Toleration in the Exercise of Religion" to a broader recognition that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."<sup>8</sup>

Madison stated his own position on religious liberty most explicitly in his *Memorial and Remonstrance against Religious Assessments* of 1785.<sup>9</sup> Precisely because Madison strains to deploy every argument he can against the idea of a general assessment, no one reading the *Memorial* could conclude intelligently that its author was anything but a strict separationist. Nothing sustains the claim that Madison actually favored what we now call nonpreferentialist support for religion in general. "Who does not see," he asked, "that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"<sup>10</sup>

As much as the *Memorial* reveals about the depth of Madison's unequivocal commitment to religious liberty, its treatment of the general problem of rights offers a curious mixture of original and conventional ideas. In its most explicitly political passages, the *Memorial* casts the question of religious liberty in the familiar terms of a struggle between overreaching rulers and a citizenry that needs to be roused to protect its rights. The rights in question belong to the ruled; the danger they face arises specifically from the rulers. Madison thus uses much the same language that Revolutionary leaders had directed against Parliament a decade earlier:

The Rulers who are guilty of such an encroachment [on the rights of the people], exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.<sup>11</sup>

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8. Madison, *Declaration of Rights and Form of Government of Virginia*, reprinted in 1 THE PAPERS OF JAMES MADISON 173, 175 (1962). The progress of dis-establishment in Virginia has been extensively studied. See T. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977); THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (M. Peterson & R. Vaughan eds. 1988) (collected essays).

9. Madison, *Memorial and Remonstrance against Religious Assessments* (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 298 (1973).

10. *Id.* at 300.

11. *Id.* at 299-300.

Thus wrote Madison in point two of the *Memorial*. The next point made the appeal even more explicit. The general assessment should be opposed, Madison continued,

[b]ecause it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.<sup>12</sup>

In his concluding point Madison returned to the greater danger that would arise from a failure to check the rulers in this one instance: If the rulers could violate this one right, why could they not "sweep away all our fundamental rights" as well?<sup>13</sup> Samuel Adams could not have put the point any better in opposing the Stamp Act or the Declaratory Act or any of the other parliamentary measures that led to the Revolution.

If the rhetoric of rights sounds familiar, however, in other respects Madison's position was not entirely conventional. The rulers against whom these claims were to operate were no longer the politically unaccountable members of Parliament or the agents of the British crown; they were the elected representatives of the citizens of Virginia. In the traditional view, they were the men who were supposed to defend popular rights and liberties against the arbitrary claims of the other main branch of government—the executive. The novelty of the question Madison and others faced was to understand how claims of rights could be maintained against the political institution long regarded as the great bulwark of liberty. Insofar as Madison could locate the assessment struggle within the familiar rubric of rulers and ruled, however, his thought remained, in a sense, conventional.<sup>14</sup>

The second phase in the evolution of Madison's thinking about the problem of rights overlaps the first. By 1785, Madison was worrying more and more about the problem of legislative misrule

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12. *Id.* at 300.

13. *Id.* at 304.

14. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 268-73 (1969).

within the states. Indeed, his mounting concern with the character of state legislation, state legislatures and state legislators was the engine that drove the development of his constitutional thinking in the mid-1780s. Much of his concern was a reaction to his experience in the Virginia Assembly in the mid-1780s. As Gordon Wood has nicely put it, "Really for the first time, Madison found out what democracy in America might mean."<sup>15</sup> What it meant, he now knew, was that "[n]ot all the legislators were going to be like him or Jefferson; many of them did not even appear to be gentlemen."<sup>16</sup> Repeatedly, his "parochial" colleagues in the Assembly mangled or rejected the useful, enlightened bills that Madison drafted or supported. "What could he do with such clods?" Wood asks.<sup>17</sup>

Madison's initial discontent centered more on general questions of public policy than on matters of rights, and more on the failings of legislators than on the shortcomings of their constituents. By 1785, however, he was clearly sensitive to the need to protect individual rights against legislative abuse. In his August 1785 letter discussing a constitution for Kentucky, Madison argued that

[t]he Constitution may expresly [sic] restrain [the legislature] from meddling [sic] with religion—from abolishing Juries[,] from taking away the Habeus corpus—from forcing a citizen to give evidence against himself, from controuling the press, from enacting retrospective laws at least in criminal cases, from abridging the right of suffrage, from seizing private property for public use without paying its full Valu[e,] from licensing the importation of Slaves, from infringing the Confederation.<sup>18</sup>

Yet even this list of rights seems fairly conventional.

It was between August 1785 and March 1787 that Madison developed the two absolutely crucial elements defining his great goals for the Federal Convention. The first derived from his conviction that state laws were not simply poorly crafted or ill considered or

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15. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 74 (1987).

16. *Id.*

17. *Id.*

18. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), reprinted in 8 *THE PAPERS OF JAMES MADISON* 350, 351 (1973).



unwise on grounds of policy, but that they were unjust because they violated fundamental private rights. The second component that is also difficult to locate in Madison's thought before 1787 is the recognition that the deeper sources of this injustice lay not in the guile or ambition of legislators, but in their very responsiveness to the wishes of their constituents.

The great moment of discovery came when Madison drafted his remarkable memorandum *Vices of the Political System of the United States* in April 1787.<sup>19</sup> For it was here that he first recognized that the "multiplicity," "mutability," and most importantly, the "injustice" of the laws that the states had enacted since independence, 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."<sup>20</sup> In explaining why this was true, Madison developed the central ideas of his constitutional theory and his new understanding of the problem of rights.

In 1787, Madison was still ready to blame the sorry condition of public affairs on the characters of state legislators. All too often they sought office only for motives of "ambition" and "personal interest," rather than from sincere considerations of "public good." But the greater danger arose, he now concluded, not from the legislators themselves, but from their constituents. "A still more fatal if not more frequent cause" of unjust legislation, he wrote, "lies among the people themselves."<sup>21</sup> Madison designed his famous theory of faction to explain why this was so.

For all the midrashic commentary this theory has evoked, its central points are readily stated. First, factions are inevitable in "[a]ll civilized societies" because the diversity of interests and the fallibility of human reason and passions generate endless sources of division.<sup>22</sup> Second, a republic's peculiar danger is that "[w]hen . . . an apparent interest or common passion unites a majority," few effective checks exist to "restrain them from unjust violations of the rights and interests of the minority, or of individ-

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19. Madison, *supra* note 2, at 354.

20. *Id.*

21. *Id.* at 355.

22. *Id.*

uals.”<sup>23</sup> Third, because the ease with which such factious majorities form varies inversely with the size of a society, a national republic will be more resistant to the mischiefs of faction than the existing states of the American union.<sup>24</sup> Fourth, because much of the burden of governance will continue to rest with the states, however, individual and minority rights will remain exposed to violation by state legislatures and the majorities they represent.<sup>25</sup> The only adequate solution to this problem, Madison believed, was to give the reconstituted national government an absolute veto over all state laws. The national government would serve as a “disinterested & dispassionate umpire in disputes between different passions & interests in the State”—that is, within the individual states—and curb “the aggressions of interested majorities on the rights of minorities and of individuals.”<sup>26</sup> The proposed national veto on state laws was thus the central innovation of Madison’s entire scheme of reform.<sup>27</sup> This, rather than the adoption of a comprehensive bill of rights, was the measure that Madison regarded as indispensable to the preservation of civil liberty in America.

Madison’s new understanding of rights was also clearly based on his growing fear that fundamental rights of property were becoming increasingly vulnerable to abuse by legislators spurred on by the factious majorities they represented.<sup>28</sup> By 1787, the need to protect property had become almost an obsession for Madison, and this concern carried his thought far beyond his longstanding commitment to religious liberty and the more conventional civil liberties of the Anglo-American tradition. The force of this attachment to the rights of property alone explains just how radical, or reactionary, his thought had become.

The rejection of the veto so gravely disappointed Madison that he left Philadelphia in September 1787, fearful that the Constitution would “neither effectually *answer its national object* nor pre-

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23. *Id.*

24. *See id.* at 356-57.

25. *See id.*

26. Letter from James Madison to George Washington (Apr. 16, 1787), reprinted in 9 THE PAPERS OF JAMES MADISON 382, 384 (1975).

27. On this point, see Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979).

28. *See infra* text accompanying notes 51-58.

vent the local *mischiefs* which every where *excite disgusts* ag[ain]st the *state governments*.”<sup>29</sup> The third stage of his thinking about the problem of rights dates from the adjournment of the Convention to Madison’s successful campaign to push the Bill of Rights through the First Federal Congress in 1789. Its significance rests on Madison’s efforts to balance intellectual consistency with his perception of the public discussions of the Constitution. Far from abandoning the conclusions he had drawn during the months before the Convention, Madison remained convinced that his reasons for dismissing bills of rights as useless “parchment barriers”<sup>30</sup> were still sound. Yet from his intense involvement in the ratification campaign of 1787-88 and the first federal elections that followed, he also came to recognize that public opinion demanded the addition of some amendments to the new Constitution.<sup>31</sup>

Just how little had changed in Madison’s private thinking about rights is evident from two remarkable letters he sent to Jefferson on the subject. Written a year apart, the letters are entirely consistent with the analysis and conclusions he had drawn in his preparations for the Federal Convention. Madison’s defense of his proposed absolute veto on state laws in the first letter cannot be dismissed as a reflective rationalization of an idea whose impracticality he now recognized. It was instead a spirited defense of a measure whose rejection would leave the new government under the Constitution unable either to defend itself against the interference of the states or to protect individual and minority rights against unjust state legislation.<sup>32</sup>

Equally important, Madison still believed that the worst threats 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 constitu-

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29. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 163, 163-64 (1977).

30. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 295, 297 (1977).

31. See Editorial Note, *Madison’s Election to the First Federal Congress Oct. 1788 - Feb. 1789*, *reprinted in* 11 THE PAPERS OF JAMES MADISON 301, 302 (1977).

32. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 206 (1977).

ents.”<sup>33</sup> The popular character of these majorities was the crucial factor that led Madison to dismiss bills of rights as mere “parchment barriers.” Why would a majority bent on injustice be dissuaded from its evil purposes by the mere existence of a bill of rights? Madison’s analysis of the sources of faction and the nature of public opinion was bent toward demonstrating why rational appeals to higher principles would prove unavailing. In a monarchy, the existence of a bill of rights might serve as “a signal for rousing & uniting the superior force of the community”<sup>34</sup> against tyrannical acts of government; but in a republic “the political and physical power”<sup>35</sup> of government rested with the people at large, and a bill of rights could hardly work to rouse the community against itself.

These comments appeared, however, in the same letter in which Madison informed Jefferson that he would be willing to accept the addition of a bill of rights to the Constitution.<sup>36</sup> Madison soon publicly affirmed this position during his contest with James Monroe for a seat in the House of Representatives.<sup>37</sup> Explaining this shift as a “campaign conversion” is easy enough.<sup>38</sup> Yet Madison had a more principled basis for his reluctant acceptance of the need for amendments. A bill of rights might be useful, Madison conceded, if “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”<sup>39</sup>

The experience of the ratification campaign itself probably made this educative aspect of bills of rights more appealing to Madison

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33. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 298.

34. *Id.*

35. *Id.* This opinion tracks his earlier explanation in THE FEDERALIST No. 49 of the reasons why appeals to public opinion could not provide an effective remedy against the abuse of legislative power.

36. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 297.

37. Editorial Note, *supra* note 31, at 302-03.

38. As Robert Morris put the point in 1789, when Madison was struggling to get Congress to consider his amendments, he “got frightened in Virginia and ‘wrote a Book.’” Madison issued public letters announcing his revised views. Letter from Robert Morris to James Wilson (Aug. 23, 1789) (Willing, Morris, and Swanwick Papers, Pennsylvania Historical and Museum Commission, Harrisburg, Pa.).

39. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 298-99.

in 1788 than earlier. The popular clamor for amendments indicated, perhaps, that public opinion was less "vicious" or misguided than Madison imagined. A bill of rights framed in response to popular demands would acquire more authority precisely because of the exceptional political circumstances under which it was adopted. To future generations, it would provide evidence of how deeply Americans had cared about preserving rights at the great moment of the Constitution's adoption. When Madison prodded a reluctant Congress in 1789 to take up his amendments, he took care to explain that he was responding, first and foremost, to the legitimate call of public opinion.<sup>40</sup>

When Madison first informed Jefferson of his willingness to accept a bill of rights, he added one other reason to justify his change of heart. "Altho' it be generally true . . . that the danger of oppression lies in the interested majorities of the people rather than in the usurped acts of the Government," he noted, "yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights would be a good ground for an appeal to the sense of the community."<sup>41</sup> He did not think this was a likely scenario, but he could not rule out the possibility that a government insulated from popular control might abuse liberty, even in a republic.

Madison came to accept the real force of this danger during the fourth phase in the evolution of his thinking about the problem of rights. This phase can be dated to the decade of the 1790s—the period after the first ten amendments were framed and ratified. As Madison and Jefferson began to oppose the programs of Alexander Hamilton, they regarded the ruling Federalist party not as the instrument of a true popular majority, but as a quasi-aristocratic clique that had gained control of the national government. Confidence in their belief that a popular majority would eventually rally to their own Republican standard sustained the two Virginians through the repeated political reverses they suffered in the 1790s. By the end of the decade, however, Madison realized that Jefferson had been right all along to insist that "a bill of rights is what the people are entitled to against every government on earth, general

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40. 1 ANNALS OF CONG. 427-28 (J. Gales ed. 1789) (speech by Madison before Congress).

41. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 299.

or particular."<sup>42</sup> For in the opposition to the Sedition Act of 1798, the first amendment did provide "a good ground for an appeal to the sense of the community" against "usurped acts of the Government."<sup>43</sup> At the same time, Madison also recognized that dangers to liberty could arise as easily at the national level of government as at the state level.

## II

If nothing else, this brief effort to trace the evolution of Madison's thinking about rights should illustrate the difficulty, if not the absurdity, of attempting to freeze a moment of historical time as the point when he possessed a true original understanding of exactly how the Constitution was to protect rights. The general problem of rights concerned Madison continuously, but his ideas of which rights most needed protection, and how they were to be protected, varied over time. Certain recurring concerns and insights, however, gave the Madisonian theory of liberty its power and brilliance, and remain instructive today.

To some extent, Madison did accept the clever arguments against a bill of rights that James Wilson offered in a widely reported public speech in Philadelphia, delivered only three weeks after the adjournment of the Constitutional Convention. The explicit reservation of certain rights in the Constitution, Wilson declared, "would have been superfluous and absurd" because the new government had not been given the power to regulate the various activities that most deserved protection.<sup>44</sup> Madison further accepted the basic Federalist argument that the positive declaration of certain rights might relegate to inferior status other rights left unmentioned but equally valuable. He was also aware that any attempt to reduce a general right to a specific textual formula could prove self-defeating if, for political reasons, "a positive declaration of some of the most essential rights could not be obtained in the

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42. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 335, 337 (1977).

43. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 299.

44. Speech by James Wilson before Public Meeting in Philadelphia, Pennsylvania State Courthouse Yard (Oct. 6, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339, 339-40 (J. Kaminski & G. Saladino eds. 1981).

requisite latitude."<sup>45</sup> The very act of reducing a conception of one right or another to any specific form might limit rather than expand the basis for its protection. Better, in other words, not to have any bill of rights than to incorporate in the Constitution weak textual statements that might leave room for the violation of liberties the bill of rights was meant to protect.

Yet, as Jefferson argued, "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."<sup>46</sup> This was the sensible objection Madison remained reluctant to accept. The problem was not that he was incapable of enumerating a whole range of rights; he could have done so readily at the dip of a quill, and had done so in a 1785 letter concerning a constitution for Kentucky, for example.<sup>47</sup> He had no problem recognizing the benefits of an outright prohibition of legislative power over matters of religion. Nor would he have found it difficult to codify the essential civil and political liberties necessary to protect the citizen against the coercive power of the state. And indeed, as Leonard Levy has noted, in 1789 Madison sought to incorporate expansive notions of rights into the provisions that became the fourth amendment's protection against "unreasonable searches and seizures" and the fifth amendment's protection from self-incrimination.<sup>48</sup>

Madison's opposition to the enumeration of rights rested on a more profound and complex set of considerations. At the heart of his thought lay two overarching concerns. One involved his substantial fears about the security of property; the other involved his analysis of the nature of legislative power itself.

The best way to develop these points may be to examine the relation between Madison's views of religious liberty and the near obsession with property rights that affected him so strongly in 1787. We know that Madison's appreciation of the liberty-preserving benefits of diverse economic interests owed a great deal to his grasp of the way in which multi-denominationalism fostered religious liberty. He said as much in a famous passage in *The Federalist* No. 51:

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45. Letter from James Madison to Thomas Jefferson, *supra* note 30, at 297.

46. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 13, 14 (1979).

47. Letter from James Madison to Caleb Wallace, *supra* note 18, at 352-56.

48. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 242-45, 247-49 (1988).

In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.<sup>49</sup>

Diversity begets jealousy, and jealousy begets security. This was a lesson Madison drew from experience as well as observation and reflection. In the struggle over the religious assessment bill of 1784-85, Madison and his allies had appealed to the mutual jealousies of the various sects of Protestant Virginia. Even though those sects arguably had a common interest in the bill, which would have supported all teachers of Christianity, its opponents managed to parlay their diverse opinions and their fear that one or more denominations might benefit excessively into a final decision validating an essential principle of liberty.<sup>50</sup> Had the denominational map of Virginia looked less complex, the bill probably would have passed.

In at least two other respects, however, the differences between the case of religious liberty in 1785 and the issues that Madison sought to resolve in 1787 are as striking as the similarities. First, the apparent lesson that Madison could have drawn from the defeat of the assessment bill in 1785 was exactly the lesson he rejected in 1787. In 1785, Madison could have concluded that appeals to public opinion could work in a liberty-preserving way. His *Memorial*, after all, was not a mere tract espousing religious liberty, but an actual petition designed to sway the votes of popularly elected legislators. That appeal, coupled with other petitions that garnered even more support, had worked, successfully mobilizing public opinion in Virginia in behalf of liberty.

Far more important, however, was the fundamental difference between issues of religious liberty and other areas of governance in which Madison feared that factious majorities stood ready to trample individual and minority rights. At the core of Madison's sup-

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49. THE FEDERALIST No. 51 (J. Madison), reprinted in 10 THE PAPERS OF JAMES MADISON 476, 478-79 (1977).

50. THE FEDERALIST No. 10 (J. Madison), reprinted in 10 THE PAPERS OF JAMES MADISON 263, 265-66 (1977).



port for free exercise and dis-establishment lay the radical conviction that the entire sphere of religious practice could be, in a word, deregulated. In this one area, at least, Madison and Jefferson were the Friedrich von Hayek and Milton Friedman—dare one say the Richard Epstein?—of their day. They believed not only that religious conviction and practice were private matters, but also that religion, like capitalism, flourished best when unregulated.

Because religion could be seen as a matter of opinion only, it marked the one area of traditional governance in which a flat constitutional denial of legislative jurisdiction seemed able to enlarge the realm of private rights. No such clarity emerged, however, when the Madison of 1787 turned to the other area in which he feared that private rights were most vulnerable to violation. When rights of property were at stake, Madison believed, neither the positive and specific delegation of legislative power, nor its explicit denial and limitation would prove adequate. The clearest statement of his reasoning on this point is in *The Federalist No. 10*, in the paragraph that follows the description of the sources of faction. It deserves careful explication.

After noting how different forms of property divided society into different “interests,” Madison closed his account of “[t]he latent causes of faction” with this observation: “The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.”<sup>51</sup> But Madison then proceeded to challenge the very idea that acts of economic regulation are truly legislative in character. “[W]hat are many of the most important acts of legislation,” he asked, “but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?”<sup>52</sup>

Madison’s examples of such “determinations” reveal how much he regarded decisions of economic policy as implicating questions of private rights. Laws relating to creditors and debtors, to the protection of domestic manufactures and the restriction of foreign

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51. *Id.* at 266.

52. *Id.*

goods, and to the apportionment of taxes all involve questions of justice, and thus of rights.<sup>53</sup> In contrast to the modern cry against judges acting as legislators, Madison suggested that legislators inevitably act as judges, without needing, however, to maintain a pretense of judicial impartiality. Economic rights, then, were fundamentally different from rights of conscience in this one critical sense: Government could safely abstain from regulating matters of religion, but it could never avoid having to regulate the "various and interfering interests" of which modern societies were composed.

The new and creative elements in Madison's understanding of the problem of rights were thus rooted in his mounting concern about the security of property. To reduce Madison's notions of rights to economic questions alone would, of course, be wrong. Yet clearly the Madison of 1787 was intensely worried that populist forces in the states might pass all kinds of laws endangering property rights.

That concern was not entirely original in 1787. In 1785, for example, Madison endorsed the idea that the electors of the upper house in the states should be limited to those holding a significant, though unspecified, amount of property.<sup>54</sup> Events since 1785 made this somewhat abstract concern more urgent. Paper money laws, debtor stay laws, and Shays' Rebellion in Massachusetts all alarmed him terribly. So did the grim prospect that he sketched at the Federal Convention. Even in the United States, he warned, a factious majority might eventually form, made up "of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings."<sup>55</sup> The constitution writers of 1776, Madison believed, had erred in assuming that by protecting "the rights of persons" they would also protect "those of property."<sup>56</sup> Now he understood "that in all populous countries"—the United States not excepted—"the smaller part [of society] only

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53. *Id.*

54. Letter from James Madison to Caleb Wallace, *supra* note 18, at 353.

55. Speech by James Madison before the Federal Convention in Philadelphia (June 26, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 76, 77 (1977).

56. Madison, Observations on Jefferson's Draft of a Constitution for Virginia (Oct. 15, 1788), reprinted in 11 THE PAPERS OF JAMES MADISON 285, 287-88 (1977).

can be interested in preserving the rights of property.”<sup>57</sup> Efforts to protect the rights of property had to be made now, while “the bulk of the people” were still attached to the rights of persons and property alike.<sup>58</sup>

These comments belie the optimistic forecast we associate with *The Federalist* Nos. 10 and 51. Madison could be fairly certain that Protestant sectarianism would remain a constant in American life, protecting religious liberty through its fruitful multiplication of irresolvable opinions on theology, ecclesiology and forms of worship. Indeed, nothing better illustrated the way in which mere opinion could generate division within a community, even when its members shared other interests. He was less confident, however, that economic change would produce divisions equally complex. True, an extended republic would prevent or discourage the wrong kinds of majorities from forming at the national level of government, but the catch lay in the residual power that the states would necessarily exercise over the economy. Even in his most expansive moments, Madison never pretended that a reconstituted national government could superintend the daily affairs of the entire union. Most legislation affecting property would continue to be enacted at the state level.

Moreover, according to the arithmetical logic of his theory of faction, the creation of an extended national republic would not prevent the continued formation of factious majorities within the individual states, which was why the entire Madisonian scheme of 1787 required the national veto on state laws. Madison may have hoped that a reformed national Congress would set examples of sound lawmaking that even the “clods” in the state assemblies could learn to imitate. Even then, however, his perception of the populist character of state politics did not encourage him to conclude that state legislators would prove suddenly resistant to the “vicious” impulses of their constituents. The factious majorities that he feared would continue to coalesce in the states were popular majorities, not simple coalitions of sleazy legislators.

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57. *Id.*

58. *Id.* Madison thus well illustrates Gordon Wood’s description of the transformation of property as a Lockean right pertaining to all men into a peculiar interest deserving protection. See G. WOOD, *supra* note 14, at 214-22.

Madison's doubts about the wisdom of enumeration had another and more profound source. Legislators themselves were no longer the sole or chief defendants in Madison's indictment of the political sources of faction. Instead, his analysis of the constitutional problem of rights placed great emphasis on the nature of legislation—especially on what he later called its “plastic faculty.”<sup>59</sup> He put the point most directly in his letter to Jefferson of October 24, 1787,<sup>60</sup> but in striking ways it recurs elsewhere in his writings. In defending his proposed national veto, Madison called attention to the supple and amorphous character of legislative power. He spoke, for example, of “the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial.”<sup>61</sup> Close off one avenue of legislative excess, and an artful legislature would only slip down another alley to do its insidious work. This was why the “partial provision[s]” the Constitution offered for the protection of economic rights through the contract clause and the prohibition against state emission of paper money would prove inadequate. “Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever.”<sup>62</sup> This was why the veto had to be unlimited.<sup>63</sup>

In the realm of economic legislation, then, Madison doubted that any enumeration of legislative powers would work. The interests to be regulated were so complex, and the ends and means of legislation so intertwined, that no simple formula seemed likely to defeat a legislative ingenuity spurred on by the passions and interests of popular majorities. Nor could one rely safely on the good offices of

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59. Letter from James Madison to Spencer Roane (May 6, 1821), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 58 (1910).

60. See Letter from James Madison to Thomas Jefferson, *supra* note 32, at 211.

61. *Id.*

62. *Id.* at 212.

63. That is also why the Madison of the 1790s must have told himself a thousand times that he should have paid more attention to the “necessary and proper” clause, whose broad interpretation by Alexander Hamilton proved how right Madison had been only a few years earlier. See Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 63, 101-07 (1965).

the executive and judiciary to counteract the improper impulses of the dominant branch. By its very rulemaking powers, the legislature could circumscribe the best efforts of the two weaker branches of government to correct the injustices of legislation. The legislature could always "mask under complicated and indirect measures, the encroachments which it makes, on the co-ordinate departments,"<sup>64</sup> Madison wrote in *The Federalist No. 48*. "It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere,"<sup>65</sup> he said.

As Jefferson was quick to note, Madison seemed to ignore the possibility that a bill of rights might actually provide an independent judiciary with a "legal check" against improper acts of legislation.<sup>66</sup> Madison had reached exactly the opposite conclusion. An enumeration of rights, he feared, would prove far more effective in limiting the judicial protection of rights than an enumeration of legislative powers would in preventing their violation.

Madison's resistance to the enumeration of rights was thus merely the opposite side of his fear that legislative power could never be confined. The enumeration of rights, in other words, might prove restrictive in a way or to an extent that the enumeration of legislative powers could not. He believed it better to give the two weaker branches something of the free play that the dominant lawmaking branch could enjoy by manipulating its "infinite of legislative expedients."<sup>67</sup> If many legislative decisions were truly judicial in nature, Madison reasoned, why not bring the judiciary into the legislative process so that judicial advice could hopefully prevent the legislature from committing its unjust mischief in the first place? This was the point of Madison's other great proposed innovation of 1787: the joint executive-judicial council of revision, which would be charged with the duty of advising Congress of the merits of legislation before it was enacted, and which could back up its advice by wielding a limited veto. The fact that the

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64. THE FEDERALIST NO. 48 (J. Madison), reprinted in 10 THE PAPERS OF JAMES MADISON 456, 457 (1977).

65. *Id.*

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

67. Letter from James Madison to Thomas Jefferson, *supra* note 32, at 212.

Philadelphia Convention found this proposal no more acceptable than the absolute veto on state laws did not shake Madison's belief in its essential value. As late as October 1788, in commenting on Jefferson's draft of a constitution for Virginia, he modified his views only to suggest that bills should "be separately communicated to the Exec[utive] & Judic[iary] depts." before their enactment.<sup>68</sup>

One can thus make the case that James Madison's thinking about rights in the late 1780s fused radical and reactionary elements. What other conclusion can we reach when we move beyond the familiar formulas of *The Federalist No. 10* to map the larger contours of his thought? Here was a man who thought that virtually all matters of religion could be put safely beyond the reach of the state, yet who also thought that all questions of economic regulation involved questions of rights; who was prepared to argue that because many legislative acts were really judicial in nature, the judiciary might just as well be involved in the business of legislation; who felt that the only reliable security for rights lay in giving an insulated national government an absolute veto over the acts of the officials most directly accountable to the people, their representatives in the state legislatures. Yet as acute and powerful as Madison's positions were, many of them were only positions—points that he was prepared to reinforce, modify or even abandon as he continued to revolve the problem of rights in the light of experience and events.

Among all the problems of rights that he had to consider, none seemed more ominous or less tractable than the single form of oppression that Madison had observed most closely. He was frank to include "the case of Black slaves in Modern times" as a potent example of "[t]he danger of oppression to the minority from unjust combinations of the majority."<sup>69</sup> At the Federal Convention, he had noted that "the mere distinction of colour has been made . . . a ground of the most oppressive dominion ever exercised by man over man."<sup>70</sup> Yet for all his virtues, which were many, Madison was

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68. Madison, *supra* note 56, at 292-93.

69. Madison, *Notes for the National Gazette Essays*, reprinted in 14 THE PAPERS OF JAMES MADISON 157, 160 (1983).

70. Speech by James Madison before Federal Convention in Philadelphia (June 6, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 32, 33 (1977).

no better prepared to imagine a solution for the problem of slavery than were any of his contemporaries. In his own way, he was part of the problem. Madison defended the republican guarantee clause in part because it would allow the national government to aid in the suppression of slave rebellions, and the three-fifths clause because the ownership of slaves was a peculiar form of property right that deserved special protection.<sup>71</sup>

One Madisonian puzzle yet remains. I have argued that the unlimited national veto on state laws was the crucial proposal for the protection of rights that Madison favored in 1787 and 1788. Could he seriously imagine that his own constituents would ever accept such a proposal once they understood that its reach would extend to the regulation of slavery? Or did he somehow hope that the veto would provide an entering wedge with which the national government might work to weaken the hold of slavery and all of its evil effects? If he at least glimpsed the latter possibility, can we not conclude that the Civil War amendments, especially the fourteenth, are the most Madisonian elements of our Constitution?

So I like to think; but nothing better exposes the limits of Madison's analysis of the problem of rights, and the reasons why we must assess his thought critically, than his inability to articulate—or perhaps even perceive—the conclusions to which his proposals led.

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71. Madison's thoughts about slavery, especially during his long period of retirement after 1817, are the subject of poignant analysis in D. McCoy, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* (1989).