

JAMES MADISON AND THE BIRTH OF THE BILL OF RIGHTS

An Analysis of the Original Intent
of the First Amendment
Within the Political Theory of James Madison

A Thesis

Presented to

The Faculty of the Department of History
The College of William and Mary in Virginia

In Partial Fulfillment
Of the Requirements for the Degree of
Master of Arts

by

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1995

APPROVAL SHEET


This thesis is submitted in partial fulfillment of
the requirements for the degree of

Master of Arts




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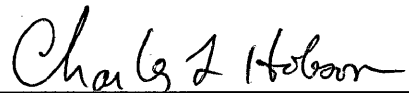
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DEDICATION

The author dedicates this work to his grandmothers, Edna "June" Bromley and Alice Marie ("Mary") Higgins, and to his parents, Thomas Gerald "Jerry" and Wynona June Higgins.

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ACKNOWLEDGMENTS

The author wishes to express his appreciation for the thoughtful and generous assistance of the members of the committee: Davison Douglas, Philip Funigiello and Charles Hobson. The author also wishes to thank John A. Soares, Jr., a professional colleague and doctoral candidate in history at The George Washington University, for his insightful criticism on earlier drafts of this manuscript.

ABSTRACT

This essay explores the manner in which the political and intellectual origin of the speech and press provisions of the First Amendment to the Constitution of the United States can be explained by the political theory of James Madison.

The analysis begins with an examination of the constitutional theory of James Madison. In particular, various of Madison's conceptual devices, which he combined for the purpose of controlling the dangerous influence of factions in an extended republic, are explored.

The analysis continues with an examination of the partisan struggle surrounding the creation and ratification of the Constitution and how that struggle made the creation of the Bill of Rights a political necessity.

Finally, it is argued that Madison championed adoption of the First Amendment because it both satisfied his political interests and complimented his political theory. In addition, the author suggests that Madison's political theory provides the most meaningful context in which to understand the role of free speech and a free press in the American constitutional tradition.

JAMES MADISON AND THE BIRTH OF THE BILL OF RIGHTS

INTRODUCTION

What the production of steel was to the industrial age, the management and dissemination of information is to our age. Indeed, the so-called post-industrial age in which we now live has so often been referred to as the information age that the term itself has become something of a cliché: it is familiar from overuse, yet suggests more than it explains. In any event, recognizing the importance of exchanging information and ideas is not something unique to the information age. Ever since the creation of the First Amendment to the U.S. Constitution, preserving the expression of ideas has come to occupy an exalted place in the American political paradigm. In particular, by characterizing speech and press as guaranteed freedoms, the First Amendment suggests that the founding fathers recognized the importance of information exchange as a necessary component of constitutional government. Ascertaining exactly how important or how necessary a component the founders considered these freedoms to be, however, is a difficult proposition. Unfortunately, in many respects the speech and press provisions of the First Amendment are like the term "information age:" they suggest more than they explain.

Attempting to understand the significance of speech and press freedoms in our system of government, therefore, is more difficult than at first supposed. While some might think these freedoms are so central to our nation's political values that to ask the question at all is ridiculous,¹ if they are in fact so centrally important, then their meaning should be readily discoverable by analysis and thoughtful inquiry. Though the rhetorical explanation emerges almost reflexively, explaining that a free press and free speech are fundamental pre-requisites of a free society, it is interesting to note that such a self-evident truth is not borne out by examining the intentions and political theory of the founders. Indeed, the historical record suggests that the First Federal Congress crafted the First Amendment in 1789 for the express purpose

¹ Thomas Kuhn writes that "[s]cientists [and by inference social scientists] work from models acquired through education and through subsequent exposure to the literature often without quite knowing or needing to know what characteristics have given these models the status of community paradigms. And because they do so, they need no full set of rules. The coherence displayed by the research tradition in which they participate may not imply even the existence of an underlying body of rules and assumptions that additional historical or philosophical investigation might uncover. That scientists do not usually ask or debate what makes a particular problem or solution legitimate tempts us to suppose that, at least intuitively, they know the answer. But it may only indicate that neither the question nor the answer is felt to be relevant to their research. Paradigms may be prior to, more binding, and more complete than any set of rules for research that could be unequivocally abstracted from them." Structure of Scientific Revolutions, 2d ed. (Chicago: University of Chicago Press, 1970), 46.

of silencing Antifederalist critics who still desired, some two years after the Constitutional Convention, to scuttle the new national government. Moreover, the historical record suggests that the First Amendment was crafted in such a way as to essentially leave in place, unaltered, the political framework of the 1787 constitution.

Nonetheless, the historical record does support the notion that speech and press freedom do have a role to play in the constitutional model of republican government envisioned by the founders. And to the extent that this original conception continues to infuse the contemporary constitutional order with meaning, speech and press freedom continue to play an instrumental role. To fully understand what this role is, however, requires that we use the historical record in general, and the writings of James Madison in particular, to deconstruct, and thereby transcend, the rhetorical record in order to create a satisfactory model explaining the enduring significance of speech and press freedom. By doing so, not only is the First Amendment infused with more particularized historical meaning but its role in the political order, both past and present, will emerge more meaningfully as well.

CHAPTER I

THE INTELLECTUAL ORIGIN OF THE FIRST AMENDMENT

The First Amendment to the Constitution of the United States occupies a singularly important, if not sacred, position in the American political tradition. The ability to speak one's mind, publish one's sentiments, criticize government, and advocate or agitate for political change generally free from official restraint are the hallmarks of American-style democracy. Nonetheless, the First Amendment, and all that it has come to represent in our contemporary political order, did not emerge effortlessly from the founding era. On the contrary, the origin of the First Amendment, speech and press freedom in particular, is best understood as a product of the various intellectual, political and cultural forces that shaped the nature and the substance of the political debate in the United States during the last decades of the eighteenth century. To come to terms with origin of the First Amendment, we must address each of these forces individually. We begin with the intellectual.

A. The Documentary Record of the Founding Fathers

Though the historical record explaining the origin and original purpose of the First Amendment spans the entire founding era, of particular significance is the period from the Constitutional Convention of 1787 through the First Federal Congress in 1789. Unfortunately, examining even this limited period presents significant difficulties. Foremost among these is undoubtedly the quality and credibility of the primary sources themselves. For example, historian James H. Hutson documents how the notes of Robert Yates, published in 1821 as the Secret Proceedings and Debates of the Convention Assembled at Philadelphia in the Year 1787, were so significantly altered under the partisan editorship of Edmond C. "Citizen" Genet that they "cannot be considered a reliable record of what occurred at the Philadelphia Convention and cannot be consulted as a source of the intentions of the framers."² Even the Notes of James Madison, considered by many to be the most reliable record of the Constitutional Convention, are frequently criticized. For example, Madison seems to have recorded his own comments with a degree of thoroughness, arguably bordering on embellishment, curiously lacking in the comments attributed to other delegates.³ Unfortunately, the official record of

² James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," Texas Law Review 65 (November 1986): 9-12.

³ Ibid, 31-33.

the Constitutional Convention is just as questionable. For example, Max Farrand, editor of the first standard compilation of the official record of the Constitutional Convention, warns readers that the Journal of the Convention was so carelessly kept that it cannot be relied upon absolutely. In particular, on the matter of debates and votes, Farrand suggests that the Journal "should be accepted somewhat tentatively."⁴

The shortcomings of the historical record are at least partially explained by the fact that the delegates to the Constitutional Convention met in secrecy and had every reason for wanting to keep their deliberations strictly confidential. After all, delegates to the convention had gathered for the politically charged purpose of amending and perhaps replacing the existing federal government. Toward this end, the Convention was closed to non-delegates, the press was barred from attending, and rules of procedure adopted at the start of the Convention prohibited members from discussing convention business outside the meeting hall.⁵ Even the various letters from convention delegates to friends and colleagues are questionable in that they represent the selective dissemination of privileged

⁴ Max Farrand, ed., The Records of the Federal Convention of 1787, rev. ed. (New Haven and London: Yale University Press, 1937) 1: xiii-xiv.

⁵ James Madison, Notes of Debates in the Federal Convention of 1787, bicentennial edition (New York: Norton, 1987), 27-28.

information.

Serious questions exist about the provenance of the documentary records of the state ratifying conventions as well. For example, Hutson describes Jonathan Elliot's Debates, the standard documentary collection of the deliberations of the state ratifying conventions, as a "bibliographical brainteaser, for it was republished in at least seven ... editions [following the original 1827-1830 edition], in differing numbers of volumes, with the contents of individual volumes differing in many cases from edition to edition."⁶ Additionally, Hutson argues that Elliot appears to have let contemporary political concerns, such as nullification, shade his presentation of the record. Moreover, the primary records themselves appear to reflect the selective, partisan sympathies of the various individuals who originally recorded the debates.

The documentary record of the First Amendment is similarly incomplete. As Hutson observes, only half of the debate in the First Congress over the Bill of Rights survives in that the Senate prohibited its proceedings from being recorded. As for the proceedings in the House, Hutson notes that the official record, as reported by Thomas Lloyd, most clearly evidences not the proceedings, but Lloyd's wandering mind in that his notes are "periodically interrupted by doodling, sketches of members, horses and

⁶ Hutson, 13.

landscapes, and by poetry."⁷

With such limitations in the documentary record, it is appropriate to ask if it is at all possible to ascertain what the founders intended. More importantly still, the question arises that given what we know about the divisive and often secretive nature of American politics in our own age, what is the likelihood that the body of law created by the founders is attributable to a readily ascertainable intent? If little or none, it becomes doubly unlikely that we can speak of the founders' intentions in anything more than a vaguely generalized fashion. Even on issues where the founders compromised or appeared to agree with one another, it is possible, indeed likely, that their intentions for doing so varied. Consequently, one might reasonably argue that the founders' collective intent, if it existed at all, is unknowable, just as it was probably unknown to them.

While we may never know what constitutes the original intent of the founding fathers, we can discern the general political theory which animated their vision of republican government. More specifically, primary sources provide us with a fairly comprehensive view of James Madison's constitutional philosophy. As previously mentioned, his Notes are generally considered the most reliable account of the Constitutional Convention. Following that, according to

⁷ Ibid., 36.

Farrand and others, the Federalist Papers (a series of anonymous essays defending and the Constitution in the weeks preceding the New York ratifying convention), of which Madison was one of the principal authors, are the second most reliable source of original intent. In regard to the Bill of Rights, the documentary record of the First Federal Congress, though questionable as noted above, reveals Madison to be the driving force behind its inception. Furthermore, a wealth of supporting essays, articles and letters give us unparalleled additional insight into the political theory of Madison. Essentially, the historical record lends itself most readily to a determination of what Madison perceived to be the intent of the Constitution. Whether this perception was solely his own or reflected the views of his peers as well is difficult to determine. Nonetheless, as Hutson observes, the shortcomings of Madison's Notes are the yardstick (as I would argue all of his work can be characterized) by which we can measure the difficulty in determining the delegates' intentions.⁸

B. The Founder's Original Intent

What Madison's Notes unquestionably reveal is that the Constitutional Convention did not agonize over, or even seriously consider, affording special protection to the

⁸ Ibid., 35.

freedoms of speech and press. Indeed, aside from a proposal for a bill of rights (including a speech and press provision) by South Carolina delegate Charles Pinckney (which later died in committee), and a disingenuous eleventh hour effort to scuttle the Constitution by delegates who held ulterior motives, the Notes indicate that speech and press freedom were not a serious concern of the Convention. In fact, it was not until political pressure arising from the ratification struggle forced the issue two years later that the First Congress undertook the effort to amend the Constitution with a bill of rights, including a free speech and press guarantee. Even then, the documentary records of the First Federal Congress indicate that the only prolonged debate over protecting speech and press centered not on whether these two were essential to the new framework of government, but whether members of Congress should be obligated to vote in the manner which popular opinion dictated. In response, Madison unequivocally assured his fellow legislators that they were not required to vote in Congress per the instructions of their constituents.⁹

While Madison's response may strike modern readers as surprisingly undemocratic, it is not at variance with Madison's constitutional theory. Indeed, nothing in any of

⁹ Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., Creating the Bill of Rights: the Documentary Record from the First Federal Congress (Baltimore and London: The Johns Hopkins University Press, 1991), 153-156.

Madison's writings from the founding era supports the notion that he viewed protecting press and speech freedom as essential to the creation, execution or adjudication of laws -- which, by any reasonable definition, is the basic purpose of government. Even when the freedoms of speech and press were elevated to the status of constitutionally protected rights, nothing in the documentary record suggests that the founders held a well articulated idea that what they were protecting was somehow fundamentally significant to the administration of government.¹⁰ On the contrary, in a letter to Richard Peters dated August 18, 1789, Madison described the creation of the Bill of Rights not as essential, but as a "nauseous project," one which he undertook for the expressly political purpose of silencing opponents to the Constitution and to honor campaign promises.¹¹

Whether we interpret "nauseous project" as referring to the arduous political struggle that amending the Constitution would require, or more fundamentally as Madison's reluctance to adulterate the unamended Constitution with needless provisions, we will see it is clear that Madison was less than convinced that amendments were necessary. Nonetheless, Madison's eventual support and

¹⁰ Leonard Levy, The Emergence of a Free Press (New York: Oxford University Press, 1985), 267.

¹¹ Veit, et al., Creating the Bill of Rights, 281-282.

championing of the amendment cause is directly attributable to his political and intellectual commitment to the new federal Constitution: without amendments, the Constitution would remain politically vulnerable and the intellectual justification on which it rested would remain in perpetual jeopardy. In sum, it was not until Madison became assured that the Constitution could be amended in a manner which would preserve its structural integrity, while at the same time defeating Antifederalist rhetoric, that he became convinced that amendments were appropriate even if unnecessary.

C. The Political Theory of James Madison

1. intellectual and historical antecedents

James Madison's political theory was undoubtedly influenced by both the intellectual and political climate of his time. In 1769, at the age of eighteen, Madison entered the College of New Jersey at Princeton. Over the course of the next three years, Madison was exposed to the writings of most of the political philosophers who dominated intellectual life in the eighteenth century. In particular, as Ralph Ketcham describes, Madison was especially enamored by the writings of John Locke, accepting the notion that the human "mind is blank at birth [receives] all its furnishings through the senses ... and [can] hold an infinite variety of

insights and opinions.¹² As a matter of cosmology,

Madison took the Newton-Locke world view at face value: the universe was marvelously harmonious; the discovery of facts about man and society would lead to progress and enlightenment; empiricism and dependence on laws of cause and effect were not incompatible; and moral and social, as well as physical, understandings would benefit from the application of human study and reason.¹³

Madison also came of age in colonial America at a time when society at large placed a high value on open discourse concerning political matters. For example, the writings of "Cato" (the pen name of influential English journalists John Trenchard and Thomas Gordon), which advocated that truth should be a defense in prosecutions for seditious libel (a criminal cause of action punishing defamatory criticism of public officials), had been very popular in colonial America since the 1720's.¹⁴ In fact, as David Rabbin argues, the popularity of Cato's Letters, and the report of the Peter Zenger trial, were not only widely quoted and reported, but they virtually "eliminated prosecutions for seditious libel in the colonies."¹⁵ Nonetheless, as Leonard Levy observes, as of 1776, "[n]o state [had] abolished or altered the

¹² Ralph Ketcham, James Madison: A Biography (Charlottesville: University of Virginia Press, 1990), 51.

¹³ Ibid., 50.

¹⁴ David M. Rabban, "Historical Perspectives on the Free Press: [Book] Review Essay: The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History." 37 Stanford Law Review 795, 806 (1985).

¹⁵ Ibid.

common law of criminal defamation in general or seditious libel in particular, and no state court [had] ruled that the free press clause of its state constitution rendered void the prosecution of a libel."¹⁶ In sum, though a system of prior restraints on the press, such as the English press licensing system of the seventeenth century, did not exist in eighteenth-century America, criminal remedies for seditious libels, as articulated by English jurist Sir William Blackstone, remained theoretically possible.¹⁷

2. need for a new national government

When Madison and his peers gathered in Philadelphia in 1787, resolving the seeming contradiction between speech and press freedom and the English common law was not of prime importance. Rather, delegates to the Convention gathered out of a common sense of urgency that a new, energetic national government was needed to better administer the affairs of their young nation. Such an undertaking, as Madison described, is "essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government."¹⁸

¹⁶ Levy, 267.

¹⁷ Ibid., 12.

¹⁸ Jacob E. Cooke, ed., "Federalist No. 37," The Federalist (Middletown, Connecticut: Wesleyan University Press, 1961), 233.

Of the external dangers facing the United States in 1787 which warranted the creation of an energetic national government, British, Spanish and French land claims on the periphery of the new nation, as well as matters of interstate and international trade, were undoubtedly the most troubling. At a bare minimum, a strengthened national government of the kind eventually proposed would be better able, both in terms of financing and organization, to raise and support an army capable of defending the fledgling nation's borders.¹⁹ Such a government would also have enhanced authority both in its dealings with foreign governments, as well as in its role of settling disputes among the individual states.²⁰ In addition, some have argued that the principal motivation behind creating an energetic national government was to simultaneously create and nurture an energetic national economy.²¹

3. internal dangers to self-government

The bulk of Madison's constitutional philosophy, however, is concerned not with external threats, but with the internal dangers faced by government. As a political philosopher and veteran legislator, Madison knew full well

¹⁹ See generally, Cooke, ed., "Federalist No. 3."

²⁰ See generally, Cooke, ed., "Federalist No. 8."

²¹ See generally, H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

that the chief and most insidious obstacle to good government is human nature itself. Specifically, Madison's constitutional philosophy emerges from a psychology of human nature which understands that people are motivated largely by selfish concerns and passions.²² In Federalist No. 10, for example, Madison observes that:

[a]s long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinion and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.²³

In other words, since human reasoning is imperfect, individuals will form a variety of differing and imperfect opinions. These opinions, in turn, will be self-serving, to the extent that man's reasoning is tied to his self-love, and will attach themselves to man's irrational faculties -- his passions.

While Madison was certainly not the first to identify self-interest as an underlying motive in human nature, his observation is unique in that it stresses this interest as the primary motivation in human nature. As David Epstein argues in The Political Theory of the Federalist:

[b]oth the economic view of self-interest which has come to be associated with liberalism, and the

²² David F. Epstein, The Political Theory of the Federalist (Chicago: The University of Chicago Press, 1984) 6.

²³ Cooke, ed., "Federalist No. 10," 58.

political hopes for self-abnegation which were once associated with republicanism, obstruct an appreciation of this important aspect of man's nature, which is neither economic nor altruistic but is selfish and political. Human selfishness takes the form not only of self-indulgence and exertion in the pursuit of self-indulgence, but also of self-assertion. For this reason politics cannot be fully understood as either simply an arena for the practice of virtue or simply a realm for the competition or aggregation of interests.²⁴

This realization that human behavior is best understood as the result of selfish desires, including a desire for self-assertion, is especially troubling for governments in which citizens are allowed a participatory role in the political process.

4. the problem of factions

Madison, after systematically reviewing both modern and ancient forms of popular government, concluded that republics have a tendency to perish because individuals not only hold selfish desires unique to themselves but unite together in factions with others holding similar interests.²⁵ Madison defined factions to mean any "number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or the permanent and aggregate interests of

²⁴ Epstein, 6.

²⁵ See generally, Cooke, ed., "Federalist No. 10."

the community."²⁶ Controlling the effects of faction was for Madison both the chief justification for and chief obstacle to popular governments.²⁷

Based on the lessons of history, Madison concluded that: "there ... are two methods of removing the causes of faction: the one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests."²⁸ Madison rejected the first remedy as worse than the disease of faction and characterized the second as wholly impractical in that the fallibility of human reasoning gives rise to different opinions.²⁹ The problem of control is further exacerbated by the fact that human beings will form into factions for any number of inexplicable reasons. As Madison argued:

[a] zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion

²⁶ Ibid., 57.

²⁷ Ibid., 56.

²⁸ Ibid., 58.

²⁹ Ibid.

presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.³⁰

Again, the problem is not that humans form different opinions and hold different interests but that they attach these to their passions and thereafter seek to assert their ideas and themselves on others in a manner which is detrimental to the common good. In that capacity, moreover, humans possess unequal abilities to assert themselves. In the absence of laws, for example, the physically strong are better able to assert themselves over the weak. Even with laws created by a popular government, those who are able to better persuade their fellow citizens to adopt a particular course of action or policy are likely to wield disproportionate political power. Similarly, these and other inequities in the talents and abilities of individuals will likely result in a further, inequitable distribution of power. As Madison observed:

[t]he diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.³¹

³⁰ Ibid., 58-59.

³¹ Ibid.

In other words, not only does the disparity in human reasoning give rise to different opinions, but it results in an unequal accumulation of power and property as well, causing yet further divisions and grounds for faction.

Most importantly, however, rather than controlling these different faculties in order to stem the tide of faction, Madison argues that it is the first object of government to protect them. In this respect, Madison appears to offer a contradictory observation by suggesting that government is required to protect something which causes faction, which in turn is the destroyer of government. In this regard, Madison concludes that "[t]he inference to which we are brought, is, that the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects."³²

5. the extended republic:
controlling the effects of faction

The means that Madison proposed for relieving the causes of faction are perhaps the most original and ingenious contribution of the entire constitutional era. Contemporary theorists, such as Montesquieu, argued that due to the problem of factions, republican forms of government are only practical in small countries comprised of a

³² Ibid., 60.

citizenry with rather homogenous concerns and interests.³³ Madison, however, appears to have built his theory on the converse observation by David Hume that republicanism is best suited to large countries with a multiplicity of interests.³⁴ Rather than relying on the similarity of interests found in small nations, Madison argued that the secret to controlling factions lay in expanding the republic into a so-called "extended republic" in order to ensure the richest possible diversity of interests. Madison observed that by doing so, the likelihood that one faction could gain enough power to oppress the interests of others was greatly diminished. In an extended republic, Madison argued, factions would simply counter-balance one another, and their ill effects would essentially cancel each other out. Moreover, a representative legislature confronted with the plurality of interests in an extended republic would be better able to resist the demands of special interests, rising above the popular fray and discerning the best course of action for the common good.

³³ Montesquieu, De L'Esprit des Lois, book 8, chapter 16 (p. 362) in Epstein, p. 92.

³⁴ David Hume, "Idea of a Perfect Commonwealth," Essays: Moral, Political and Literary, ed. by Eugene F. Miller, rev. ed. (Indianapolis: Liberty Classics, 1987), 512-529.

6. natural aristocracy and the filtration of talent

Though these observations may sound elitist, Madison and his peers had precisely this view of the role of government. Madison argued in Federalist No. 10 that the principal advantage of an extended republican government is that public views may be refined and enlarged "by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."³⁵ Moreover, Madison argued that in an extended republic, electors "will be more likely to centre on men who possess the most attractive merit, and the most diffusive and established characters."³⁶ In other words, just as the extended republic enables the counter-checking of factious interests, elections in the extended republic will eliminate the most factious candidates and select only those with the proper character to discern the public good. Edmund Burke, an English contemporary of Madison's, in a November 3, 1774 speech to the electors of Bristol, observed that:

Parliament [and I take him to mean all representative legislatures] is not a congress of ambassadors from different and hostile interests, which interests each may maintain, as an agent and advocate, against other agents and advocates; but

³⁵ Cooke, ed., "Federalist No. 10," 62.

³⁶ Ibid., 63.

Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.³⁷

Echoing this observation, Madison noted that:

[a] good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can best be attained. Some governments are deficient in both these qualities: most governments are deficient in the first. I scruple not to assert that in the American governments, too little attention has been paid to the last. The federal constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.³⁸

Significantly, neither Madison's nor Burke's observation places any emphasis on the capacity of the governed to capably secure their own happiness, effectively discrediting the notion that unrefined public opinion should guide policy making. Rather, they argue that government alone is capable of transcending such mundane concerns as local prejudices to secure the people's happiness. In order for government to honor this objective and to be considered good by his definition, Madison maintains that it must possess a knowledge about what constitutes the people's happiness, and skilled enough in the mechanics of governing to bring it about. Most importantly though, as indicated

³⁷ Philip B. Kurland and Ralph Lerner, eds., The Founders Constitution: Major Themes (Chicago: University of Chicago Press, 1987), 392.

³⁸ Cooke, ed., "Federalist No. 62," 415.

above, Madison believed that the strength of the system of government devised by the Constitution lay in its ability to effectively channel the knowledge and skills of those who govern in a way that best serves the happiness of the governed.

7. the assumption of virtue (public spiritedness)

Madison's political theory, though principally concerned with human selfishness and self-assertion, simultaneously appreciates, as a necessity, that the people endorse the legitimacy of the system. For Madison, the chief expression of the people's endorsement undoubtedly occurs when the people, acting in the capacity of voters, select men of the best character to hold public office. Nonetheless, the extended republic yields an even more fundamental expression of commitment. As Madison observed:

[j]ustice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty is lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may truly be said to reign, as in the state of nature where the weaker is not secured against the violence of the stronger: And as in the latter state [nature] even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves: So in the former state [government], will the more powerful factions or parties be gradually induced by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.³⁹

³⁹ Cooke, ed., "Federalist No. 52," 352.

In other words, on some level, Madison's political theory assumes that on balance, the people, despite their factious proclivities, recognize the importance of protecting the rights of both political majorities and minorities; accordingly, the people expect their elected officials to recognize this importance as well. As Gordon S. Wood observes, so long as elected officials observe republican principles, "the people [can] relax their jealousy and suspicion and become open and trustful."⁴⁰ Whether we call it a commitment to justice, civic virtue, or "public spiritedness," without this commitment, the founders believed that no system of barriers (constitution, bill of rights, separation of powers, federalism, etc.) could by itself achieve good government.⁴¹ When asked what would prevent Congress from passing laws to favor itself and a select class of citizens at the expense of the People, Madison answered:

the genius of the whole system, the nature of just and constitutional laws, and above all the vigilant and manly spirit which actuates the people of America -- a spirit which nourishes freedom, and in return is nourished by it.⁴²

Nonetheless, while such a commitment may foster the creation of popular government, Madison still recognized that imperfect human reasoning renders such spirit

⁴⁰ Ibid., 109.

⁴¹ Ibid.

⁴² Cooke, ed., "Federalist No. 57," 387.

insufficient to maintain good government. Quite simply, as Madison noted:

[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.⁴³

By external controls, Madison is unquestionably referring to the capacity of the extended republic to ensure that "[a]mbition... be made to counteract ambition."⁴⁴

8. structural safeguards:
constitutional apportionment of power

Internal controls, on the other hand, deal more specifically and technically with the structural design of government itself so that such counteraction may be maintained. On the simplest level, Madison argued that the Constitution observes "the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct."⁴⁵ In fact, Madison argued that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may

⁴³ Ibid.

⁴⁴ Cooke, ed., "Federalist No. 51," 349.

⁴⁵ Cooke, ed., "Federalist No. 47," 324.

justly be pronounced the very definition of tyranny."⁴⁶ On this level, therefore, the Constitution delegates separate spheres of authority to the three branches of government primarily as a means of diffusing political power. As a further control on the accumulation of political power in any one branch, each branch is given a limited authority to check the abuses of the others (*i.e.*, the presidential right of veto over legislation, the congressional right to override presidential vetoes, the advise and consent powers of the U.S. Senate over presidential appointments and treaties, etc.).

While these fundamental checks and balances in the federal government are familiar themes, perhaps less familiar is the fact that Madison viewed federalism as a fundamental check as well. Since the Constitution of the United States proposed a national government of limited powers only, the presumption was that the bulk of political power would continue to be exercised by the states.⁴⁷ The extent to which this was a concession to the political reality of the day will be discussed shortly. What is important to emphasize here is that Madison's constitutional vision was driven by an understanding of human psychology which recognized that popular government, for the sake of civil society, is not only necessary but likely to perish.

⁴⁶ Cooke, ed., "Federalist No. 47," 324.

⁴⁷ See generally, Cooke, ed., "Federalist No. 14."

Federalism, the various checks and balances of the national government, virtue in the people and office-holders, as well as the general tendency of the extended republic to neutralize the power of factions, were the principal means Madison embraced as the manner to make popular government not only enduring but good.

CHAPTER II
THE POLITICAL ORIGIN OF THE FIRST AMENDMENT

The political theory of James Madison, as described in Chapter One, provides the intellectual context in which the origin of the First Amendment is most meaningfully understood. Apart from its intellectual pedigree, however, the origin of the First Amendment cannot be fully understood without considering the political struggle from which it emerged. It is often forgotten, for example, that the First Amendment was precisely that -- an amendment to the fundamental framework of government crafted at the Constitutional Convention of 1787. Indeed, it is important to note that the Philadelphia Convention adjourned in the fall of 1787, having carefully designed the framework for a new national government, without ever seriously considering whether speech and press freedom should play any role whatsoever in the new government. The circumstances under which the Constitution was amended with the Bill of Rights are explained as much, if not more, by the political forces at work in America during the period 1787-1791 than by the intellectual concerns embodied in the political theory of the extended republic. It is precisely these forces to

which our attention must now turn.

A. The Constitutional Convention

At the adjournment of the Constitutional Convention on Monday, September 17, 1787, delegate Benjamin Franklin remarked that he doubted "whether any other Convention we can obtain, may be able to make a better Constitution."¹ And despite many minor reservations, including some held by Madison, all of the delegates to the Convention, except three, essentially agreed with Franklin and signed the Constitution sending it off to the states for ratification.

The three delegates who refused to sign did so for reasons that were later to play themselves out in the struggle for ratification eventually culminating in the Bill of Rights. One of them, Virginia delegate George Mason, publicly stated three weeks after the convention adjourned that he opposed the Constitution because, among other things, it contained "no declaration of rights ..."² As the principle author of Virginia's 1776 Declaration of Rights, Mason's objection might seem completely reasonable until we consider that he waited until five days before the Convention adjourned to suggest that a bill of rights be

¹ Madison, Notes, 653.

² Cecelia M. Kenyon, The Anti-Federalists (Boston: Northeastern University Press, 1985), 192.

included in the Constitution.³ Even more interesting is the fact nearly a week before calling for a bill of rights, he had already announced that he would "sooner chop off his right hand than put it to the Constitution..." Mason reasoned that certain points [unrelated to a declaration of rights] remained to be settled, and "[s]hould these points be improperly settled [in the remaining two weeks of deliberation], his wish would then be to bring the whole subject before another general Convention."⁴ Edmund Randolph, another member of the Virginia delegation to the Convention who ultimately refused to sign the Constitution, concurred in Mason's objection arguing that "the State [ratifying] Conventions should be at liberty to propose amendments to be submitted to another General Convention which may reject or incorporate them, as shall be judged proper."⁵ In reaffirming their opposition on the next to last meeting of the Constitutional Convention, Mason and Randolph, without any reference to a bill of rights, announced that they were voting against the Constitution so that they would be free to vote against it in their state's ratifying convention. In other words, having failed to shape the Constitution to their satisfaction at the Convention, they would attempt to amend, or if necessary,

³ Madison, Notes, 630-631.

⁴ Ibid., 566.

⁵ Ibid., 567.

defeat it at the state level -- a forum where they had more experience and wielded considerably more influence.

Interestingly, in devising the ratification process, delegates at the Philadelphia Convention anticipated much of the strategy that opponents to the Constitution, the so-called "Antifederalists," would later employ. Gouverneur Morris and Charles Pinckney tried, unsuccessfully, to insert in the ratification provisions that state conventions be called "as speedily as circumstances will permit." Specifically, "Morris said his object was to impress in stronger terms the necessity of calling Conventions in order to prevent enemies to the plan, from giving it the go by. By degrees the State officers, & those interested in the State [Governments] will intrigue & turn the popular current against it."⁶

Luther Martin, who had attended most of the Philadelphia Convention as a member of the Maryland delegation (but departed before the Constitution was adopted), agreed that "after a while the people would be [against] it, but for a different reason than that alleged." He believed that the people would not ratify the Constitution unless "hurried into it by surprise."⁷ Elbridge Gerry, the third delegate who refused to sign, concurred with Martin and asked the delegates to reconsider

⁶ Ibid., 566.

⁷ Ibid.

their decision to require ratification by just nine states. As Madison described, Gerry "represented the [proposed] system as full of vices, and dwelt on the impropriety of distroying the existing Confederation, without the unanimous consent of the parties to it."⁸ In a final attempt to prolong the ratification process, Gerry tried unsuccessfully to restore a previously deleted provision that would have required the consent of the Confederation Congress as well.⁹

In all fairness, much of what these, and other Antifederalists objected to in the proposed Constitution stemmed from honest philosophical disagreements over the nature of government, the separation of powers (including federalism itself), and more generally, the understanding of human psychology and political behavior advanced by the Federalists. Specifically, the Antifederalists worried that the Constitution would not preserve a limited form of national government. Rather, they believed that despite the purported safeguards of specific, enumerated powers, the Constitution would create a consolidated national government. For example, through its powers to tax, make treaties, raise an army and navy, and, most especially, "[t]o make all Laws which shall be necessary and proper for

⁸ Ibid.

⁹ Ibid., 611.

carrying into Execution,"¹⁰ the Antifederalists believed that the new national government would result in a total domination of the state governments and the people themselves.¹¹ In short, the Antifederalists rejected Madison's entire concept of the extended republic, arguing as the essayist "Agrippa" did that "no extensive empire can be governed upon republican principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of smaller states, each having the full powers of internal regulation."¹²

In their public remarks, however, the Antifederalists frequently painted their objections to the Constitution in bleak hyperbole. The essayist "Centinel" accused the framers of attempting to establish a permanent aristocracy, a form of government "which ever abominates and suppresses all free inquiry and discussion ..." as evidenced by their having "made no provision for the liberty of the press, that grand palladium of freedom, and scourge of tyrants"¹³ Luther Martin plumbed the depths of demagoguery by declaring that:

I most sacredly believe [that the founders] object is the total abolition and destruction of all state governments, and the erection on their ruins

¹⁰ U.S. Constitution, Article I, Section 8.

¹¹ Kenyon, ed., The Anti-Federalists, xli-xlvi.

¹² Kenyon, ed., The Anti-Federalists, 132-133.

¹³ Ibid., 13.

of one great and extensive empire, calculated to aggrandize and elevate its rulers and chief officers far above the common herd of mankind, to enrich them with wealth, and to encircle them with honours and glory, and which according to my judgement on the maturest reflection, must inevitably be attended with the most humiliating and abject slavery of their fellow citizens, by the sweat of whose brows, and by the toil of whose bodies, it can only be affected.¹⁴

These remarks are important, not so much for the dire warning they sound about the founders' intentions, but for what they suggest about the nature of the public debate that ensued over the ratification of the Constitution. Historian Leonard Levy suggests that most opponents of the Constitution genuinely feared, in varying degrees, the proposed national government.¹⁵ Some Antifederalists, however, deliberately exacerbated this climate of fear by resorting to demagoguery in order to defeat the Constitution. As Levy argues, "[m]erely to denounce the omission of freedom of the press and other liberties was superbly effective and even useful as a mask for less elevating, perhaps sordid, objections to the Constitution concerning such matters as tax and commerce powers."¹⁶ As the Constitution underwent ratification, charges that it would eclipse the power of the states gave Antifederalists in the state ratifying conventions a compelling reason to

¹⁴ Ibid., 169-170.

¹⁵ Levy, 234-235.

¹⁶ Ibid.

reject it. Charges that the Constitution would result in a general repression of rights and create a permanent aristocracy pervaded the popular rhetoric.

B. The State Ratifying Conventions

1. Pennsylvania

News of the Constitution began filtering out of Philadelphia in the weeks following the Convention, and, after an official endorsement from the Confederation Congress, the struggle for state ratification began. The Pennsylvania legislature, having been presented with the Constitution the day after the Philadelphia Convention concluded, immediately set about the task of calling for a ratifying convention. Nonetheless, by the time the ratification convention convened in late November, newspapers, pamphleteers, and speakers of every kind had fueled a rancorous public debate.

Of this popular debate, Wat Tyler reminded his fellow Pennsylvanians a month before their ratifying convention began that:

few men comprehend the science of government, and, that destitute of judgment, the people are only influenced by their passions. Hence arises the expediency of resorting to sound instead of sense; and of bewildering the imagination with visionary terrors, instead of instructing the understanding with rational disquisition, or candid

interpretation.¹⁷

On a more substantive note, the author M.C. observed in the Pennsylvania Herald days later that while many men, including many learned men, had been excited by the various doomsaying Antifederalist tracts, their concerns were not unreasonable, but rather stemmed from genuine patriotism, "fearful for the liberty of posterity and anxious to prevent future encroachments of Congress."¹⁸ M.C. went on to argue that to prevent such encroachments, and in order to preserve the liberty of the press as well as other rights, a meeting of citizens should be called to draft a bill of rights to be transmitted to the states for simultaneous consideration with the Constitution.¹⁹

M.C.'s argument is especially significant in that it foreshadowed the strategy that many of the Antifederalists would take in the coming months, namely: that the Constitution itself was so defective as to warrant the calling of a second convention to draft a new one. While not completely successful in Pennsylvania, this tactic did succeed in encouraging twenty-one of the twenty-three conventioners who voted against the Constitution to

¹⁷ Merrill Jensen, et al., eds., The Documentary History of the Ratification of the Constitution of the United States (Madison: State Historical Society of Wisconsin, 1976-), 2:202.

¹⁸ Ibid., 2:204

¹⁹ Ibid.

formally dissent to ratification. As drafted by Robert Whitehill, the minority dissent essentially echoed the most significant Antifederalist charges: omission of a bill of rights and the inordinate grant of power to the national government which threatened state sovereignty making the unamended constitution unacceptable.²⁰

On the side of the majority, James Wilson articulated the counter-strategy that the Federalists would successfully employ throughout the ratification struggle. Wilson argued that the new federal government would be limited to the exercise of specific, enumerated powers, and that since this government was entitled to no specific authority to abridge the rights of individual citizens, a bill of rights would be unnecessary. Furthermore, Wilson argued, those who were citizens of states that already had bills of rights, such as Pennsylvania, would still have their rights protected. Citizens of states that did not have bills of rights, moreover, were ample proof, based on the general liberty afforded citizens throughout the Confederation, that such declarations were essentially unneeded.²¹

²⁰ Ibid., 3:617-631

²¹ Robert Green McCloskey, ed., The Works of James Wilson (Cambridge: Belknap Press of Harvard University Press, 1967), 2:145.

2. Massachusetts

The twin themes of the need for a bill of rights and amendments to preserve state power played themselves out again in next state ratifying convention where the Constitution was seriously challenged -- Massachusetts. Though through a series of political maneuvers²² the Massachusetts ratifying convention was packed with supporters of the Federalist cause, Elbridge Gerry, by publishing a list of his objections to the Constitution, rallied the Antifederalist opposition. Ultimately, however, pleas for compromise by John Adams and John Hancock proved to be more persuasive. The essence of this compromise was that although the convention would formally ratify, it would do so only with the clear understanding that Massachusetts, as well as the other states, would retain sovereignty in all respects not specifically reserved by the national government. Moreover, the Adams-Hancock compromise resulted in a suggested list of amendments to be considered at some future date.²³ Interestingly, these suggested amendments, which included protections for the liberty of the press and the freedom of conscience, were silent on the question of free speech.

²² Gordon S. Wood, The Creation of the American Republic (New York: Norton, 1972), 486.

²³ See Michael Allen Gillespie, "Massachusetts: Creating Consensus," in Michael Allen Gillespie, et al., Ratifying the Constitution (Lawrence, Kansas: The University of Kansas Press, 1989) 144-158.

3. Virginia

With the ratification by Massachusetts on February 6, 1788, the call for amendments began in earnest. In a letter to George Washington nine days later, Madison described the prospect of introducing amendments as a blemish on ratification, but a blemish "in the least offensive form."²⁴ In other words, nearly six months before the Virginia ratifying convention convened, Madison, though essentially unconvinced as to the necessity of amendments, feared the prospect as little more than a nuisance. As we will see, this is exactly the strategy that Madison would employ in his state's convention as well as in the First Federal Congress; in order to defeat the Antifederalists, he gave them exactly what they demanded -- amendments -- without giving them what they really wanted -- a second constitutional convention.

As the Virginia convention approached, even Edmund Randolph, one of three delegates to the Philadelphia Convention who refused to sign, began having doubts about the Antifederalist cause. In a letter to James Madison dated April 17, 1788, Randolph voiced "grave suspicions" of the motives of those calling for amendments. He believed that a political game was being played by the "Amendmentites," whom he feared "more and more daily; not knowing how far the scheme of those, who externally

²⁴ Jensen, et al., eds., Documentary History, 4:505.

patronize them, may internally extend."²⁵

When the Virginia convention convened on June 2, 1788, eight of the nine required states had already ratified. Accordingly, Virginia's endorsement, or lack thereof, particularly given its population and political importance, would either carry the Constitution to victory or ensure its ultimate defeat. Support for the Federalist and Antifederalist positions, moreover, was more or less evenly split both in the convention itself and in popular opinion. On the second day of the convention, Patrick Henry, who, as legend has it, declined an invitation to be a delegate to the Philadelphia convention because he "smelt a rat," lent his considerable elocutionary skill to the Antifederalist cause. Henry declared that he had come to express the uneasiness of his constituents on having been "brought from that state of full security [the Articles of Confederation], which they enjoyed, to the delusive appearance of things [the Constitution]." Henry rhetorically asked who had authorized the Philadelphia Convention to speak for "We, the People" instead of "We the States," in that "[s]tates are the characteristics, and the soul of a confederation."²⁶

Essentially, as others had argued before, Henry was rejecting Madison's conception of the extended republic.

²⁵ Robert Allen Rutland, The Birth of the Bill of Rights, 1776-1791 (Chapel Hill: University of North Carolina, 1955), 167.

²⁶ Jensen, et al., eds., Documentary Record, 4:930.

Moreover, Henry's chief concern was the preservation of state power. George Mason echoed this line of attack by arguing more specifically that history, "supported by the opinions of the best writers [*i.e.*, Montesquieu], shew us, that monarchy may suit a large territory, and despotic Governments ever so extensive a country; but that popular Governments can only exist in small territories [such as the present states]."²⁷ As a secondary consideration for rejecting the Constitution, both Henry and Mason argued that endorsing a national government of the kind proposed would jeopardize rights.²⁸

In response, Madison argued that:

on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.²⁹

In other words, the size of the republic for Madison was immaterial. Whereas the causes of faction might have less effect in a small republic, faction was, for Madison, a fact of political life in popular government no matter the size of the republic in question. Consequently, the essential dilemma facing popular government for Madison is not how to maintain a modest-sized republic in order to minimize

²⁷ Ibid., 4:937.

²⁸ Ibid., 4:937-951

²⁹ Ibid., 4:990.

faction, but, rather, how to create a political culture in which the effects of faction can be minimized. In this regard, Madison believed that such a political culture was possible only if a diversity of interests and factions could be made to counter-balance one another. Once again, the conceptual devices Madison employed toward this end were the extended republic, separation of powers, federalism, the leadership of a natural aristocracy, and the virtue of the people.

It was the reasoning of arguments such as these that led Edmund Randolph to change his mind once again, this time in support of the Constitution. On June 25, 1788, Randolph recounted for his fellow Virginians that:

I went to the federal Convention ... I refused to subscribe, because I had, as I still have, objections to the Constitution, and wished a free inquiry into its merits. [But] the accession of eight states reduced our deliberations to the single question of Union or no Union ... When I see safety on my right, and destruction on my left, ... I cannot hesitate to decide in favor of the former.³⁰

And this, in an elemental sense, is the issue that remained when all debate had concluded in Virginia and elsewhere. Despite the misgivings of many Antifederalists, anti-nationalists, and those with various regional and economic interests that felt threatened by the Constitution, and despite the frequent sincerity and unfortunate demagoguery with which these objections were articulated in the public

³⁰ Ibid.

imagination, the issue before the ratifying conventions was simply, as Randolph argued, union or no union.

Once the issue of a second convention was put to rest, all that the Antifederalists could hope for were amendments to alter the gravest defects of the Constitution, which in Virginia, was precisely the compromise reached. Yet in reaching this compromise, one last effort was made by the Antifederalists to defeat ratification. Since ratification seemed inevitable in the closing days of the Virginia convention, a final attempt was made to condition ratification on the acceptance, by all of the states, of certain corrective amendments. To Madison, the strategy was clear. On June 25, 1788, he summarized the juncture at which the convention had arrived:

If we propose the conditional amendments, I entreat gentlemen to consider the distance to which they throw the ultimate settlement, and the extreme risk of perpetual disunion. They cannot but see how easy it will be to obtain subsequent amendments. They can be proposed when the legislatures of two thirds of the states shall make application for that purpose; and the legislature of three fourths of the states, or conventions in the same, can fix the amendments so proposed. If there be an equal zeal in every state, can there be a doubt that they will concur in reasonable amendments? If, on the other hand, we call on the states to rescind what they have done, and confess that they have done wrong, and to consider the subject again, it will produce such unnecessary delays, and is pregnant with such infinite dangers, that I cannot contemplate it without horror. There are uncertainty and confusion on the one hand, and order, tranquility, and certainty, on the other. Let us not hesitate

to elect the latter alternative.³¹

Two days later, the Virginia assembly endorsed ratification, simultaneously endorsing a proposed list of amendments (including a provision protecting speech and press freedom based on Virginia's 1776 Declaration of Rights authored by George Mason) to be considered by Congress at their first assembly under the new Constitution.³² In short, when confronted with a choice between a weak confederation and an energetic national government, the Virginia convention chose the latter, unamended, despite the plethora of arguments that individual freedoms would be threatened in the process. That the ratification convention ultimately put its trust in the new national government to initiate corrective amendments, in the precise manner that the Constitution prescribed and that Madison advocated, indicates the extent to which Madison's constitutional theory proved irresistible.

4. New York

Eight days prior to Virginia's ratification, the final critical state convention convened in New York. Though ratification, according to the terms specified in the

³¹ Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, 2d ed., (New York: Burt Franklin, 1888), 629-630.

³² Ibid., 657.

Constitution, was already accomplished, without the accession of New York, perhaps the most commercially important state of the time, the character of the new union would be tainted. It was out of concern for a successful convention, as well as to assuage fears nationwide, that Madison, along with Alexander Hamilton and John Jay, published an anonymous series of essays, advocating the merits of the proposed frame of national government. These essays became The Federalist, unquestionably the fullest articulation of the theory underlying the U.S. Constitution.

The debate in the New York convention centered around the same fundamental issues agonized over in the other state conventions. Underneath all of the objections and rebuttals presented in the convention, though cast in the particular concerns and interests of the empire state, the essential question re-emerged: would the new national government be able to control itself, or would it usurp the sovereignty of the state governments and obliterate the rights of the people in the process? As Cecil Eubanks noted, the delegates to the New York convention generally agreed that a strengthened national government was needed to provide some consistency in matters of trade and commerce, but they feared national power. Though many favored ratification, many also favored corrective amendments and perhaps a second

convention.³³

Melanchton Smith, a prominent New York political figure and opponent of the Constitution, temporarily gained the upper hand in the convention when he championed an effort to proceed with ratification on the condition of subsequent amendments. Ultimately, Smith retreated from this position when presented by a letter from Madison to Smith's friend, Alexander Hamilton, in which Madison argued that "subsequent conditions" were unacceptable and that anything less than an unconditional ratification would be a tainted ratification.³⁴ The following day, the letter was read by Hamilton before the Convention. Afterward, the proposal calling for conditional amendments was altered to simply recommend various amendments³⁵, including a provision for free speech and press protection for subsequent consideration by the states and the First Congress. Two days later, the Convention ratified the Constitution, and the new national government became an unquestioned reality.

³³ Cecil L. Eubanks, "Federalism and the Political Economy of the Union," in Ratifying the Constitution, 328-329.

³⁴ Harold C. Syrett, et al., eds., The Papers of Alexander Hamilton (New York: Columbia University Press, 1961-1979), 5:184-185.

³⁵ Ibid.

C. James Madison's Conversion to the Amendment Cause

Partisan tempers did not cool immediately with the conclusion of the ratification process. In Virginia, Madison's political enemies, most notably Patrick Henry, not only conveniently overlooked him for one of Virginia's two Senate seats, but gerrymandered his home congressional district to include as many pockets of Antifederalist sentiment as they could. Madison's opponent, James Monroe, used this to his advantage by campaigning on the need for amendments and by charging that Madison was "dogmatically attached to the Constitution in every clause, syllable and letter."³⁶ In the face of this political battle, Madison's opposition to constitutional amendments began to soften.

This transformation in thought is significant, for, as we have seen, Madison viewed factions, and not just and well-ordered governments, as the chief threat to individual liberties in a popular government. In a letter to his friend Thomas Jefferson, Madison argued that though he was generally unopposed to a bill of rights, so long as the enumerated powers of Congress were left intact, he did not believe that such "parchment barriers" were necessary, nor did he believe that they would accomplish their intended function. Specifically, he argued that:

[w]herever the real power in a Government lies,

³⁶ William T. Hutchinson, et al., eds., The Papers of James Madison (Charlottesville: University Press of Virginia, 1977-), 11:418.

there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.³⁷

In other words, given Madison's belief that factions are the greatest threat to liberty and popular government, a bill of rights would be unnecessary in that the various structural devices of the extended republic, including federalism and the separation of powers, were seen by him to be more than adequate in controlling the effects of factions.

Clearly, though elegant from a theoretical standpoint, the two weakest links in Madison's reasoning are: 1) his assumption that the extended republic would produce a talented, principled leadership essentially immune to the whims of popular opinion, and 2) that the people possess enough virtue to select virtuous leaders, and to trust the system. The various devices of the extended republic, after all, are only capable of countering the ill effects of faction -- they cannot fully displace parochial concerns with "public spiritedness."

Jefferson, in reply, suggested to Madison that a bill of rights would be worthwhile if for no other reason that it would put appropriate authority in the hands of the Supreme Court to check the powers of Congress. This authority would

³⁷ Ibid., 11:297-30

also give the state governments, Jefferson argued, a similar check.³⁸ In other words, Jefferson presented Madison with a rationale for a bill of rights that fit securely within Madison's theory of balancing power against power and faction against faction; rather than weakening the devices of the extended republic, a bill of rights could actually serve to accentuate their efficiency. Nonetheless, even with this additional check, the system would demand an essential residuum of "public spiritedness" in order to function properly.

Even before receiving Jefferson's letter, Madison was coming to accept the idea of a bill of rights. Though he had yet to embrace the idea of amendments, Madison argued that if "pursued with a proper moderation and in a proper mode, [amendments] will be not only be safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty."³⁹ Whether by Jefferson's or his own reasoning, Madison slowly began to warm to the idea of constitutional amendments. If nothing else, it is certain that Madison considered himself morally bound to work for amendments, not only because of promises he made during his campaign, but because of the explicit instructions of Virginia's ratifying

³⁸ Julian P. Boyd, et al., eds., The Papers of Thomas Jefferson. (Princeton: Princeton University Press, 1950-), 13:659-661.

³⁹ Papers of James Madison, 11:404-405.

convention.

D. The First Federal Congress and the Creation of
the First Amendment

The First Federal Congress convened in New York City on March 4, 1789. A quorum was reached on April 6th, and the following month, as promised, Madison introduced the subject of Amendments, but postponed making a formal proposal until June 8th. By the time Madison made his formal proposal, the legislatures of Virginia (on May 5th) and New York (on May 6th) had already petitioned the new congress for a second convention in order to address the serious defects of the Constitution. In order to mollify state concerns, Madison's eventual proposal essentially synthesized the various state recommendations (Massachusetts, South Carolina, New Hampshire, Virginia and New York) for corrective amendments, including a provision protecting the freedoms of press and speech. In addition, Madison proposed two protections no state had asked for, namely, that no person could be forced to give up his property without just compensation and that no state [emphasis added] could infringe the equal rights of conscience, freedom of the press, or trial by jury in criminal cases.⁴⁰

Despite Madison's efforts, Federalist and Antifederalist sympathizers in Congress alike proved less

⁴⁰ Veit, et al., eds., Creating the Bill of Rights, 11-31.

than enthusiastic. Many Federalists still believed that a bill of rights was unnecessary, whereas many Antifederalists feared that if only rights-oriented amendments were adopted, any chance of major structural amendments, or even of another constitutional convention, would be lessened.⁴¹ Nonetheless, Madison pressed on. Upon making his formal proposal to the House, Madison argued that:

[h]is object was to quiet the mind of the people by giving them some early assurance of a disposition in the house to provide expressly against all encroachments on their liberties, and against the abuses to which the principles of the constitution were liable.⁴²

In response to arguments made by his fellow members that there was more pressing business before the House, such as a tax bill and a bill to create a lesser federal judiciary, Madison responded:

I am sorry to be accessory to the loss of a single moment of time by the house.... If I thought I could fulfill the duty which I owe to myself and my constituents, to let the subject pass over in silence, I most certainly should not trespass upon the indulgence of this house. But I cannot do this; and am therefore compelled to beg a patient hearing to what I have to lay before you. And I do most sincerely believe that if congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence on the public councils, and prepare the way for a favorable reception of our future measures.⁴³

Nonetheless, despite Madison's pleas, Congress was

⁴¹ Ibid., xiv-xv.

⁴² Ibid., 63.

⁴³ Ibid., 77.

reluctant to undertake amending the Constitution, and voted instead to put the whole matter before a committee of the whole at some future date. On July 21, 1789, Madison once again asked his colleagues to consider the business of amendments. Again, the members of the House debated not the worthiness of the amendments, but rather, questioned the propriety of wasting valuable time when other, more important matters were still pressing. Massachusetts Congressman Fisher Ames, an avowed Federalist, argued that a special, select committee, rather than a committee of the whole, would be better able to deal with the question of amendments. Elbridge Gerry once again articulated the Antifederalist objection, arguing that the matter was too important to be left to a select committee, but as yet, Congress was still too busy to deal with the issue in a committee of the whole. In other words, Gerry wanted the whole matter postponed indefinitely. Nonetheless, the majority Federalist position prevailed, and the House voted to refer the issue to a select committee comprised of members from every state.⁴⁴

On August 13, 1789, Virginia Representative Richard Bland Lee moved that the House should form itself into a committee of the whole in order to consider the report of the select committee on the subject of constitutional amendments. Once again, the opposition argued

⁴⁴ Ibid., 97-103.

unsuccessfully against the motion, offering that the matter was too delicate to be considered at a time when the House had to contend with more pressing matters.⁴⁵ After a lengthy debate concerning whether the amendments should be incorporated in the text of the Constitution, as Madison wanted, it was decided that they would appear as an appendix to the Constitution, and with that, the individual amendments were finally set for full consideration by the House.⁴⁶ Two days later, what would eventually become the First Amendment, which many in our present day consider the epitome of the spirit of liberty envisioned by the founding fathers, was reluctantly taken up for discussion by the First Federal Congress.

South Carolina Representative and Antifederalist Thomas Tudor Tucker, upon the first reading of what was then the fifth proposed amendment, moved to insert language qualifying the speech and press freedom of individuals as a means of instructing their representatives. This proposal ultimately resulted in more debate than any other question as to the basic efficacy of protecting speech and press freedom. Pennsylvania Representative Thomas Hartley opposed Tuckers's proposed insertion on straight-forward Madisonian grounds. He argued that:

[t]he power of instructing might be liable to

⁴⁵ Ibid., 104.

⁴⁶ Ibid., 112-128

great abuses; it would generally be exercised in times of public disturbance, and would express rather the prejudices of faction, than the voice of policy; thus, it would convey improper influences into the government.⁴⁷

In support of Hartley, Connecticut Representative Roger Sherman echoed Burke's understanding of representative legislators by arguing that:

instructions were not a proper rule for the representative, since they were not adequate to the purposes for which he was delegated. He was to consult the common good of the whole, and was the servant of the people at large. If they should coincide with his ideas of the common good, they would be unnecessary; if they contradicted them, he would be bound by every principle of justice to disregard them.⁴⁸

Only Elbridge Gerry openly supported the proposal by arguing that if the people were sovereign, as contended, then it would be inconceivable that they not also have "the right to instruct their agents at their pleasure."⁴⁹

Once again, it would be for Madison to clarify the question at hand. In general, Madison opposed Tucker's motion because it spoke of a "doubtful" right, one which many people, himself and those in state government included, would find especially worrisome, particularly in light of his dual objective of mollifying critics and preserving the basic structure of government intended by the Constitution. Madison agreed that the proposal was partially true, that

⁴⁷ Ibid., 151.

⁴⁸ Ibid., 151.

⁴⁹ Ibid., 152.

the people most definitely have a right to speak and publish their sentiments on political issues, and also unquestionably have a right to petition the government for a redress of grievances. Nonetheless, the proposition that such views should obligate Congress in anyway, Madison argued, was "certainly false." With specific regard to Gerry's remark, Madison agreed that the people are sovereign, but asked:

who are the people? Is every small district, the PEOPLE? and do the inhabits of this district express the voice of the people, when they may not be a thousandth part, and although their instructions may contradict the sense of the whole people besides? Have the people in detached assemblies a right to violate the constitution or controul the actions of the whole sovereign power? This would be setting up a hundred sovereignties to the place of one.⁵⁰

South Carolina Representative William Smith offered that if Congress were bound by the instructions of constituents, then states in closer proximity to Congress would have an unfair advantage in that they would have greater ease conveying their sentiments (owing to the communications technologies of the day) to their congressmen.⁵¹ And perhaps most acutely, Maryland Representative Michael Stone argued that adopting the Tucker motion would change the nature of the Constitution:

[i]nstead of being a representative government, it would be a singular kind of democracy, and whenever a question arose [as to] what was the

⁵⁰ Ibid., 152.

⁵¹ Ibid., 153.

law, it would not properly be decided by recurring to the codes and institutions of Congress, but by collecting the various instructions of different parts of the Union.⁵²

Quite simply, creating a system of government in which public opinion played a fundamental role in the formulation of public policy was not what the founders intended. With a few subsequent, minor revisions, the First Congress adopted what would become the First Amendment without ever debating the merits of protecting speech and press again.

Ultimately, the question of free speech and press, as well as the other amendments comprising the Bill of Rights, were forced upon the First Congress as part of the political battle surrounding ratification of the Constitution, not as a result of some deeply held constitutional theory.

On August 19, 1789, James Madison, in a letter to Richard Peters, outlined his reasoning for supporting what he described as the "nauseous project of amendments." First, Madison argued that a declaration of rights is not, in and of itself, an improper thing to be contained in the Constitution in that every government has the propensity to oppress its subjects, and a paper barrier, though frequently transgressed, is never powerless. Secondly, Madison argued, many of the states ratified the Constitution with the tacit assumption that certain amendments would be undertaken. Thirdly, had amendments not been promised, Madison argued

⁵² Ibid.

that the Virginia congressional delegation would have been composed "almost wholly of disaffected characters...." Fourthly, had the Federalists not raised the subject of amendments, the Antifederalists almost certainly would have if only to make the point that they were forcing their opponents to keep their word. Fifthly, and perhaps most importantly, Madison argued that proposing amendments would "kill the opposition every where..." giving greater credibility to the new government in the process. And finally, if no amendments had been proposed, Antifederalist arguments that the aim of the new government was to deprive the people of their liberties would be reinvigorated, and the likelihood of a second convention would be trebled with Congress having failed to deliver on the corrective measures it had been instructed to render.⁵³

⁵³ Ibid., 281-282.

CHAPTER III

THE FIRST AMENDMENT WITHIN THE POLITICAL THEORY OF JAMES MADISON

Ultimately, as discussed in Chapter Two, James Madison came around to the idea of amendments because he believed they could be secured without seriously altering the balance of powers achieved by the Constitution. In sum, the rationale for protecting free speech and a free press can be fit securely within Madison's conception of the extended republic. As Madison noted in Federalist No. 51:

[i]n the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces [and I take him to mean the expression of these interests, parties and sects by means of speech and press], a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; and there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of the society itself.¹

The capacity of the extended republic to accommodate variety, neutralize faction and nourish an environment in which self-government and good government can flourish

¹ Cooke, ed., "Federalist No. 51," 352-353.

simultaneously provides an excellent rationale for protecting the freedoms of speech and press. As we have seen, at the heart of Madison's extended republic is the proposition that the ill effects of faction (the greatest threat to self-government) must be controlled. So long as the underlying interests that give rise to factions are diverse, and so long as the powers of government are sufficiently separated and balanced to prevent majorities from asserting themselves in the political arena except in a manner conforming to the best interests of the whole nation, then the deleterious effect of factions will be neutralized.

In this sense, ideas, whether expressed in writing or speech, can be seen to fit within Madison's theory of human psychology which explains the inevitability of factions. As noted earlier, this theory argues that the cause of factions are individuals and groups, who, having exercised their highly fallible powers of reasoning, form a myriad of opinions on every aspect of the human condition, to which their passions are attached. This combination of passion and opinion, moreover, results in the human proclivity to self-assertion, giving rise to both factions and their ill effects. If we consider the interchange of ideas in the popular arena, as Madison essentially did, as simply a manifestation of human nature and its faction-forming propensity, then the challenge that self-expression represents to self-government is the same challenge that

faction poses to self-government generally.

Since extinguishing liberty is worse than suffering its excesses, the way to best protect the freedoms of speech and press within the context of Madison's theory is to provide a framework, much like the extended republic, in which a wide diversity of ideas are made to compete and balance each other. The separation of government powers, as well as the degree to which representative legislators are separated from factious minority opinion, provides a further barrier minimizing the assertion of factious majorities (and their ideas) in the process of self-government -- except in those instances where a majority consensus is satisfied that such an assertion is warranted by the need to serve the common good. In other words, by proclaiming that the freedoms of speech and press are beyond the power of Congress, and given that it is assumed that such protection will result in a diversity of opinions and ideas being introduced into the public imagination, the First Amendment, by embracing a sphere of activity typified by the assertion of factions, seeks to control the ill effects of those factions by ensuring their rich diversity, and ultimately, their mutual counter-action and neutralization.

In sum, Madison's constitutional philosophy, including the First Amendment, results in a representative national government constrained by a majority public opinion which in turn is constrained by public spiritedness as well as the

filtration mechanisms of the extended republic. As Madison noted in 1791:

[p]ublic opinion sets bounds to every government, and is the real sovereign in every free one. As there are cases where the Public Opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government. This distinction, if kept in view, would prevent or decide many debates on the respect due from the government to the sentiments of the people.... Whatever facilitates a general intercourse of sentiments, [such] as good roads, domestic commerce, a free press, and particularly a circulation of newspapers through the entire body of the people, and Representatives going from, and returning among every part of them, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive. (emphasis omitted).²

All of which adds another dimension, beyond the simply political, explaining Madison's ultimate support for a constitutional amendment protecting speech and press freedom. While it is clear how Madison was able to fit the media protections of the First Amendment within his general constitutional theory, it is less clear what the other members of the First Congress, or the state conventions that ultimately ratified the Bill of Rights had in mind. Rather, instead of providing a clear historical record, the documentary histories of the First Congress and those of the state conventions, reveal only apathy, ambiguity, brevity and political intrigue. As historian Leonard Levy notes, while there is no doubt that Congress and the state conventions cared about protecting speech and press, "no one

² Gaillard Hunt, ed., "Public Opinion," The Writings of James Madison. (New York: G.P. Putnam's Sons, 1906), VI:70.

seems to have cared enough to clarify what [they] meant by the subject upon which [they] lavished praise."³ Levy, moreover, offers what I think is one of the best examples demonstrating that the founding fathers had little idea of exactly what they were protecting. Levy argues in The Emergence of a Free Press that despite the colonial American precedent of the Peter Zenger trial and another half dozen similar cases, the concept of seditious libel remained unchallenged before and after the First Amendment. Levy argues that the Alien and Sedition Acts, enacted by Congress in 1798, were used with particular vehemence against newspaper publishers critical of the Adams administration. Surprisingly, despite the guarantee of the First Amendment, supporters of the Act argued that the First Amendment did not repudiate the common law concept of seditious libel--namely, that harsh criticism of the government and those in it, whether true or not, constitutes a libelous injury to the government itself.⁴

As an example, Levy argues that the controversy over the Alien and Sedition Acts, which pitted Jefferson's Republican party against the Federalists, ultimately resulted in the libertarian understanding of free press and

³ Levy, 2

⁴ Ibid., 274-281.

speech that we have today.⁵ For example, in opposing the Acts, Madison articulated the significance of speech and press freedom in a significantly different manner, and with a stronger conviction than he had in the First Federal Congress.⁶

The most compelling explanation for Madison's change of heart, however, is found in the changing political culture of the nation itself. In his landmark work, The Radicalism of the American Revolution, historian Gordon S. Wood argues that the American Revolution set loose cultural forces that eventually produced an uniquely American paradigm of democratic government. Specifically, Wood argues that in the decades following the Revolution:

[t]he founding fathers were unsettled and fearful not because the American Revolution had failed but because it had succeeded, and succeeded only too well. What happened in America in the decades following the Declaration of Independence was after all only an extension of all that the revolutionary leaders had advocated. White males had taken only too seriously the belief that they were free and equal with the right

⁵ The author wishes to stress that although the Levy thesis has been sharply criticized for its focus on seditious libel as the principal touchstone by which to measure the founders' commitment to free speech and a free press, such criticism has left intact this author's contention that the contemporary libertarian understanding of the First Amendment was not solely the product of the Constitutional Convention, the First Federal Congress, nor the struggle to ratify the Constitution or the Bill of Rights. See generally, David M. Rabban, "Historical Perspectives on the Free Press: [Book] Review Essay: The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History." 37 Stanford Law Review 795 (1985).

⁶ Ibid.

to pursue their happiness. Indeed, the principles of their achievement made possible the eventual strivings of others-black slaves and women-for their own freedom, independence, and prosperity.⁷

In this respect, the Constitution, and the political theory from which it emanates, were ultimately swept up and transformed by the cultural revolution set loose by the American Revolution. In combination, these revolutions set in motion the twin contending themes of equality and liberty which continue to play themselves out in the political life of this nation.

A. Madisonianism in the Modern Age

As it exists today, Madison's model, the Constitution, encompasses commitments to both freedom and equality, while employing the divergent interests of the extended republic to keep these contradictory commitments in equipoise. Although frequently used in conjunction, liberty and equality, as political ideals, are actually at odds with one another; whereas liberty is focused on the state of the individual in society, equality is focused on the state of society at large. For example, without a commitment to equality, a commitment to liberty would result in an inequitable hierarchy in society. Similarly, without a commitment to liberty, equality would result in the degradation of individual rights. Quite simply, without the

⁷ Gordon S. Wood, The Radicalism of the American Revolution (New York: Vintage Books Edition, 1991), 368.

capacity of the extended republic to neutralize faction, we might easily live in a society that placed absolute value on individual freedom, without any concern whatsoever for the inevitable resulting disparities in wealth and power. On the other hand, without the extended republic, we might easily live in a society that placed absolute value on equality, without any recognition whatsoever of the diverse talents and abilities that make each of us unique individuals.

In short, without the Madison model, we might have no solution for the Madisonian dilemma; that is, how to create and maintain a popular, participatory system of government without allowing the will of the majority to trample on the rights of the minority, while, simultaneously, disallowing the minority the ability to trample on the right of the majority to govern itself. In other words, the Madisonian solution to the Madisonian dilemma seeks to avoid both majority and minority tyranny by employing the extended republic to neutralize faction and to assist the articulation of solutions to contemporary problems in a manner that preserves good government. By doing so, the Madisonian model assumes that the values of political majorities, both in Congress and the public at large, when passed through the filter of the extended republic, will ultimately articulate and advocate public policy choices that serve the greater good. For lack of a

better term, Madison's model is nothing less than the model of American democracy that survives to this day.

B. Conclusion

On balance, it appears that the contemporary incarnation of Madison's model has worked extraordinarily well. While we may no longer subscribe to Madison's elitist assumptions about a natural aristocracy, voters still tend to vote for candidates on the basis of character, not issues. As Michael Corbett observes, polling data reveal that "[t]he primary function of elections is to determine who will make policy decisions, not to determine what the policy positions will be."⁸ In this respect, the model of the extended republic acts as a filter in elections as well; as Corbett observes, "[p]ublic officials who want to be re-elected are likely to be responsive to very broad segments of the population and avoid offending any significant group of voters."⁹ It is in this manner, moreover, that the model is self-correcting; should a representative wholly disregard constituent opinion which is highly salient and unchanging, he or she is likely to be defeated at the ballot box.

In essence, beyond the structural safeguards of the Constitution, Madison's model of constitutional democracy

⁸ Ibid., 323.

⁹ Ibid., 322.

requires only two things: 1) diversity in the extended republic (opinions as well as persons) and 2) a certain virtue, or public spiritedness in both elected officials and the voting public. The First Amendment serves the requirement of diversity, and the mechanism of the extended republic filters out the ill effects of faction. What remains as the driving force for the articulation and enactment of good public policy is public spiritedness itself.

It is an optimistic model; it is a model which assumes that beneath all of our differences and factional allegiances lies a wellspring of commitment simultaneously respecting the values of equality and liberty. Such a commitment, as Madison observed, is the genius of the whole system.

For those who strive for social justice, the model is undoubtedly frustrating and slow, for it articulates, but does not drive, popular commitment to these values with respect to contemporary issues of concern. On balance, however, there simply is no denying that the model generally moves us in a positive direction; a direction which continually demonstrates that it is possible for a people to govern themselves; a direction which suggests that self-government can be both enduring and good.

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