

William & Mary Law Review

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

Article 6

February 1990

The Trivialization of the Bill of Rights: One Historian's View of How the Purposes of the First Ten Amendments Have Been Defiled

Robert A. Rutland

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Robert A. Rutland, *The Trivialization of the Bill of Rights: One Historian's View of How the Purposes of the First Ten Amendments Have Been Defiled*, 31 Wm. & Mary L. Rev. 287 (1990), <https://scholarship.law.wm.edu/wmlr/vol31/iss2/6>

Copyright c 1990 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

THE TRIVIALIZATION OF THE BILL OF RIGHTS: ONE HISTORIAN'S VIEW OF HOW THE PURPOSES OF THE FIRST TEN AMENDMENTS HAVE BEEN DEFILED

ROBERT A. RUTLAND*

Professor Rakove has written an impressive paper, and we can only applaud anything in our time that focuses attention on the ongoing battle for liberty.¹ We learned long ago that the battle never ends in total victory, so in a sense we historians are reporters of the skirmishes that have taken place. I wish all of them had been heroic struggles, but more on that later.

To Professor Rakove's suggestion that without James Madison there would have been no Bill of Rights, I cannot agree. Recall that Madison climbed on the bandwagon after it was rolling. Madison jumped on it, he did not start it. As with so many historical movements of some magnitude, the Bill of Rights would be in place whether Madison had been present or not. Madison's presence and hard work only forced the First Congress to deal with the issue in 1789. Without Madison's insistence, the vital amendments might have arrived on the legislative scene a little later, but there was too much pressure from George Mason, Thomas Jefferson, Richard Henry Lee and others for the matter simply to have dropped.

As to what rights are important, as Professor Rakove says, we know how difficult it is to define the important rights; our perceptions "vary all the time."² Clearly, however, we have gone far afield from the rights of 1789 in our quest for liberty in the 1980s. We have chants for the "right to life" from anti-abortionists, the "right to work" from anti-unionists, the "right to breathe fresh air" from anti-pollutionists, and so on. People are much more sure of what they oppose than of what they favor in our society, and the confusion is not Madison's fault. He knew what freedom of the press was when he wrote his Report of 1800 and pleaded for absolute

* Research Professor of History, University of Tulsa.

1. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245 (1990).

2. *Id.* at 247.

freedom of the press as a political instrument shaped to preserve self-government.³ Madison's freedom of the press was intended to ensure free elections, free discussion and the survival of free institutions.

With those goals in mind, recall Jefferson's allusions to judicial "twistification."⁴ We have seen plenty of twistifications of the Bill of Rights in the past few decades. We have witnessed the spectacle of a college newspaper editor denied the use of four-letter words, trying to make himself into another John Peter Zenger.⁵ There is a matter of degree in these incidents. John Lilburne gave us a great legacy in law with his defiance. What is the legacy of the so-called Free Speech Movement from Berkeley in 1965?

Our conception of rights is still a matter of controversy, and I regret to say that at times it is a ludicrous controversy—one that demeans more than it enlightens our society. The Bill of Rights was not Madison's version of Pandora's Box. The blessings of liberty are endangered, but the danger is coming from the pettifoggers and the trivializers—the ambulance chasers of our time—who take the precious rights so cherished in 1789 and make them close to a joke. I will leave it to your judgment. Do we not trample on a great principle when we allow a court to rule on whether a young girl's right to play basketball on a boys' team has been violated because she is denied a tryout?⁶ Not her rights as an athlete—her rights under the *Bill of Rights*! Sometimes merely a whimsical idea, not even a real right, is involved, as when the Minnesota chapter of the American Civil Liberties Union threatened to file

3. *Madison's Report on the Virginia Resolutions* reported to the House of Delegates, session of 1799-1800, reprinted in 4 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 546, 561-80 (J. Elliot rev. ed. 1987).

4. Letter from Thomas Jefferson to James Madison (May 25, 1810), reprinted in *MARSHALL V. JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* 161 (D. Dewey ed. 1970).

5. In 1968, the *UCLA Daily Bruin* carried a news story that used the four-letter "street" expression for copulation several times. Chancellor Franklin D. Murphy called me (I was then Chairman of the UCLA Journalism Department) at 9:01 a.m. the day it appeared, seeking advice about press guidelines "and common decency." The student editor defended the language and continued to use four-letter words in the *Daily Bruin*. He and his staff insisted that a great principle under the first amendment was involved. One outcome of the incident was that the editor, Brian Weiss, appeared on the cover of *Time* magazine, June 7, 1968.

6. *O'Connor v. Board of Ed.*, 449 U.S. 1301 (1980).

suit against high schools in the state for refusing to drop their identifications as "Braves," "Warriors" and "Indians" on the grounds that "[s]uch symbols are discriminatory and demeaning . . . More to the point [the executive director of MACLU] says, they violate the equal protection clause of the 14th Amendment."⁷ A common sense perspective on this burning problem came from the director of the Michigan Indian Commission, who said she was not going to spend time pursuing the issue. "We've got so many other issues to worry about," she said, "like finding jobs and keeping our kids in school."⁸

Common sense tells us we are losing sight of the great issues addressed in the Bill of Rights when we need to go to court to keep a high school team from being cheered as the Deer River Warriors. Madison thought human rights were a serious matter: "As we have a right to our property," he said, "so we have a property in our rights."⁹ We ought to value that property more highly and treat our rights as precious, not as the stuff that brings laughter in the marketplace of ideas. So I take issue with Professor Rakove when he says, "As it is today, so it was in the era of the American Revolution."¹⁰ I think we are forgetting that the Constitution and Bill of Rights came after some disillusionment as to the efficacy of liberty as a means of pursuing happiness. The problem in 1787 was, as most of the founders believed, that there was too much liberty—to avoid taxes, to shun debts, to break contracts—and not enough responsibility. The Constitution is consequently full of prohibitions, restrictions and limitations; it created a government of specific powers. The ninth and tenth amendments were written with this in mind, and "the plasticity of the legislative power"¹¹ was not a *carte blanche* in Madison's view.

Madison wanted responsible self-government. That is what Madison meant when he wrote to Jefferson on October 24, 1787,

7. Worthington, *Athletic Teams' Indian Names Under Fire*, *The Tulsa World*, Apr. 20, 1989, at A12, col. 1.

8. *Id.*

9. Madison, *Essay on "Property"*, in the *National Gazette* (Mar. 29, 1792), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 186 (M. Meyers rev. ed. 1981).

10. Rakove, *supra* note 1, at 247.

11. *Id.*

and gave us the following formula: "The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society [as] to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society."¹² In other words, liberty, the right to be left alone if you are law abiding, is the blessing conferred on citizens in a society that knows how to control itself. Madison was saying that an irresponsible society has no liberty; so we cannot say in good faith that "[as] it was in 1789, so it is in 1989," for our system veers out of control when we trivialize the pursuit of liberty. Madison wanted the tyranny of the majority held in check, but how would he regard the burning of the American flag in a contemptuous manner, under provocative circumstances? Is the flag burner a true defender of freedom or a publicity-seeker yearning for the martyrdom of a night in the county jail?

To my mind, we have seen a great deal of the trivialization of the pursuit of happiness in our day, and in the process genuine liberty, as protected by the Bill of Rights, has been eroded. Look not far from here, at a woman who has spent some eighteen months in jail on a contempt of court charge because she has the notion that she is protecting her child,¹³ and we can see how fragile real liberty is in our society.

I vary with Professor Rakove on another point: his use of a quote by Madison during the debates over the Bill of Rights in the House of Representatives as being engaged in a "'nauseous project.'"¹⁴ The key word brings to mind distastefulness, sickness and vomiting. The point seems to be that in mid-August 1789 Madison was almost fed up with the whole business. This was the gist of Professor Rakove's argument in a recent *Atlantic* article,¹⁵ and Leonard Levy used the quotation in the same sense in his recent

12. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 10 THE PAPERS OF JAMES MADISON 206, 214 (1977).

13. See *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), cert. denied, 109 S. Ct. 790 (1989).

14. Rakove, *supra* note 1, at 245 (quoting Letter from James Madison to Richard Peters (Aug. 19, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON 346, 346 (1979)).

15. Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC, Dec. 1986, at 77.

book on the original intent of the founding fathers.¹⁶ This interpretation is creeping into the literature related to the formative period of the Bill of Rights. By implication, Madison's labors on behalf of the Bill of Rights take on more than a tinge of hypocrisy.

The error here is taking an offhand remark as a statement of fact. We must remember that Madison was replying to a letter from Richard Peters, who had recently sent Madison a piece of doggerel about eleven cooks making a soup.¹⁷ This was Peters' rather feeble attempt to parody the eleven states represented at the Federal Convention and their cooking up of a Constitution. In kindly fashion in his reply, Madison urged Peters to share his so-called fable with his friends; and in the next sentence Madison went on to report that some enclosed papers "will shew that the nauseous project of amendments has not yet been either dismissed or despatched."¹⁸ But we read on:

We are so deep in them now, that right or wrong some thing must be done. I say this not by way of apology, for to be sincere I think no apology requisite. I. because a constitutional provision in favr. of essential rights is a thing not improper in itself and was always viewed in that light by myself.¹⁹

Madison continued by adding six more reasons for getting on with the business, with the penultimate reason concluding that "[i]f no amendts. be proposed,"²⁰ the Antifederalists who had warned against ratification without fetters would be able to say, in effect, "I told you so."

It is misreading Madison to linger on his slip of the pen. This was the Madison who, in Williamsburg in 1776, had cut his legislative teeth with an amendment to the Virginia Declaration of Rights that called for "the free exercise" of religion, not simply toleration.²¹ And this was the Madison who, in his 1785 *Memorial and Remonstrance*, wrote that "[t]he preservation of a free Gov-

16. L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 168-69 (1988).

17. See Letter from Richard Peters to James Madison (Jul. 20, 1789), reprinted in 12 *THE PAPERS OF JAMES MADISON* 301, 301 (1979).

18. Letter from James Madison to Richard Peters, *supra* note 14, at 346-47.

19. *Id.* at 347.

20. *Id.*

21. Editorial Note, *Declaration of Rights and Form of Government in Virginia*, reprinted in 1 *THE PAPERS OF JAMES MADISON* 171 (1962).

ernment requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people."²² And what was that barrier? It was the same "parchment barrier"²³ of which both Madison and Jefferson spoke during their exchanges in 1787-88: a bill of rights.

I think we ought to stop bringing up the "nauseous project" quotation as a true indication of how Madison regarded his work for a bill of rights. It seems to me that Madison was sick and tired of the obstructionism of Roger Sherman, Aedanus Burke, William Loughton Smith, James Jackson and other congressmen who thought the introduction of a bill of rights was a waste of time. Even Elbridge Gerry, who had tried to introduce a bill of rights at the Federal Convention at George Mason's instigation, now said the notion of a bill of rights was at best premature and at worst might fuel the second-convention advocates waiting in the wings of Congress.²⁴ Let there be more public debate on the matter, Gerry said, and let a groundswell of public opinion precede the legislative pathway for amendments such as Madison proposed.²⁵

We see that Madison had to push and pull his amendments through a reluctant House. Late in June 1789, Madison told Jefferson that the business of Congress "proceeded with a mortifying tardiness" and that the amendments could not be debated until the bills for tax revenues and the creation of the executive departments had passed.²⁶ Six weeks later, Madison was constantly on his feet, trying to keep niggling corrections from watering down his original amendments. Madison wrote Peters in the midst of this battle, on the same day that he lost his fight to make the amendments part of the original constitution. Madison wrote friends in Virginia of his frustration. "Many circumstances justified an opin-

22. Madison, *Memorial and Remonstrance against Religious Assessments*, reprinted in 8 THE PAPERS OF JAMES MADISON 298, 299 (1973) (citation omitted).

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

24. See R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* 114-25, 203 (1983).

25. *Id.* at 203.

26. Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON 267, 268 (1979).

ion that if amendts. were not decided on at this crisis, other business & the approach of the time . . . to adjourn till December, would prevent any decision at [this] Session."²⁷ Madison complained to Edmund Randolph that the House had upset his plan to place a bill of rights in the Constitution proper, and added that some congressmen wished "to defeat [it] by delaying a plan short of their wishes."²⁸ From August 19 onward, Madison was on the defensive. His amendment, which would have changed our history fundamentally for it bound the states as well as the national government to protect civil liberties, was tossed out in a House-Senate conference committee. If that amendment had stayed in the final version, no *Barron v. Baltimore* would have occurred!²⁹ But Madison salvaged as much as he could:

The tombstone marking Madison's grave at Montpelier says nothing about the Bill of Rights or any of Madison's other parchment victories. But during the ratification struggle, Madison came to see the importance that citizens attached to a bill of rights. He wrote Jefferson:

The 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. . . . Altho' it be generally true . . . that the danger of oppression lies in the interested majorities . . . rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.³⁰

A plea for the "fundamental maxims of free Government" was Madison's concrete gesture in the First Congress. In our time, "an appeal to the sense of the community" might bring an end to the

27. Letter from James Madison to Edmund Pendleton (Aug. 21, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 348, 348 (1979).

28. Letter from James Madison to Edmund Randolph (Aug. 21, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 348, 348 (1979).

29. 32 U.S. (7 Pet.) 243 (1833) (holding that the fifth amendment takings clause was intended solely as a limitation on the power of the federal government and was not applicable to the states).

30. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 295, 298-99 (1977).

trivialization of the Bill of Rights. Judges, lawyers, historians and men of good will: Are we concerned enough to stop the comic-opera aspects that enfeeble "the fundamental maxims of free Government"?