PARCHMENT BARRIERS AND THE POLITICS OF RIGHTS

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1. Historical Questions

As an episode in political history, the adoption of the Bill of Rights in 1789-1791 does not present particularly difficult or puzzling questions. In the standard interpretation, the Bill of Rights was a product of the expedient, even cynical political maneuvers of both Federalists and Antifederalists; once proposed by the First Federal Congress in 1789, after the heroic efforts of James Madison, it generated little interest in the states, and quickly passed into a state of legal and political irrelevance.[1] By far the more challenging questions that the history of the Bill of Rights raises concern not its origins in the distant world of the eighteenth century but rather the reasons for its modern recovery and prominence in our own time. Indeed, were it not for the central place that disputes about the Bill of Rights hold in contemporary law and politics, the conventional account of its adoption would still seem satisfactory and sufficient. Conversely, the intensity of our current debates has turned the seemingly prosaic circumstances surrounding the adoption of the Bill of Rights into a source of nervous unease. Surely, we sense, there must have been more to the story than this!

One response to the perceived inadequacies of a merely political account of the adoption of the Bill of Rights takes the form of particularistic inquiries into the "original meaning" of the individual clauses that have become the subject of current controversy. By suggesting that each right codified in the text possessed an independent history that can be studied in isolation

from the others, this approach asks how the formulations of 1789 reflected the development of legal thinking in specific areas.[2] This is especially useful when the provisions adopted were innovative by eighteenth-century standards, as was the case, for example, with the establishment clause or the advanced language with which James Madison consciously cast the Fourth Amendment's protection against "unreasonable searches and seizures" or the Fifth Amendment's prohibition against self-incrimination.[3]

Though significant gaps remain in our understanding of how concepts of particular rights evolved during the Revolutionary era, this monographic approach has served the fields of legal and constitutional history well. Yet insofar as these studies have been inspired by the contemporary debate over rights, they may also distort or mistake the questions that most need asking about revolutionary Americans' ideas of rights. For although all questions about original meaning are inherently historical, they do not readily represent the kinds of questions that historians ordinarily ask. Few if any historians would find it worthwhile to ask exactly what the establishment clause or the right to bear arms or the prohibition against "unreasonable searches and seizures" meant in 1789 or 1791, were it not for the fact that such issues as school prayer, gun control, or drug testing are hotly disputed today.[4]

A strictly historical inquiry into the original meaning of a particular right does not presuppose that that meaning, if and when it can be recovered, should be binding today; it simply asks why a

particular clause was adopted while marking a base line from which its subsequent evolution can be traced and assessed. But in recent years, the demand for a return to a "jurisprudence of original intention" has raised the stakes of historical research by insisting that the true meaning of a particular clause was somehow fixed at the moment of adoption, and that the task of interpretation is to apply that meaning to contemporary issues. Equally important, many proponents of "originalism" also hold that the only rights deserving constitutional recognition and protection are those explicitly mentioned in the text of the Constitution.[5]

Both of these claims imply that the central problem of rights in the revolutionary era was to identify, enumerate, and define with textual precision the rights that Americans felt were most crucial to the protection of their liberty. The inherent bias of originalism thus equates American ideas of rights with the Bill of Rights. From the vantage point of contemporary jurisprudence, this bias may seem sensible; but from the vantage point of history, the equation of the problem of rights with the issue of enumeration is questionable. With its pressing need to find determinate meanings at a fixed historical moment, the strict theory of originalism cannot capture everything that was dynamic and creative--and thus uncertain and problematic--in revolutionary constitutionalism; nor can it easily accommodate the diversity of views that (after all) best explains why the debates of this era were so lively.[6] Where we look for answers, the framers and ratifiers of the late 1780s were still struggling with questions whose novelty and complexity

had already carried them away from the received wisdom of their time.

One of these questions was indeed identical with the issue so much agitated today: whether the enumeration of specific rights within the Constitution was understood to relegate all other rights left unmentioned to an inferior status. But while a concern with this question was very much part of the debate about the need for a bill of rights in 1788 and 1789,[7] it was neither the sole nor even the most important problem that the Americans confronted during their revolutionary experiment in designing republican governments. The colonists entered the revolutionary crisis of 1765-1776 confident that they knew what their rights were; in the decade after independence, they modified these original ideas only modestly. What did evolve, far more dramatically and creatively, were their ideas of where the dangers to rights lay, and how rights were to be protected.

As was the case with every other aspect of constitutional theory--representation, sovereignty, federalism, the definition of a constitution itself--American ideas about rights and their protection evolved continuously if unevenly throughout the Revolutionary era, from the Stamp Act controversy of the mid- 1760s to the organization of political parties in the 1790s.[8] At the outset of this period, Americans, as good whigs, believed that arbitrary acts of magistracy--that is, of the crown and its officials in the colonies--posed the greatest danger to rights. The claim that Parliament could legislate for America "in all cases

whatsoever" exposed a new threat to colonial rights, but precisely because Americans denied that Parliament could ever represent their interests, it did not shake the deeper conviction that the greatest security for the collective rights of the people lay in the process of representation. It took a decade of experience under the new state constitutions written at the moment of independence to expose the dual dangers that so alarmed James Madison in 1787: that the abuse of legislative power was more ominous than arbitrary acts of the executive, and that the problem of rights was a matter less of protecting the ruled from the rulers than of defending minorities and individuals against the impassioned or self-interested desires of popular majorities acting through government. When set against this broader shift in the way that Americans thought about rights, the issue of which rights deserved explicit constitutional mention appears as a distinctly secondary problem.

How this transformation in the broader understanding of the problem of rights led Madison, his colleagues in the Federal Convention, and like-minded Federalists to dismiss formal statements of rights as mere parchment barriers is the central theme of this essay. After first describing how the colonists thought about the protection of rights before independence, it asks how the experience of the Revolution led to the reconsideration of these traditional ideas. The concluding section then considers how Madison fashioned a new synthesis of the problem of rights in the late 1780s, and why his initially disparaging view of the utility of bills of rights was modified by the constitutional debates of

the late 1780s.

2. Definitions of Rights in Colonial America

In Federalist 37, his brief but acute meditation on the epistemology of the science of politics, James Madison sought to explain why attempts to delineate the "three great provinces" of government or "the several objects and limits of different codes of law and different tribunals of justice" repeatedly "puzzle" even "the greatest adepts in political science" and "the most enlightened legislators and jurists." Madison traced "the obscurity which reigns in these subjects" to three distinct causes: "indistinctness of the object, imperfection of the organ of conception, [and] inadequateness of the vehicle of ideas." The science of politics was necessarily untidy, Madison understood, because the objects it studied were inherently complex; because human faculties of observation and analysis were fallible; and because language itself was a source of "unavoidable inaccuracy."[9]

Writing at a point in the ratification campaign when Federalists still opposed a bill of rights, Madison naturally avoided citing the case of rights as another example of the difficulties of classifying political phenomena. He could easily have included it, however, had he wished to; and indeed, on the specific issue of language, one of his reservations about enumerating constitutional rights was the danger of reducing a broad claim of right to any specific textual formula. More than that, Madison and other Federalists found the task of classifying

rights genuinely daunting. The rights to which eighteenth-century Americans laid claim, whether as British subjects or citizens of an independent republic, were diverse and complex. Nor did rights pertain to individuals alone. Communities, corporate bodies, and institutions of government all had rights, which were exercised both on behalf of the collective groups so constituted and their individual members.[10] A farmer in, say, Medway, Massachusetts, who voted for his town's representative in the General Court was simultaneously exercising an individual right of suffrage and participating in a communal right of representation; arguably he also had a stake in both the legislator's right to speak freely when he attended the General Court in Boston, and the assembly's sole right to levy whatever taxes would burden its constituents.

Recent scholarly commentators on the origins of American constitutionalism have emphasized the complexity and diversity of the rights Americans claimed. Take, by way of example, the briskly synthetic chapter canvassing "The Rights of Englishmen" in Forrest McDonald's Novus Ordo Seclorum.[11] Though hardly exhaustive, this survey manages to describe both rights of property and civil liberties in a short compass. To speak of the former, McDonald observes, one must describe the corporate right of the public to govern the use of property through regulation of markets, sumptuary laws, the granting of monopoly privileges, and various forms of takings: forfeiture, eminent domain, and most important, taxation, which in turn implicated the fundamental right of representation. Private rights of property included such prosaic matters as

"grazing, wood gathering, hunting, passage, and the use of water."[12] Far more exalted were the civil rights that defined the relation between citizens and subjects, on the one hand, and the state, on the other: the right of habeas corpus and other procedural safeguards against the coercive power of government. Of these, "the genuinely crucial right was that of trial by jury."[13] In England and America, rights of conscience had gained broad and principled recognition by the eighteenth century, even if dissent was often merely tolerated instead of accepted as an absolute right, and even if the exemptions that dissenters enjoyed varied from place to place with the strength of local establishments. Within the realm of political life, freedom of speech was still regarded more as a privilege of legislators than citizens, while freedom of the press meant only a prohibition on prior restraint from publication, not a broad defense against prosecution for the various forms of libel.

Any discussion which reveals how "the rights of Englishmen" subsumed concepts as diverse as estover (the right to gather wood) and the limited yet vital definitions of freedom of the press has already illuminated the inherent complexities of the subject. But for all its elegance, McDonald's survey does not explain how these diverse notions affected the development of American ideas of constitutional rights. To understand rights in this sense, one has to ask how colonial ideas reflected both the intense debate precipitated by the Stamp Act of 1765 and, more broadly, the constitutional history of England and the British empire.

Perhaps the most important and certainly the most detailed examination of the prerevolutionary debate over rights is found in the writings of John Phillip Reid. In a series of monographs, Reid has catalogued the multiple claims of rights the colonists invoked; traced these claims to their primarily English sources; and vindicated American positions as faithful expressions of traditional doctrines that had become problematic not because the colonists were grasping for pretexts to justify resistance, but rather because British constitutional theory was itself changing in radical ways. In these writings, which are archaeological in depth and intensely taxonomical in approach, Reid confirms just how deeply the language of rights and liberties suffused American thinking--so much so that modern readers may find it hard to comprehend both the intense precision and flabby abstraction with which these terms were repeatedly invoked.[14]

At the most general level, Reid argues, the imperial debate brought two rival conceptions of the British constitution into irreconcilable conflict. Adhering to traditional English notions, Americans saw themselves defending a body of customary rights that history, common law, and precedent had secured beyond the reach of governmental interference. But this insistence upon their inherent rights as Englishmen[15] collided with the emerging doctrine of parliamentary supremacy and "the constitution of arbitrary power that the British constitution was about to become."[16] Once that doctrine was arrayed in all its splendor, the traditional notions that the Americans espoused verged perilously close to anachronism.

Where law itself had been regarded as a set of customary restraints on the exercise of arbitrary power, it was now being transformed into the mere command of the sovereign.[17]

Although Reid avoids asking how the revolutionaries confronted problems of rights once they began drafting their own constitutions of government,[18] his conclusions remain significant for that problem on several grounds.

Reid demonstrates, first, that rights were regarded as being constitutional in nature, and indeed, that the British constitution itself was a constitution of rights: "the basic theory, stated often enough in the eighteenth century," was "that the constitution and rights were one."[19] The security of rights and the right to security were the very end of the constitution and the measure of its legitimacy.[20] But precisely because the eighteenth-century constitution was in process of transformation, Reid insists on the importance of distinguishing law that was either "fundamental" or "constitutional" from acts that were still legal even while violating the former norms. "To say that a statute or a governmental action was unconstitutional was to say that it was contrary to the constitution, it was not to say that it was illegal." Yet in Britain and especially in America, the conviction survived that there remained a category of fundamental law that was "immutable law beyond the reach of any institution of government."[21] Thus the paradox: rights deemed constitutional could be either rendered vulnerable by statute or exalted as fundamental, depending on how parliamentary supremacy was balanced against the

vestigial but potent norms of the customary constitution.

Reid's work bears on emerging American doctrine in a second significant way. For all its abstraction and "circuity," for all the nuances and paradoxes of definition that Reid lovingly details, the language of rights was clearly pervasive in Anglo-American political culture, and this alone explains why bills of rights formed an organic part of the new state constitutions that the Americans drafted in the mid- 1770s. Simply put, a failure to incorporate statements of rights in the new charters would have been far more surprising than their presence. If rights were constitutional by nature, a constitution whose end was their security would naturally include some statement of rights--even though the rights there proclaimed can be described, as Gordon Wood has aptly noted, as "a jarring but exciting combination of universal principles with a motley collection of common law procedures."[22]

Finally, Reid's efforts to identify the multiple sources of the rights Americans claimed establishes the point of departure from which the significance of emerging American conceptions can best be seen. For the prerevolutionary debate, Reid argues, the crucial problem is not to identify the rights Americans claimed. "The rights were British rights and well known," Reid observes. "Why Americans were entitled to them was more controversial and more complicated."[23] The heart of his analysis of "the authority of rights" requires examining the ten-fold sources upon which the colonies relied, sometimes admittedly for rhetorical effect, but

more profoundly as expressions of the multiple constitutional foundations for their claims. The very diversity and complexity of these sources helps to clarify the theoretical dilemma that the Americans encountered after independence. How would the promulgation of written constitutions at precise (and literally memorable) moments of historical time affect the status and extent of rights whose authority had previously rested on more elusive and diffuse foundations? On the one hand, the American innovation promised to simplify and clarify the authority of rights, and to close and perhaps even erase the distance between rights that were fundamental and rights that were merely constitutional. On the other hand, the explicit designation of particular rights as constitutional created at least a latent possibility that other rights that were equally venerable but ignored in the new frames of government would be relegated to a lesser status. Could a right remain fundamental that was not explicitly constitutional?

Confined as his analysis is to the revolutionary debate with Britain, Reid does not ask how Americans perceived the problem of rights after 1776. Nor does he venture an answer to the question that seems so crucial to the contemporary debate over rights: whether the authors of the federal Bill of Rights understood that the adoption of particular rights would or would not relegate other equally fundamental rights left unenumerated to an inferior (or less than constitutional) status. But other legal scholars, most notably Thomas Grey and Suzanna Sherry, have carried the story forward from 1776 to 1789 (and beyond). In their account, Americans

continued to recognize that their resort to the novel device of a written constitution did not annul the authority of other sources of fundamental or inherent rights--notably the principles of both the common law tradition and natural law. Ideas of rights broader than any positive enumeration of rights survived in the form of an "unwritten constitution" to which American jurists still accorded substantial weight.[24]

3. The Constitutional Protection of Rights

Much more could of course be written--and has indeed been written--about the particular rights that Americans claimed, the sources of those rights, and the way in which conceptions of specific rights were affected by the course of the Revolution. One could ask how the Second Amendment's affirmation of a right to bear arms reflected radical whig assumptions about the virtue of a citizen militia, or why the Third Amendment's prohibition on the quartering of soldiers in civilian homes was derived from the problem of housing loutish British soldiers in colonial cities.[25] But the balance of this essay will be more concerned with asking how Americans thought rights in general were to be protected than with cataloguing or mapping the various rights they claimed.

At the start of the revolutionary controversy, American ideas about the protection of rights were derived largely from their perceptions of the complementary constitutional histories of both the mother country and its colonies. Nothing better illustrates how much our approach to the protection of rights has departed from the

original understandings of the revolutionaries than the substantially different emphases that our very ideas of constitutional history express. Where we define that history first and foremost as the development of judicial doctrine, the revolutionaries understood the constitutional history of rights as a history of representation. Before hope or confidence in the judicial protection of rights could become the defining trait of American constitutionalism, Americans first had to question their orthodox belief that representation was the great and potentially sufficient source of security for all rights.[26]

a. Representation: The First Defense

Of all the rights the colonists claimed before 1776, the most crucial and controverted was the right to be subjected only to laws enacted by their own duly elected assemblies. By defending the privileges of these assemblies, Americans asserted both their rights as a people and the transcendent importance they attached to the belief that the protection of popular rights required representative government. As a matter both of constitutional theory and history, this hallowed axiom of Whig thought had been decisively confirmed in the great struggles between Stuart kings and their parliamentary foes, and beyond that, in the centuries-long effort of Parliament--and especially the Commons--to recover ancient rights lost after the descent into Norman dominion. The individual rights discovered in common law mattered too, of course; and a number of commentators, including William Blackstone, fretted

that excessive lawmaking by Parliament was undermining the consistency and security of common law itself.[27] But in a deeper sense, the collective survival of English rights and liberty depended on the political capacity of Parliament to check arbitrary royal encroachment. Just as the rules of common law governed the king's judges as they dispensed royal justice, so the vindication of parliamentary supremacy in the Glorious Revolution of 1688-1689 guaranteed the collective rights of the people.

The most important precedent the colonists could look to for an explicit affirmation of constitutional rights was thus the Declaration of Rights of 1689. The Declaration asserted both parliamentary and popular rights; but its crucial feature was that all of the rights it proclaimed were to be protected against abuse by the crown. There, in the arbitrary acts of the kings and his subordinates, lay the preponderant threats to the rights and liberties of his subjects and their representatives. By making the prior acceptance of this statement of rights a condition for the accession to the crown of William and Mary, the Convention Parliament understood full well that the monarchy would henceforth be bound to honor the constitutional rights recognized in the Declaration. The Declaration, in that sense, was more than a bill of grievances directed against the Stuarts; it also satisfied the traditional terms of a compact between the ruled and their magisterial (royal) rulers.[28]

Colonists who regarded themselves as equal heirs with their English countrymen to the Glorious Revolution had every incentive

to appropriate its constitutional settlement in their own struggles with royal officials in America. Because political strife in the colonies so often took the form of institutional conflicts between assemblies and governors, the seventeenth-century constitutional disputes framed the dominant paradigm within which political arguments were conducted. The model of extensive parliamentary privilege set the standards to which all colonial assemblies aspired. If the rights of Englishmen depended on the rights of Parliament, American rights similarly required that colonial assemblies enjoy equal privileges vis-a-vis crown and proprietary governors.[29] So, too, the colonists applied the idea that all government was founded on a compact between rulers and ruled to describe the conditions under which their ancestors, migrating under the auspices of the crown, had secured, retained, or "purchased" the English rights they carried with them.[30]

b. The Imperial Debate

Americans forged their attachment to these principles when claims of royal prerogative represented the chief threat to their rights. Yet no great shift was needed when the new threat from Parliament eclipsed the older one from the crown: the danger still lay to rights of autonomy that were equated with legislative privilege. What was new after 1765 was the specter of a Parliament which, as a lawmaking body itself, could not merely obstruct the exercise of colonial legislative powers, as the governors had long done, but actually usurp them. Even then, however, the colonists

opposed Parliament under the same principles that Parliament had once asserted against the crown. The security of their collective rights required effective representation in a legislative body of their own choosing.

This prior history affected the development of American ideas about the protection of rights in several crucial but not entirely consistent ways. Although the whig tradition imbued Americans with a powerful residual suspicion of executive power, for a time the logic of the imperial controversy led them to turn to the crown to secure their rights. So, too, while the colonists naturally opposed Parliament by affirming the customary rights of their own assemblies, their political explanations of the sources of Parliament's assault on American liberties raised troubling questions about the risk of legislative misrule. Finally, the Americans' longstanding reliance on the authority of their original charters and other documents asserting their rights and privileges began to lead them toward a new understanding of constitutionalism itself.

Perhaps the most curious aspect of the imperial quarrel was the enhanced image of the crown that it led the colonists to espouse. While accommodation with Britain remained their avowed goal--as it did well into 1775--the colonists struggled to find a constitutional basis on which to abide within the empire, still subject to its governance, yet with their legislative rights secured. In this quest they earned little help "across the water": spokesmen for the British position eliminated any basis for

compromise by refusing to "draw a line" between what Parliament could and could not do.[31] American hopes for reconciliation thus came to depend, constitutionally and politically, on the crown. It was up to George III to avert calamity by intervening as a patriot king on the side of the colonists, redressing their grievances, vetoing parliamentary acts violating their rights, and halting the conflict before the police action in Massachusetts escalated into civil war. More important, to repair the constitutional flaws exposed by a decade of inquiry into the structure of the empire, the crown must assume an enhanced role in its government, acting, in Jefferson's phrase, as "the balance of a great, if well-poised empire."[32]

This wildly improbable solution was defective on two counts. Urging the crown to act against Parliament meant asking George III to defy the Glorious Revolution itself. For a king schooled in the duties of limited monarchy, this notion was politically unacceptable and constitutionally inconceivable.[33] Second, little in their history suggested that Americans would happily embrace this vision of royal authority once it served its immediate purpose: anyone familiar with colonial politics could safely predict that old conflicts between the assemblies and governors would soon revive. However much Americans venerated a patriot king, his minions would face the same contentious opposition they had encountered before. The sole form of kingship Americans would accept was one that vigorously protected their customary rights against all external dangers, royal or parliamentary.[34]

On balance, then, this belated willingness to resort to the king as a potential security for rights was too expedient and problematic to relax longstanding fears of royal power. It was far more of a response to the exigencies of the imperial debate than a considered reassessment of the positive role that executive power could play in protecting rights. In 1776, such a notion was still heretical, amply condemned by the colonists' whiggish reading of their own history and England's. Americans were far more obsessed with the demonstrated abuse of executive power than the potential betrayal of legislative trust. As Madison noted a decade later, "want of fidelity in the administration of power" was the principal "grievance" the colonists had felt under the empire.[35] Americans drew the appropriate lessons both in the institutional design of the new state constitutions and in their accompanying statements of rights. There was no analogue to the patriot king in the original scheme of American republicanism, no notion that an executive above party would preserve the balance upon which liberty depended.[36] The constitution writers of 1776 revealed their continuing suspicion of executive power by stripping the governors of anything smacking of prerogative and reducing their authority to the literal execution of legislative will. This same obsession with the executive was reflected in the slightly anachronistic quality of the early bills of rights. Insofar as they were modeled upon the traditional English formula, they were designed to protect popular rights against executive abuse. Yet how dangerous would a republican executive be, when in nearly every respect its power was

subordinated to legislative control?

The American aversion to executive power had one additional source. Well before the Stamp Act, Americans had come to believe that avaricious ministers of state wielding improper influence had seriously compromised the independence of Parliament.[37] Steeped in the opposition literature that placed ministerial corruption first among the political evils afflicting Britain, they were prepared to expect the worst of Parliament almost from the onset of the controversy.

This cynical perception encouraged some colonists to reconsider the relation between representation and rights more critically. The capacity of any representative body to protect popular rights required more than legislative independence. It also depended on the conditions of representation--that is, on all the constitutional and legal provisions that determined how legislative bodies debated and acted, and how faithfully they served the public good. The defects of representation in the House of Commons--the vices of rotten and pocket boroughs and other inequities of apportionment; the servile dependence of placemen, pensioners, and creatures of aristocratic patronage; the lack of accountability created by the Septennial Act and a narrow franchise--were long familiar to Americans. Indeed, of the many issues in dispute between Britain and America before 1776, representation was probably the one area in which, in both theory and practice, the two societies had most manifestly diverged.[38]

Yet from this perception of the defects of the British

practice of representation, American constitution writers could still draw two divergent conclusions about the protection of rights. The belief that the conditions of American politics were different from those prevailing "at home" reinforced the orthodox conclusion that representation afforded the most effective protection for popular rights. Yet rather than dismiss the vices of the British system as a problem for the mother country alone, some Americans took them seriously enough to ask whether their legislatures, too, could be made to pursue the same inimical ends.

c. Revolutionary Constitutionalism: The First Phase

The remedies that the Americans adopted in 1776 promised to spare the new republic the vices of the parliamentary system by narrowing the distance between constituents and legislators. To a remarkable extent, the constitutions of independence combined republican confidence with republican mistrust.[39] By emphasizing the relative homogeneity of American interests and the ability of legislators to re-present the society, republicanism supposed that legislators and constituents would share common concerns and values--including a common stake in their mutual rights. The metaphors of representation that Americans repeatedly invoked reinforced this expectation. Imagining legislatures as "mirrors" or "miniatures" of society, they expected legislators to protect both popular rights and the public good. Yet the very devices that would keep the mirror unclouded, the miniature true to scale --annual elections, rotation in office, the right of instruction, equitable

apportionment and a broad franchise--also betrayed doubts about the feasibility of the enterprise. A half-century's criticism of Parliament had prepared Americans to wonder whether their own assemblies could also go astray. "If once the legislative power breaks in upon [the constitution]," warned the author of the acute Four Letters on Interesting Subjects, "the effect will be the same as if a kingly power did it."[40] So, too, the Virginia Declaration of Rights could insist that in order that the members of both the executive and the legislature "may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were taken."[41]

If the equivalence between executive and legislature in this article is striking, so also is its expectation that the proper remedy to the dangers it foresees lies in the political practice of rotation (which in Virginia was constitutionally required only for the senate, not the lower house). Neither the Declaration of Rights nor the constitution proper suggested that a formal limitation of legislative power might better prevent the legislative abuse of rights. If a legislature violated its trust, the proper republican remedy lay in the citizenry, voicing their concerns through the medium of annual elections. Indeed, orthodox republicanism regarded this one device as a sufficient protection for all popular rights. "While all kinds of governmental power reverts [sic] annually to the people, there can be little danger of their liberty," observed "Demophilus," one of the more radical republicans of 1776. "Because

no maxim was ever more true than that, WHERE ANNUAL ELECTION ENDS, SLAVERY BEGINS." In this sense, rights of suffrage and representation were arguably superior to any others: if these were explicitly guaranteed, others could be safely omitted. "If the government be free, the right of representation must be the basis of it," one New Hampshire writer observed; "the preservation of which sacred right, ought to be the grand object and end of all government."[42] Even in 1776, some Americans understood how closely the details of suffrage and apportionment were tied to questions of rights. Spokesmen for rural interests, like the author of The People the Best Governors, argued that it should be left to legislative discretion to determine whether populous towns deserved additional representation. But other writers, recalling both the rotten boroughs of England and crown efforts blocking the creation of new districts in America, thought otherwise. The crucial point was elegantly stated in the last of the Four Letters on Interesting Subjects.

> A constitution should lay down some permanent ratio, by which the representation should afterwards encrease or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to be dependent upon the will and pleasure of future legislatures. And for the same reason perfect liberty of conscience, security of person against unjust imprisonments, similar to what is called the Habeas Corpus act; the mode of trial in all law and criminal cases; in short, all the great rights which man never mean,

> nor ever ought, to lose, should be guaranteed, not granted, by the Constitution, for at the forming a Constitution we ought to have in mind, that whatever is secured by law only, may be altered by another law.[43]

Here emerging American doctrine is stated with remarkable clarity. Rights of representation need special security against legislative abuse, because they are so essential; but on closer examination, other rights also merit the same protection against prospective acts of the legislature.

The same animus informed the celebrated resolutions with which the Concord, Massachusetts, town meeting first explained why a constitution could not be drafted by "the Supreme Legislative," but required instead the meeting of a special convention. In its resolves of October 21, 1776, the town meeting offered three reasons for its position:

> first, because we conceive that a Constitution in its proper Idea intends a System of principles Established to Secure the Subject in the Possession and enjoyment of their Rights and Priviliges, against any Encroachment of the Governing Part---- 2d Because the same Body that forms a Constitution have of Consequence a power to alter it. 3d--Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights and priviliges.[44]

With extraordinary elegance, the Concord meeting thus recognized that rights could be endangered by legislative act, but more than

that, it also grasped the more sophisticated point that the act of declaring constitutional rights legislatively could in fact weaken rather than enhance their juridical status, leaving them vulnerable to revision by a future legislature.

Yet for all their insight and prescience, in the context of 1776 these positions were still relatively advanced. The central, indeed controlling element of this first phase of revolutionary constitutionalism was its "restructuring of power" in a manner that simply presumed that legislatures could faithfully represent the just interests and rights of their constituents. The idea of directing statements of rights explicitly against legislative power was more than most constitution writers imagined. Having rallied opposition to Britain around the right of each colony to exercise comprehensive and exclusive legislative power, they felt little need to make the limitation of that power a vital principle of the new constitutionalism. It was enough to purify its exercise by curbing corrupt executive influence, retaining the safeguard of bicameralism, and by supposing that a vigilant citizenry would defend its rights should a legislature actually ran amok. The idea of protecting rights by enumerating specific powers of legislation, or by fencing off areas beyond its reach, was a concept that Americans were only beginning to grasp.

Still, the very act of writing constitutions involved a delegation of power, and that in turn made it possible to ask whether even legislative power could be limited. Here, too, the prior history of colonial politics influenced how Americans first

conceived the problem of rights. For the idea of measuring acts of government against the standard of written constitutions was not woven from whole cloth in 1776. A century of disputes between assemblies and governors had made recourse to the authority of the original colonial charters a staple weapon in the American arsenal. These charters, and other declarations of colonial rights, were repeatedly invoked both to justify the claimed powers of the colonial assemblies and to codify the individual civil rights that Americans insisted they had retained in migration. These texts did not "create" the rights Americans claimed, but rather described rights they had always possessed and never forfeited. But the more the colonists resorted to the evidence of charter as proof of their rights, the easier it became to consider written constitutions as prescriptive as well as descriptive texts.[45]

From the idea of a written constitution as fundamental law would eventually develop the doctrine of judicial review, which in turn formed so crucial and eventually controlling an element of the American theory of rights. But from the vantage point of 1776, the role that the judiciary should play in the protection of rights was as yet poorly defined and highly problematic.

The initial uncertainty about the place of the judiciary in a republican constitution had multiple sources.[46] Again, the retrospective quality of American thinking--its natural tendency to recall past abuses rather than anticipate future dangers--left Americans uncertain whether they had more to hope or fear from an independent judiciary exercising discretionary judgment. Under the

colonial regime, members of the higher courts were crown appointments, so that when Americans demanded that judges hold office during good behavior or not receive royal salaries, they typically meant only that judges should be independent of the crown. Whether judicial dependence on elective legislatures would prove equally dangerous was another matter. An advanced thinker (and professionally self-conscious attorney) like John Adams could boldly assert that "the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both,"[47] but other writers were more cautious.

Two sets of reasons militated against elevating judicial power to full constitutional equality with the other branches. The first stemmed from the residual difficulty of distinguishing judicial from executive power. The authority of "the celebrated Montesquieu" notwithstanding, judicial power was still regarded as merely another aspect of executive power. To render judges as officeholders independent of executive (or legislative) control was not the same thing as saying that the act of judging was a qualitatively distinct function. "[H]owever we may refine and define," observed the author of the Four Letters on Interesting Subjects, "there is no more than two powers in any government, viz., the power to make laws, and the power to execute them; for the judicial power is only a branch of the executive, the Chief of every country being the first magistrate."[48] Second, and equally important, many Americans rejected the idea that courts should be

free from legislative correction or review. The author of the quasi-populist The People the Best Governors expressed a widely held view when he argued that judicial discretion in interpreting the law, which was made necessary because the "circumstances [of cases between man and man] are so infinite in number, that it is impossible for them all to be specified by the letter of the law," ineluctably led judges into "assum[ing] what is in fact the prerogative of the legislature, for those, that made the laws ought to give them a meaning, when they are doubtful."[49] Jefferson made essentially the same point while discussing the need to make punishment "strict and inflexible, but proportioned to the crime." "Let mercy be the character of the law-giver"--that is, the legislature--"but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man."[50] To the modern reader, it is an open question whether Jefferson's image of the judge as machine is more striking than his equation of judicial discretion with the arbitrary will of unrestrained executive power.

When it came to fixing the place of judicial power in a republican constitution, then, American ideas were susceptible to being pulled in divergent directions. At the outset, the familiar association of judicial and executive power, reinforced by fears and historical memories of the abuse to which both could be put, probably weighed more heavily than the formulaic statement of the

benefit of judicial independence that first appeared in the Virginia Declaration of Rights. Before Americans could better appreciate the role that an independent judiciary could play in protecting rights, they first had to ponder the defects of the legislative supremacy that was the central feature of all the early state constitutions--which was exactly what the course of the Revolution made possible by forcing the legislatures to make unprecedented demands on the entire society.

4. Legislative Supremacy in Practice

Taken by itself, the idea of legislative supremacy to which eighteenth-century British and American whigs were devoted did not mean that the principal task of government--or even of the legislature--was to legislate. It meant, rather, that the legislature should be able to prevent the other branch(es) of government from taking arbitrary actions injurious to the rights and liberties of citizens and subjects. This checking function was as central a legislative duty as positive lawmaking.[51] And although in both countries the volume of lawmaking increased throughout the eighteenth century, reigning ideas about the nature and purposes of legislation remained traditional. Members of the House of Commons or the provincial assemblies were not elected to enact legislative programs, nor was the ability to frame bills or secure their adoption taken as the measure of their political talent. The ordinary business of any legislative session was largely spent dealing with petitions requesting authority to undertake some

enterprise promising particular benefits within the small compass of local communities. Other requests commonly involved appeals by individuals of decisions taken by local courts. Legislatures responded to these requests by granting new trials or resolving matters on their own authority, thereby revealing (pace Montesquieu) that the theoretical line separating judicial and legislative power was as blurred and permeable as the line separating judicial and executive power. When statutes affecting the entire community were enacted, they were likely to be either acts of appropriation or taxation, or corrections of some common law procedure.[52]

Yet this Anglo-American conception of the limited scope of lawmaking may mask important differences between the two countries in the actual exercise of legislative power. Bernard Bailyn's analytical comparison of the instability of colonial politics with the relative harmony of Georgian Britain illustrates the central point. Parliament played a far more modest role in governance, Bailyn suggests, than did its sister institutions across the Atlantic. "Parliament did, of course, pass some laws relating to social and economic development," Bailyn notes, but in the authoritative judgment of Sir Richard Pares, "most of this legislation was private, local, and facultative, setting up local agencies, such as turnpikes, paving, enclosure, or improvement commissioners where such things appeared to be desired by the preponderant local interests." The American assemblies, however, "were led willy-nilly, by the force of circumstance, to exercise

creative powers, and in effect to construe as public law what in England was 'private, local and facultative.'" The very need to organize a new society inclined the colonists to accept a broader role for legislative regulation than most Britons yet accorded to Parliament.[53]

Other historians have suggested that this contrast between Parliament and the colonial assemblies is overdrawn. The greater comfort that Americans felt with the exercise of positive legislative power before 1776 resulted less from their advanced thinking on this subject than from their distrust of the other (imperial) elements of their constitutions.[54] British and American attitudes toward legislation, in other words, differed more in degree than kind. Yet regardless of how progressive or traditional colonial concepts of legislation can be said to have been, it seems evident that crucial departures in American thinking about the scope of legislative power took place after 1776. For just as the early state constitutions removed any effective limitations on legislative dominion, so the course of the Revolution demanded the vigorous exercise of lawmaking authority in the modern, positive sense.

The massive burdens that wartime mobilization placed on both society and government were without precedent in the entire colonial past. Once the sobering recognition that victory would not come easily or cheaply replaced the sunshine patriotism of 1774-1776, the assemblies were repeatedly impelled to use their legislative initiative to frame the laws required to mobilize the

resources and manpower for a protracted struggle. The real stuff of wartime lawmaking did not involve drafting enlightened statutory codes to compact the legislative debris of the colonial era into suitably concise and republican form, as in Jefferson's famous project for Virginia; nor did the amateur lawmakers who came and went every session spend much time thinking about ways of improving the republican manners of their constituents. Instead, matters at once more prosaic yet urgent preoccupied their attention: currency emissions and the measures required to halt their depreciation; laws setting the terms of military service, meeting congressional requisitions for men and supplies, regulating prices and markets in an unhappy effort to balance the rival needs of military commissaries, farmers, and urban artisans; and whatever other expedients the war required. Within each of the states, this legislation was intrusive and burdensome to an extent previously unimaginable.

Among all the areas upon which the assemblies were forced to act, the most sensitive and important concerned taxation, public debts, paper currency, and the control of markets--in other words, the broad arena of public finance and economic regulation. The controlling circumstances against which the legislatures struggled were the open-ended demands of the war and the inherent inflationary pressures generated by national and state reliance on currency finance.[55] The irony of the revolutionary predicament was precisely that to secure the great right to be free from parliamentary taxation and legislation, the Americans had to accept

(at least over the short run) a host of economic restraints and financial measures far more onerous than anything that Britain would ever have imposed. At one time or another, almost every segment of American society found cause to feel aggrieved either by the policies the states were forced to pursue, or by their inability to control the most palpable economic consequences of the war: rising prices, a depreciating paper currency, shortages of goods, and the like. Sensitive to the complaints of their constituents, the assemblies were reluctant to levy taxes commensurate with the costs of war, but this caution did not lessen the disturbing impact the war had on masses of ordinary families. After all, the inflation that inevitably resulted from the reliance on currency finance was itself, as Benjamin Franklin observed, "a kind of imperceptible Tax."[56] Nor did the coming of peace in 1783 magically relieve the state legislatures of all their burdens, since they still faced the problem of retiring the staggering public debt incurred during eight years of war.

A grasp of the substance and scope of all the legislating the war and its aftermath required is vital to understanding how the problem of rights could be reformulated by the 1780s. The crucial consideration is that the legislatures had to govern actively, and to make law in areas where nearly every decision was bound to aggravate one segment of the community or another. It was in this sense that the war and the recovery efforts of the mid-1780s translated legislative supremacy from an abstract constitutional principle into an empirical description of a functioning republican

government. At the same time, it subverted the belief, so dear to the republicanism of 1776, that a properly constituted legislature could at once mirror society and pursue the general good to which all classes and individual communities could uniformly adhere. No legislature could possibly distribute the burdens of the war equally among its people, nor avoid persuading some segments of society that their interests were being treated unjustly. Nor could the assemblies long escape the criticisms, resentments, and simply ornery complaints that measures impinging so deeply on the conduct of private affairs inevitably evoked. And because so much of the legislation of the war period directly affected property--whether through inflation, taxation, price controls and other restrictions on commerce, or the collection of critical supplies--those aggrieved by particular decisions could readily agree that the damage done to their immediate interests was also an assault on their rights.[57] When Americans increasingly questioned how well their legislators were truly representing their interests--a process that Gordon Wood has aptly described as the "disintegration of the concept of representation"--they were probably driven less by the logic of popular sovereignty or the working out of other constitutional ideas than by complaints about the inability of the legislatures to manage all the economic evils the war had produced.[58]

Yet crucial as this concern with economic rights proved to the politics of constitutional reform in the late 1780s, it is better seen as a particular application of a more general transformation.

What the failures of republican lawmaking during the decade after independence encouraged was a new appreciation of the nature and scope of legislative power itself and a more critical understanding of the danger that legislative acts--rather than the arbitrary decisions of executive and judicial officials--posed to rights. At the same time, the political divisions that the Revolution either generated or reinforced undermined the image of a homogeneous people with a mutual interest in protecting the collective rights of the people against arbitrary acts of government. The lessons upon which new ideas about rights could be based were no longer drawn solely from the prior history of English and Anglo-American politics; now they included as well the potent examples of recent experience.

5. James Madison and the Bill of Rights

a. The significance of Madison

To formulate the problem of rights in this way is already to give its solution a strongly Madisonian twist.[59] For although Madison was hardly alone in condemning the character of state lawmaking, both his analysis of the principal threats to rights in a republic and his condescending attitude toward bills of rights rested on an acute appreciation of the nature of legislative power, and beyond that, on a still more powerful explanation of the social sources of legislative misrule. Three major convictions controlled Madison's general theory of rights. First, purposeful legislation, rather than capricious exercise of the coercive authority of the

state, posed the greatest danger to rights. Second, the central problem of rights was not to protect the people against their rulers, but one segment of the people against another--or more directly, to protect individuals and minorities against popular majorities who could literally claim to embody the people themselves. Third, consistent with the arithmetical logic of his theory of faction, rights would be most in jeopardy where government was most immediately responsive to the wishes of its constituents--that is, within the democratic polities of the states, rather than the extended republic that would hopefully insulate the national government from populist pressure. None of these positions had been part of the original American understanding of rights circa 1776.[60] Taken together, they indicate how far American thinking--or at least its leading edge--had since advanced.

It could, of course, be objected that placing too great an emphasis on Madison is wrong because he was, after all, only one actor among many. Moreover, if his ideas were so advanced, he can hardly be described as a representative thinker.[61] Nevertheless, two powerful reasons justify giving his ideas and actions close attention. First, were it not for Madison, a bill of rights might never have been added to the Constitution. Among the members of the First Federal Congress, Madison almost alone believed that prompt action on amendments was politically necessary. Nearly all his colleagues favored deferring the entire subject until the new government was safely operating--by which point, the perceived need

for a bill of rights might well have evaporated. But Madison insisted that Congress had to act sooner, not later, and in the event, the amendments it eventually submitted to the states in September 1789 followed closely the proposals he had introduced in June. Madison was not merely one participant among many nor even primus inter pares; he was the crucial actor whose purposes deserve scrutiny for that reason alone.

The enormous influence that Madison's writings hold over modern interpretations of the Constitution offers a second reason for examining his approach to the issue of rights in some detail. To the historian, the problem with this emphasis is not that it is undeserved, but rather that so much of the Madison midrash surrounds a mere handful of texts. But the nuances of his thought cannot be reduced to the binary logic of Federalist 10. Madison never regarded himself as "an ingenious theorist" whose best work was "planned in his closet or in his imagination."[62] For all his bookishness, he was very much a public man whose ideas reflected his continuous engagement in politics. Like any intellectual, he valued consistency; but his thought was dynamic, and can only be explained contextually.

A coherent historical explanation of Madison's developing position must solve two central puzzles. The first involves explaining how his intense commitment to the protection of rights and his analysis of the "vices of the political system of the United States" led him by 1787 to dismiss bill of rights as so many "parchment barriers" with little if any practical value. The second

requires asking how Madison thereafter reluctantly agreed that additional statements of rights should be appended to the Constitution, and further, what role he hoped a bill of rights could henceforth play in American politics.

b. The young liberal

Madison's interest in issues of rights can be traced to an early age. The young man who completed his studies at Princeton in 1772 returned to Virginia deeply committed to the cause of religious liberty--a commitment that in fact predated his interest in either politics or constitutional theory. His first notable action in public life was to secure an amendment to the Virginia Declaration of Rights of 1776, altering the article that originally promised "the fullest toleration in the exercise of religion" to the broader affirmation that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." But Madison's crucial contribution to religious liberty came in the mid-1780s, when he led the successful opposition to a bill providing public funds for all teachers of Christianity, and then capitalized on this victory to secure passage of the celebrated Virginia Statute for Religious Freedom, originally drafted by Thomas Jefferson in 1779.[63]

Madison expressed his ideas about religious liberty most completely in his Memorial and Remonstrance against Religious Assessments of 1785, which he published anonymously to rally public opposition against the pending general assessment bill. From the

power in behalf of rights also found expression in his August 1785 letter discussing a constitution for Kentucky. "If it were possible," Madison wrote,

> it would be well to define the extent of the Legislative power but the nature of it seems in many respects to be indefinite. It is very practicable however to enumerate the essential exceptions. The Constitution may expresly restrain them from medling with religion--from abolishing Juries from taking away the Habeas corpus--from forcing a citizen to give evidence against himself, from controuling the press, from enacting retrospective laws at least in criminal cases, from abridging the right of suffrage, from seizing private property for public use without paying its full Valu[e] from licensing the importation of Slaves, from infringing the Confederation &c &c.

Save for the references to religion and slavery, this listing of rights is not exceptional; what distinguishes it instead is the recognition--not present in the state bills of rights--that it is against the legislature that explicit prohibitions must be made. Equally notable, too, is Madison's ensuing recognition that in constructing a constitution, "The Judiciary Department merits every care. Its efficacy is Demonstrated in G. Brittain where it maintains private Right against the corruptions of the two other departments & gives a reputation to the whole Government which it is not in itself entitled to."[65]

c. The vices of the political system

The crucial departures in Madison's thinking about rights, however, occurred after 1785, and they carried him away from the lessons he seemingly had learned by that point--as well as the republican orthodoxy of 1776. Rather than infer from the rejection of the assessment bill that appeals to public opinion could protect popular rights against legislative abuse, Madison now concluded that the greater danger to liberty came from the people themselves, acting through their elected representatives. He similarly came to doubt whether any formal limitation of legislative authority--either through the enumeration of particular legislative powers, or the constitutional exemption of specific rights--could restrain a legislature bent on mischief from enacting unjust laws. And as he revolved these dual problems of legislative and popular misrule, Madison further concluded that the greatest danger to liberty would necessarily arise within the states, where the wrong kinds of majorities--again, both popular and legislative--could more readily form to pursue their vicious ends. The disparaging opinion that he now formed about bills of rights was a consequence of the profound analysis of republican politics upon which these more fundamental insights rested. If he grew more skeptical about the value of bills of rights, it was not because he found it difficult to enumerate individual rights worth protecting, but rather because he increasingly doubted that any formal declaration, however carefully stated or comprehensive, could counteract the real forces threatening their security in a republican polity.

In reaching these conclusions, Madison drew upon his own experience in the Virginia assembly and his observation of the course of legislation--particularly economic legislation--in other states. Indeed, a mounting dismay with state legislation, legislatures, and legislators was the engine driving all of his creative responses to the crisis of republicanism--his ideas of federalism, separation of powers, and representation, as well as rights. Surveying "the vices of the political system" in the early months of 1787, Madison concluded that the "multiplicity," "mutability," and most important, "injustice" of the laws that the states had enacted since 1776 had called "into question the fundamental principle of republican government, that the majority who rule in such Governments are the safest Guardians both of public good and of private rights."[66] His concern about the security of private rights was rooted in his palpable fear that fundamental rights of property were being jeopardized by the rise of populist forces in the states. Paper money laws, debtor stay laws, and the specter of Shays's Rebellion in Massachusetts all alarmed him terribly. So did the grim prospect he sketched at the Federal Convention when he warned that even in the United States a factious majority might eventually form from "those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings."[67] The constitution writers of 1776 had erred in assuming that by protecting "the rights of persons" they would also protect "those of property." Now he understood "that in all populous countries the smaller part [of society] only

can be interested in preserving the rights of property."[68] Although other classes of rights remained of concern to Madison, his analysis of the sources of the dangers to rights of property was (arguably) paradigmatic for the development of the program of constitutional reform that he carried to Philadelphia in the spring of 1787.

When rights of property were at stake, Madison feared, neither the specific enumeration or explicit denial of positive legislative powers would provide adequate safeguards. In this sense, his solution to the problem of religious liberty--to deny government any authority to legislate for religion--could never wholly apply to public finance and economic regulation.[69] His clearest statement on this point appears in Federalist 10. Madison closed his famous passage describing the sources of faction and the way that different forms of property divided society into different "interests" by noting that "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government." But he then denied that acts of economic regulation were solely legislative in character. "What are so many of the most important acts of legislation," Madison asked, "but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes they determine?" The examples of economic regulation that Madison

cited reveal that he regarded all decisions of economic policy as implicating questions of private rights: laws relating to creditors and debtors, to the protection of domestic manufactures and the restriction of foreign goods, to the apportionment of taxes--all involved questions of justice, and thus of rights.[70] Economic rights were fundamentally different from rights of conscience, then, in at least one critical sense: While government could safely abstain from religious matters, it could never avoid having to regulate the "various and interfering interests" of a modern society; and any legislative decision would necessarily affect not merely the interests but also the rights of one class of propertyholders or another.

This strikingly modern perception of what legislatures could do reflected not only discontent with the sheer busyness of American lawmaking, but more fundamentally, a recognition of "the impossibility of dividing powers of legislation, in such a manner, as to be free from differing constructions, by different interests, or even from ambiguity in the judgment of the impartial." In the realm of economic legislation, the interests to be regulated were so complex, and the ends and means of legislation so intertwined, that no simple formula seemed likely to defeat the "infinitude of legislative expedients" that artful lawmakers could always deploy.[71] Nor did Madison expect the executive and judiciary to be able to counteract the injustice of the legislature. Its very rulemaking power, he observed in Federalist 48, enabled the legislature to "mask under complicated and indirect measures, the

encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure, will or will not extend beyond the legislative sphere."[72]

By its very nature, then, legislative power was too supple and plastic--too "indefinite"--ever to be neatly confined. But Madison's analysis thrust deeper still. It was not enough to identify the danger that excessive legislation posed; Madison also felt compelled to explain its political sources. Because republican politics was necessarily the politics of representation, this concern in turn led Madison to ask why the essential safeguard of representation--the first and most formidable line of defense for the protection of rights--had been found wanting.

Madison traced much of the blame for the sorry condition of public affairs to the character of state lawmakers, too many of whom sought office only for "ambition" and "personal interest" rather than from sincere consideration of "public good." Those who were not demagogues or self-seekers were too often inexperienced backbenchers with little understanding of public issues and less inclination to withstand the improper influence either of designing leaders or their own electors.[73] As many commentators have observed, Madison's quite Burkean ideal of national representation was designed to "extract from the mass of the Society the purest and noblest characters which it contains," and to allow them to serve under conditions that would effectively insulate their deliberations from the populist pressures of their constituents.[74]

Yet as "vicious" as state lawmaking and legislators seemed, Madison now thought that the ultimate danger lay not in unchecked rulers but in society itself. "A still more fatal if not more frequent cause" of unjust legislation, he wrote in April 1787, "lies among the people themselves." His theory of faction was designed to explain why this was the case. As is well known, Madison located the sources of factious behavior in the passions and interests of the citizenry, and argued that smaller communities--whether the city-states of antiquity or the early modern era, or the substantially larger American states--were more vulnerable to injustice than an extended national republic would be, simply because in a smaller society it would be easier for such factious majorities to form. The peculiar danger in a republic was that "whenever . . . an apparent interest or common passion unites a majority," few if any checks existed "to restrain them from unjust violations of the rights and interests of the minority, or of individuals."[75]

Though Madison could easily illustrate this proposition from his voluminous reading in the history of ancient and modern republics, its relevance to American politics in 1787 manifestly reflected his bleak assessment of the legislation that the states were enacting to deal with the economic and financial problems of the postwar years. What these problems enabled him to perceive was how certain issues of public policy could lead to the coalescence of popular factions in society, which would then actively compete to manipulate the legislature to secure the desired ends. It is

doubtful whether such a perception would have been readily attainable had recent experience not made it appear realistic, though some precedents for it could be found in Anglo-American history before the Revolution, in mercantilist legislation or an exceptional episode such as the Massachusetts Land Bank controversy of 1740 or the repeal of the parliamentary Jew Bill of 1753. But arguably it was the Revolution itself that provided the most compelling lessons. The urgency and pervasive impact of the problems it created, and the legislatures' inability to overcome them, all alerted Madison to both the scope of legislative power and its susceptibility to popular influence.

This dual obsession with both the nature of legislative power and the populist sources of unjust legislation was also reflected in Madison's approach to the problem of federalism. For Madison, the problem of protecting rights was first and foremost a problem of finding ways to curb injustice <u>within</u> the individual states. However powerful a national government the Federal Convention might propose, Madison understood that most laws affecting property--as well as all other ordinary activities of society--would still emanate from the states. Second, the arithmetical logic of his theory of faction predicted that majorities willing to commit injustice would still readily form within the states. From these perceptions came the two proposals that Madison thought would protect rights far more effectively than any formal bill of rights could ever promise to do: an unlimited national legislative veto on all state laws, and the establishment of a joint executive-judicial

council of revision, armed with a limited veto over national laws and a participatory role in the national review of state laws.

d. Radical remedies

At the start of the Federal Convention, Madison regarded the veto on state laws as the one indispensable measure for the preservation of private rights against "vicious" state legislation. Armed with such a power, the national government could act as a "disinterested & dispassionate umpire in disputes between different passions & interests in the State"--that is, within the individual states--and thus curb "the aggressions of interested majorities on the rights of minorities and of individuals."[76] From the vantage point of 1776, it would be difficult to imagine a more offensive proposal--especially when Madison explicitly linked his veto with the similar prerogative power the British crown had wielded over colonial legislation (and against which his friend Thomas Jefferson had complained so bitterly in the Declaration of Independence). The proposed council of revision seemed equally obnoxious to the orthodox doctrine of separated powers. As much as Madison believed in this principle, he also understood that mere textual declarations of the need to keep the three branches of government distinct would always prove inadequate. His dismissal of formal constitutional statements of this principle echoed his impatience with bills of rights: both erected "parchment barriers"[77] that could always be easily pierced if other methods of securing balanced government were not provided. Rather than trust the two

weaker branches to correct an unjust law after it was enacted, Madison instead preferred to involve them directly in legislation through the proposed executive-judicial council of revision. If many legislative decisions were truly judicial in nature, he reasoned, why not bring the judiciary into the lawmaking process itself, in the hope that sound judicial counsel could prevent the adoption of unjust laws in the first place?

If these proposals illustrate Madison's impatience with trite axioms of constitutional thought, they also reveal how far his impassioned analysis of the vices of republicanism had carried him beyond the boundaries of what was politically feasible in 1787. At the Convention, both the veto over state laws and the council of revision encountered decisive criticism. Their rejection left Madison fearful that the Constitution "will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst. the state governments."[78]

In one of the most remarkable of all his political papers--his October 24, 1787 letter to Jefferson--Madison went out of his way to defend the absolute veto on state laws, and in a way that makes clear why he was so dismissive of the practical value of a bill of rights. It was true, he observed, that the Constitution did afford some basis for the protection of economic rights, by prohibiting the states from emitting paper currency and enacting laws impairing the obligation of contracts. Yet even if these restrictions proved "effectual as far as they go, they are short of the mark," Madison observed. "Injustice may be effected by such an infinitude of

legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it." Because a provision reaching "all cases whatsoever" would not have to identify the specific rights deserving protection, Madison's reservation about enumerating rights was the corollary of his concern that an "infinitude of legislative expedients" could always be deployed to circumvent a formal ban proscribing the exercise of particular powers. In effect, Madison feared that an enumeration of rights would prove restrictive and effective in a way that the enumeration of legislative powers could not. Nor would it do to trust the federal judiciary to remedy wrongs: "it is more convenient to prevent the passage of a law [through a national veto], than to declare it void after it is passed," he observed, and this was "particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary."[79]

From this defense of his pet scheme for a veto, Madison went on to present Jefferson with his first statement of his theory of faction.[80] Only once in this letter, whose central theme is the protection of rights, did Madison refer to the issue of a bill of rights, when he noted that George Mason, his colleague in the Virginia delegation, "considers the want of a Bill of Rights as a fatal objection" to either his own signing of the Constitution or its ratification. Madison clearly regarded this objection as specious. No federal bill of rights could reach the real and

subsisting dangers to American liberty unless it somehow restrained the legislative power of the states and the vicious impulses of the local majorities whom they too faithfully represented. No partial list of prohibitions on the state legislatures could be efficacious--especially in the crucial realm of rights of property--given the plasticity of legislative power and its intrusive impact on the economy.

e. Subsisting doubts and grudging acceptance

Nearly a full year passed before Madison provided Jefferson with a more powerful set of reasons for questioning the utility of a federal bill of rights--even as he prepared to commit himself to secure appropriate amendments to the Constitution. When Madison sat down on October 17, 1788, to respond to the arguments that Jefferson had made in support of a bill of rights, a full year of public debate on the subject had barely altered his original opinion.[81] He had "always been in favor of a bill of rights," he wrote (at least a shade disingenuously), "provided it be so framed as not to imply powers not meant to be included in the enumeration." This, of course, invoked the central claim that Federalists had opposed to the call for a bill of rights. Madison then explained why he had still "not viewed it in an important light." To some extent, he accepted James Wilson's argument that a bill of rights was less necessary for the federal government because it was vested with limited powers; and also because the independent existence of the states would "afford a security"

against an abuse of federal power. Too, there was "great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude"--especially if "rights of conscience" were considered.

But Madison saved for last the one argument that expressed his most profound doubts. "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed," he observed. "Repeated violations of these parchment barriers have been committed in every State." The crucial point followed.

> Wherever the real power in a Government lies, 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 cheifly 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. This is a truth of great importance, but not yet sufficiently attended to: and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter.

By this last comparison, Madison set his own recent observations about American politics against the inferences Jefferson had drawn from his four years of service as American minister in France--inferences that allowed Jefferson to cast the problem of rights in the traditional terms of protecting the ruled from the rulers. In

a monarchy, Madison continued, a bill of rights could serve "as a standard for trying the validity of public acts, and a signal for rousing the superior force of the community" against "abuses of power" by "the sovereign." But in a republic, "the political and physical power" were both lodged "in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community."

If Madison's deepest concern was still for the security of property--because, in the familiar words of Federalist 10, "the most common and durable source of faction has been the various and unequal distribution of property"[82]--he nevertheless applied this general analysis of the prevailing force of public opinion to other categories of rights. He remained convinced, he told Jefferson, that some form of religious establishment could yet be adopted in Virginia, if the assembly "found a majority of the people in favor of the measure," and "if a majority of the people were now of one sect," notwithstanding the "explicit provision" protecting rights of conscience in the state constitution and "the additional obstacle which the law has since created" through the Statute for Religious Freedom. He questioned whether it would be useful to cast the provisions for rights that Jefferson wanted to incorporate in the Federal Constitution in "absolute" terms. "The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public," Madison warned, "and after repeated violations in extraordinary cases, they will lose

even their ordinary efficacy." "No written prohibitions on earth" would deter a people alarmed by civil turmoil from supporting a suspension of habeas corpus, nor would an article prohibiting standing armies as a danger to popular liberty do much good if Britain or Spain massed forces "in our neighbourhood."

What value, then, would a bill of rights have in a republic, Madison asked rhetorically? He saw two uses for it "which though less essential than in other Governments, sufficiently recommend the precaution." The first can be described as educative: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." By his own standards, this formulation seems remarkably optimistic: everywhere else in his concurrent political writings he concluded that ordinary citizens would rarely find appeals to principle more persuasive than the impulses of interest and passion.[83] He was equally doubtful about the second rationale he conceded for a bill of rights: that occasions could arise when "the danger of oppression" would lie more in "usurped acts of the Government" than "the interested majorities of the people," or even when "a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty." But Madison treated even this more as a speculative possibility than a serious threat. In the American republics, the greater danger by far was that government would experience a progressive "relaxation"

of its power to restrain the populace, "until the abuses of liberty beget a sudden transition to an undue degree of power."

With these monitory strictures in mind, Madison was prepared to endorse the call for a bill of rights, if suitably framed, and to assume personal responsibility for the adoption of appropriate amendments. Yet this grudging acceptance of political necessity reflected no sudden realization that a national bill of rights would have great practical value. The original failure of the Federal Convention to accept the programmatic reforms he valued most--the national veto and the council of revision--could not be remedied by the adoption of a federal bill of rights that would not reach the cases (or in a sense the arena) where most rights would remain at greatest risk. Legislation affecting rights of property, rights of conscience, and the other legal procedures (civil and criminal) to which Americans would be subject remained the province of the state legislatures, and Madison simply could not see how the acceptance of cautionary limitations on the exercise of national power would do much good.

Given the continuing force of these reservations, Madison's public declaration favoring amendments can easily be interpreted as a campaign conversion inspired by his difficult contest against James Monroe for election to the First Congress. That is what many of his colleagues suspected. Senator Robert Morris of Pennsylvania, for example, scoffed that Madison had "got frightened in Virginia and 'wrote a Book'"--that is, issued public letters revising his known views about amendments.[84] Yet as important as political

considerations both local and national were in convincing Madison to take the lead in promoting the adoption of amendments, the depth of his libertarian convictions was never in doubt. When the time came to enumerate rights meriting explicit constitutional recognition, he had no problem drafting an expansive list of civil rights in language that by contemporary standards can only be described as advanced. His subsisting objections to bills of rights were more pragmatic and functional than principled. Madison simply regarded the adoption of a federal bill of rights as an irrelevant antidote to the real dangers to rights that republican politics would generate. Unless it applied to the states, it would not reach the political arena where the greatest threats lay. Nor could he imagine how rights of property could ever be codified with the same relative ease and precision with which the procedural guarantees of more conventional civil rights could be stated.

Just as Madison's deepest reservations survived intact, so he found it impossible to dissemble when the time came (both in Virginia and Congress) to present his reasons for first for accepting and then for sponsoring the requisite amendments. For all the aggravation that his personal stewardship of the eventual bill of rights caused him, Madison did not shrink from offering a final and largely unmodified defense of his essential views. Rather than endorse the Antifederalist claim that a Constitution lacking a bill of rights would prove dangerous, he carefully explained why standard Federalist arguments against amendments were at once plausible yet less than persuasive. He stressed that the most

important reasons for proposing amendments was to reconcile to the Constitution all those "respectable" citizens whose "jealousy . . . for their liberty . . . though mistaken in its object, is laudable in its motive." Similarly, Madison used his speech introducing amendments to reiterate central elements of his own teachings about republican government. He reminded his colleagues, and the public who would read his speech in the newspapers, that it was against the legislative branch that a declaration of rights needed to be aimed, not the relatively weak executive. But in fact, Madison continued, "the greatest danger" to liberty was "not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority."[85]

Far from seeking to assuage public opinion or Antifederalist arguments at any cost, Madison thus restated the convictions that still informed his analysis of the essential problem of rights. So, too, he sought once again to place further restrictions on the abuse of state power by proposing an additional amendment declaring that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Though far more limited than his proposed national veto on state laws, this measure marked one last effort to salvage something from his earlier critique of the preeminent dangers to rights within the states. In subsequent debate, Madison boldly described this clause "as the most valuable amendment on the whole list." Would the people not be equally grateful, he asked, if "these essential

rights" were secured against the state as well as the national governments? This logic prevailed in the House but not the Senate, which acted to protect the rights of its legislative constituents in the state assemblies against national encroachment.[86]

In his speech of June 8, Madison did make one notable point he had not endorsed previously. If a declaration of rights was "incorporated into the constitution," he observed,

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[87]

The inspiration for this statement came from Jefferson.[88] But however attractive this prospect seemed in the abstract, Madison did not expect the adoption of amendments to free judges to act vigorously in defense of rights--at least over the short run. The true benefits of a bill of rights were to be found in the realm of public opinion, whose mysterious workings Madison--following David Hume--found so compelling. Beyond the immediate boost in allegiance to the new government that the prompt approval of amendments would produce, Madison hoped and expected a bill of rights to reinforce the stability of government over a much longer period. "In proportion as Government is influenced by opinion, must it be so by whatever influences opinion," Madison privately noted in December 1791. "This decides the question concerning a bill of rights, which

acquires efficacy as time sanctifies and incorporates it with the public sentiment."[89] As greater popular respect for the justice and importance of protecting individual and minority rights did develop over time, then perhaps the judiciary would eventually act as Madison very much hoped, yet initially doubted, it would. But the greater benefit would occur if acceptance of the principles encoded in rights acted as a restraint on political behavior, tempering improper popular desires before they took the form of unjust legislation.

If this interpretation is correct, the principal value of a bill of rights was educative.[90] Perhaps that in turn explains why Madison insisted that Congress take up the subject of amendments at its first session. The logic of this demand was consistent with the concern with public opinion that figured so prominently in his constitutional thinking in the late 1780s. By linking the adoption of amendments so closely with the ratification of the Constitution, and by treating both as extraordinary exercises of rational deliberation and choice, Madison hoped to attach to this conception of rights "that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[91]

6. The relevance of history

A bicentennial later, no one doubts that the Constitution has attained this "requisite stability," but it would be more problematic to suggest that the Bill of Rights enjoys a similar

degree of "veneration." The ceaseless controversies that swirl around claims of constitutional rights--whether asserted or denied, protected or endangered--provide the most volatile and contentious issues of American politics, and so they seem destined to remain indefinitely. Yet if a consensus about rights will always prove unavoidably elusive, in certain respects the modern evolution of the Bill of Rights has followed a Madisonian trajectory. Indeed, a strong case can be made that the most Madisonian element of the Constitution is found in the Fourteenth Amendment, and that the extension of the Bill of Rights to the states, under its aegis via the "incorporation" doctrine, is entirely consistent with the general role that Madison originally intended the national government to play in protecting individual and minority rights.[92] So, too, the idea that the fundamental rights enumerated in the first eight amendments were exemplary and illustrative rather than exhaustive and restrictive, expresses a deeper principle that Madison sought to codify explicitly in the formula of the Ninth Amendment--so long ignored, but now so intriguing a source of constitutional scrutiny.[93]

Historians are always happy to describe the relevance of the ideas and events they study to contemporary issues--the more so when they witness complex historical evidence being abused or at least grossly oversimplified for political ends. But they are happier still when issues arising in the present occasion a fresh look at that evidence and a better understanding of the events and developments it represents. To trace the rapid evolution that took

place after 1776 in American thinking about the protection of rights is to appreciate, again, how fertile and innovative this period of republican experimentation was. To recast the problem of rights in the new terms that Madison helped to fashion required both theoretical originality and a pragmatic, questioning approach to pressing political issues. As it is today, so it was in the beginning. By its very nature, the language of rights seeks the eloquent forms of moral principle and philosophical abstraction; but those who speak it must also master a more vernacular dialect whose rules reflect the play of interest, opinion, passion--and politics.

NOTES

Author's note: In addition to the members of the Wilson Center Workshop, I am grateful to Thomas Grey, Ralph Lerner, Robert Post, and John Phillip Reid for useful comments, suggestions, and even criticisms--not all of which, I fear, I have successfully answered. Section 5 of this essay derives from my essay, "The Madisonian Theory of Rights," William and Mary Law Review 31 (1989-90): 241-66, and I am grateful to the editors for their permission to draw so extensively on that essay here.

1. James H. Hutson, "The Birth of the Bill of Rights: The State of Current Scholarship," Prologue 20 (1988): 143-59 provides a good historiographical survey, while suggesting that too great an emphasis has been placed on the explicitly political aspects of the adoption of the Bill of Rights. Robert A. Rutland, The Birth of the Bill of Rights, 1776-1791 (Chapel Hill: University of North Carolina Press, 1955) is the standard narrative history; see also Leonard W. Levy, "The Bill of Rights," in Levy, Constitutional Opinions: Aspects of the Bill of Rights (New York: Oxford University Press, 1986) 105-34. Two recent collections of essays survey the progress of ratification of the Constitution in the states, touching on the significance of the call for a bill of rights as warranted: Michael A. Gillespie and Michael Lienesch, eds., Ratifying the Constitution (Lawrence, Kansas: University Press of Kansas, 1989); Patrick T. Conley and John P. Kaminski,

eds., The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution (Madison, Wis.: Madison House, 1988).

2. The most influential works in this vein are those of Leonard W. Levy, especially Origins of the Fifth Amendment: The Right against Self-Incrimination (New York: Oxford University Press, 1968), and Emergence of a Free Press (New York: Oxford University Press, 1985), a significantly revised version of his controversial Legacy of Suppression: Freedom of Speech and Press in Early American History (Cambridge, Mass.: Harvard University Press, 1960). A useful collection of essays on the original meaning of particular rights is Jon Kukla, ed., The Bill of Rights: A Lively Heritage (Richmond, Va.: Virginia State Library and Archives, 1987). One avenue of research that might prove promising would involve asking whether or to what extent the federal Bill of Rights provided the model for state constitutions adopted after 1789.

3. Leonard W. Levy, Original Intent and the Framers' Constitution (New York: Macmillan, 1989), 242-50 and ff.

4. I do not mean to suggest by this that these presentist concerns have produced what is often called "law office history," only that our general interest in these questions can be explained as a function of contemporary issues rather than the inherent importance--relative to other events of the time--of the subject itself.

5. As theories of constitutional interpretation, both of these claims lie beyond the realm of definitive historical resolution.

But insofar as all appeals to original intent are appeals to the evidence of the past, historical interpretation can both sustain and subvert the assumptions upon which originalism rests. Historical evidence may conceivably demonstrate that some clauses were understood in a reasonably consensual way circa 1789, and after; or it may prove that the Constitution and its clauses were subject to conflicting interpretations ab initio, and thereby illustrate the impossibility of freezing that one pristine moment of understanding that a theory of originalism seemingly requires. For a representative sampling of various issues and positions in this debate, see the essays collected in Jack N. Rakove, ed., Interpreting the Constitution: The Debate over Original Intent (Boston: Northeastern University Press, 1990). For perhaps the strongest statement asserting the primacy of originalism and the limiting power of the enumeration of rights, see Robert H. Bork, The Tempting of America: The Political Seduction of the Law (New York: Free Press, 1990).

6. As Gordon S. Wood has aptly observed, "When confronted with these contrasting meanings of the Constitution, historians . . . are not supposed to decide which was more 'correct' or more 'true.' Our task is rather to explain the reasons for these contrasting meanings and why each side should have given to the Constitution the meaning it did." Wood, "Ideology and the Origins of Liberal America," William and Mary Quarterly, 3d ser., 44 (1987): 632.

7. On this point, see especially the July 28, 1788 speech of James Iredell in the first North Carolina ratifying convention, which

presciently imagines how later interpreters might plausibly but wrongly conclude that the only rights that had mattered to the original adopters of the Constitution were those they explicitly included in the proposed bill of rights; reprinted (in part) in Philip B. Kurland and Ralph Lerner, eds., The Founders' Constitution (Chicago: University of Chicago Press, 1987), I, 475-476.

8. Nowhere is this sense of development more powerfully captured than in the two concluding chapters of Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass.: Harvard University Press, 1967).

9. Benjamin F. Wright, ed., The Federalist (Cambridge, Mass.: Harvard University Press, 1961), 268-70.

10. Indeed, a powerful case can be made that in the Anglo-American tradition, rights were regarded first and foremost not as qualities belonging to individuals but rather as the collective property of the people. I am grateful to John Reid for clarifying this point to me in private correspondence.

11. Subtitled, The Intellectual Origins of the Constitution (Lawrence, Kansas: University Press of Kansas, 1985), 9-55.

12. Ibid., 37 ff.

13. Ibid., 36-40.

14. "Liberty fascinated eighteenth-century English-speaking people as much as an abstraction as a practical constitutional principle . . . . The extent to which eighteenth-century legal, constitutional, and political commentators discussed liberty in the

abstract is simply amazing." John Phillip Reid, The Concept of Liberty in the Age of the American Revolution (Chicago: University of Chicago Press, 1988), 11.

15. Reid's emphasis on "The Englishness of [the] Rights" the colonists claimed is consciously designed to challenge the view, still dearly held in some circles, that natural rights provided the dominant conceptions of the rights that American cherished. See Reid's essay, "The Irrelevance of the Declaration," in Hendrik Hartog, ed., Law in the American Revolution and the American Revolution in the Law (New York, 1981), 46-89.

16. John Phillip Reid, Constitutional History of the American Revolution, vol. I, The Authority of Rights (Madison, Wis.: University of Wisconsin Press, 1986), 237.

17. Reid, Concept of Liberty, 60-63.

18. Thus Reid deems the Declaration of Rights of the First Continental Congress of 1774 far more important than the state bills of rights of 1776, "as these were concerned with future principles of governance, not with the prerevolutionary controversy." Authority of Rights, 18.

19. Ibid., 5.

20. Ibid., 34-38; Reid, Concept of Liberty, 68-73.

21. Reid, Authority of Rights, 75-78.

22. Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), 271. Reid would respond to this slightly dismissive characterization by arguing that rights were always regarded as being essentially

procedural in nature.

23. Reid, Authority of Rights, 65-66.

24. See especially Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," Stanford Law Review 30 (1978): 843-93; idem., "The Original Understanding and the Unwritten Constitution," in Neil L. York, ed., Toward a More Perfect Union: Six Essays on the Constitution (Provo, Utah: Brigham Young University Press, 1988), 145-73; and Suzanna Sherry, "The Founders' Unwritten Constitution," University of Chicago Law Review 54 (1987): 1127-77.

25. For discussion of these issues, see Robert E. Shalhope, "The Ideological Origins of the Second Amendment," Journal of American History 69 (1982-83), 599-614; Lawrence Delbert Cress, "A Well-Regulated Militia: The Origins and Meaning of the Second Amendment," in Kukla, ed., A Lively Heritage, 55-65; and B. Carmon Hardy, "A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment," ibid., 67-82.

26. Here, again, my interpretation of what might be called the starting position of American thinking about the protection of rights owes a great deal to the work of John Phillip Reid, especially his treatment of The Concept of ~~Revolution~~ Representation in the Age of the American Revolution (Chicago: University of Chicago Press, 1989).

27. David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain (Cambridge, Eng.: Cambridge University Press, 1989), 1-67.

28. Lois G. Schwoerer, The Declaration of Rights, 1689 (Baltimore: The Johns Hopkins University Press, 1981), 101.

29. The literature on the general topic of the rise of the colonial assemblies and their quarrels with the representatives of the crown is massive. Two books by Jack P. Greene, the synthetic Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (Athens, Ga.: University of Georgia Press, 1986) and his earlier monograph, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776 (Chapel Hill: University of North Carolina Press, 1963), provide the best introduction. It could of course be argued that the "ancient" rights claimed by Parliament and confirmed to it by the Glorious Revolution were either less venerable or legally secure than their advocates asserted; see Schwoerer, Declaration of Rights, 58-101, which surveys the sources of particular claims. In theory this would have made it more difficult for the colonists to claim that equivalent or identical rights had been vested in their assemblies ab initio; in practice, both American and English whigs had good reason not to press their historical scholarship too far, but simply state their claims as given. As Bernard Bailyn has argued, the constitutional sources of political strife in eighteenth-century America can be traced to the retention by crown authorities in America of prerogative powers that the Glorious Revolution and its aftermath had rendered archaic in Britain; Bailyn, The Origins of American Politics (New York: Alfred A. Knopf, 1968), chapter II.

30. Reid, Authority of Rights, 114-68.

31. By 1775 the best the Americans were prepared to offer was to abide by the navigation acts regulating imperial commerce, with the understanding that American adherence was the product of voluntary consent rather than simple obedience. See the discussion in Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress (New York: Alfred A. Knopf, 1979), 35-38, 57-59, 72-73.

32. Thomas Jefferson, A Summary View of the Rights of British America (Williamsburg, 1774), reprinted in Julian Boyd, ed., The Papers of Thomas Jefferson (Princeton: Princeton University Press, 1950-), I, 134-135; Rakove, Beginnings of National Politics, 35-36.

33. John Phillip Reid, "Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge," New York University Law Review 64 (1989): 987-88; Greene, Peripheries and Center, 143.

34. Ibid., 124-28; for a case study tracing how notions of "the rights of the people" were defined largely as a reaction against the perceived corruption of royal officials, see Richard L. Bushman, King and People in Provincial Massachusetts (Chapel Hill: University of North Carolina Press, 1985), 88-132.

35. Madison to Caleb Wallace, August 23, 1785, in William Hutchinson, William M. E. Rachal, Robert Rutland et al., eds., The Papers of James Madison (Chicago: University of Chicago Press, and Charlottesville: University of Virginia Press, 1962-), VIII, 350-

351; hereafter cited as Papers of Madison.

36. By this I do not mean to suggest that the ideal of the patriot king, associated first and foremost with the writings of Bolingbroke, did not survive the revolutionary interregnum, only that it is difficult to discover its imprint in the institutional arrangements of the new republics. As a constitutional value, the ideal had to be resurrected in the 1780s. See, in general, Ralph Ketcham, Presidents above Party: The First American Presidency, 1789-1829 (Chapel Hill: University of North Carolina Press, 1984).

37. This is of course the central explanation of the Revolution offered in Bailyn, Ideological Origins, 1-159.

38. Reid, Concept of Representation, especially 119-46; Bailyn, Ideological Origins, 161-75.

39. This formulation parallels, I believe, Gordon Wood's efforts to trace the American attachment to republicanism and its promise of "moral reformation" to the contradictory images that the colonists held of themselves, as a people who seemed at once uniquely virtuous (or capable of acting virtuously), yet who were also active pursuing the self-interest that republicanism abhorred. This tension or contradiction was also manifested, Wood argues, in the conflicting ideas of representation I discuss here: that is, in the conflict between the residual attachment to the ideal of virtual representation, as a norm of legislative conduct, and the pressures, apparent from the start, to make the legislatures susceptible to popular will. Wood, Creation of the American Republic, 91-124, 178-196.

40. Four Letters on Interesting Subjects (Philadelphia, 1776), 24.

41. Kurland and Lerner, eds., Founders' Constitution, I, 6.

42. Demophilus, The Genuine Principles of the Ancient Saxon, or English Constitution (Philadelphia, 1776), 24; New Hampshire Gazette, January 4, 1783, quoted in Wood, Creation of the American Republic, 164.

43. Four Letters on Interesting Subjects, 21-22.

44. Oscar and Mary Handlin, eds., The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780 (Cambridge, Mass.: Harvard University Press, 1966), 153.

45. Bailyn, Ideological Origins, 193-98.

46. The entire question of the origins of American ideas of an independent judiciary deserves more careful consideration. For obvious and good reasons, scholars have long been fascinated, indeed obsessed with the origins of the doctrine of judicial review, which can certainly be seen as the most innovative and potentially momentous element in the constitutional theory of judicial power. Yet given the prior ambivalence in American attitudes toward the judiciary, perhaps it would be useful to ask whether acceptance of the idea of judicial review was not itself contingent upon, or a manifestation of, a broader shift in the appreciation of the nature and uses of judicial power. On this point, J. M. Sosin, The Aristocracy of the Long Robe: The Origins of Judicial Review in America (Westport, Conn.: Greenwood Press, 1989) provides a useful survey, though one still concerned, as the subtitle indicates, with the hoary question of judicial review. Of

course, in the early republic the role of the judiciary in a republican society was at least as hotly disputed as it remains today, as is clearly demonstrated in Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic (New York: Oxford University Press, 1971).

47. [Adams], Thoughts on Government, (Philadelphia, 1776), reprinted in Kurland and Lerner, eds., Founders' Constitution, I, 109.

48. Four Letters on Interesting Subjects, 21.

49. The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom ([Hartford], 1776), 12-13.

50. Jefferson to Edmund Pendleton, August 26, 1776, Boyd, ed., Papers of Jefferson, I, 505.

51. Reid, Concept of Representation, 28-30.

52. William Nelson's accounting of "the legislative product" of the 1761 session of the Massachusetts General Court reveals how widely these notions of lawmaking differed from the modern concept of positive legislation. "The great bulk of the General Court's acts in that year were essentially administrative, involving questions of raising and appropriating money, organizing and granting jurisdiction to local units of government, and responding to specific local needs. The Court also acted on a number of occasions in a quasi-judicial capacity when it granted new trials to litigants in pending actions. In that year it passed only three acts that were arguably legislative in the sense that they changed

law or made new law--an act making robbery a capital offense, an act prohibiting the arrest of royal soldiers or sailors for debt, and an act for incorporating the Society for the Propagation of Christian Knowledge." William E. Nelson, Americanization of the Common Law: The Impact of Legal Chance on Massachusetts Society, 1760-1830 (Cambridge, Mass.: Harvard University Press, 1975), 14.

53. Bailyn, Origin of American Politics, 101-104.

54. In addition to the portrait of legislation drawn in Nelson, cited supra, see Thomas L. Purvis, Proprietors, Patronage, and Paper Money: Legislative Politics in New Jersey, 1703-1776 (New Brunswick: Rutgers University Press, 1986), 176-99; Allan Tully, William Penn's Legacy: Politics and Social Structure in Provincial Pennsylvania, 1726-1755 (Baltimore: The Johns Hopkins University Press, 1977), 98-102; and Robert Zemsky, Merchants, Farmers and River Gods: An Essay on Eighteenth-Century Politics (Boston: Gambit, 1971), 10-27. The validity of the comparison between British and American attitudes toward legislation requires a systematic assessment of legislative output in the two societies. For a view suggesting that historians have underestimated the legislative role of the eighteenth-century Parliament, see Lieberman, Province of Legislation Determined, 13-28. For all its old-fashioned quality, the subject as a whole merits further study. As Purvis aptly notes, "Little is presently known regarding either the disposition of petitions or the general range of statutes enacted by provincial governments in eighteenth-century America."

55. For all that has been written on state politics during the Revolutionary War, more attention could well be paid to the problem of mobilization and regulation at the state level--that is, to the use of power--as opposed to the more familiar themes of struggles for "democracy" or the opening up of the political system to new groups. The best study for these purposes is Richard Buel, Jr., Dear Liberty: Connecticut's Mobilization for the Revolutionary War (Middletown, Conn.: Wesleyan University Press, 1980). See also Ronald Hoffman, A Spirit of Dissension: Economic, Politics, and the Revolution in Maryland (Baltimore: The Johns Hopkins University Press, 1973); and Edward C. Papenfuse, "The Legislative Response to a Costly War: Fiscal Policy and Factional Politics in Maryland, 1777-1789," in Ronald Hoffman and Peter J. Albert, eds., Sovereign States in an Age of Uncertainty (Charlottesville: University of Virginia Press, 1981), 134-56.

56. Quoted in Ralph V. Harlow, "Aspects of Revolutionary Finance, 1775-1783," American Historical Review 35 (1929): 62-63.

57. The most remarkable example of this can probably be found in the extended correspondence between Charles Carroll of Annapolis, reputedly one of the largest landowners in the entire nation, and his politically active son, Charles Carroll of Carrollton, over the injustice of Maryland financial legislation. See the account in Ronald Hoffman, A Spirit of Dissenion, 205-23.

58. Wood, Creation of the American Republic, 363-76. Here as elsewhere, in my view, Wood's illuminating account of the directions in which American thought was moving after 1776 pays

insufficient attention to the specific issues of public policy to which both public officials and their constituents were responding. See Jack N. Rakove, "Gordon S. Wood, the 'Republican Synthesis,' and the Path Not Taken," William and Mary Quarterly, 3d ser., 44 (1987), 617-22.

59. This section draws on a number of essays I have written about various aspects of Madison's constitutional thought. Especially important for the purposes of this essay is "The Madisonian Theory of Rights," William and Mary Law Review 31 (1989-90): 241-66. See also, "Mr. Meese, Meet Mr. Madison," Atlantic, vol. 258 (December 1986): 77-86; "The Great Compromise: Ideas, Interests, and the Politics of Constitution Making," William and Mary Quarterly, 3d. ser., 44 (1987): 424-57; and "The Madisonian Moment," University of Chicago Law Review 55 (1988): 473-505. I have also benefited from reading Paul Finkelman, "James Madison and the Bill of Rights," which will appear in Supreme Court Review (1991).

60. Although one could argue that the loyalists, by dint of theory and experience alike, would have then been prepared to subscribe to the second and third propositions.

61. This is a potentially significant objection from the vantage point of a strict theory of originalism, which, following Madison's own position in the early 1790s, holds that the authoritative original understandings of the Constitution must be found in the shared opinions of its ratifiers or, more generally, the broad body of public opinion they represented.

62. These phrases appear in Federalist 37, Wright, ed., The Federalist, 271. Cf. the penultimate paragraph in David Hume's essay, "Whether the British Government Inclines More to Absolute Monarchy or to a Republic," where Hume, expressing his preference for monarchy, observes: "let us consider, what kind of republic we have reason to expect. The question is not concerning any fine imaginary republic, of which a man may form a plan in his closet." David Hume, Essays Moral, Political, and Literary, Eugene F. Miller, ed., (Indianapolis: Liberty Press, 1987), 52.

63. On Madison's early views, see his letters to his college friend William Bradford of December 1, 1773; January 23, 1774; and April 1, 1774, Papers of Madison, I, 101, 106, 112. The Virginia Declaration of Rights can be found ibid., 172-75. The progress of disestablishment in Virginia has been extensively studied; see especially Thomas C. Buckley, Church and State in Revolutionary Virginia, 1776-1787 (Charlottesville: University of Virginia Press, 1977); and the essays collected in Merrill D. Peterson and Robert C. Vaughan, eds., The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History (New York: Cambridge University Press, 1988).

64. Papers of Madison, VIII, 299-304.

65. Madison to Caleb Wallace, August 23, 1785, ibid., 351-352. Madison here echoes the comments of William Livingston, the venerable New Jersey whig, writing anonymously as "Scipio" in the New Jersey Gazette of June 14, 1784, in defense of fixed salaries for state judges: "the purity of their courts of justice,"

Livingston wrote of England, "is now perhaps the only remaining band that (amidst the wreck of publick and private virtue) holds together the pillars of that tottering nation." Carl E. Prince et al., eds., The Papers of William Livingston (New Brunswick: Rutgers University Press, 1988), V, 137. Compare the discussion of judicial independence in contemporary British constitutional practice in Alan Ryan's essay in this volume.

66. From his memorandum on the Vices of the Political System of the U. States, [April 1787], ibid., IX, 353-354.

67. Speech of June 26, 1787, ibid., X, 77.

68. Observations on Jefferson's Draft of a Constitution for Kentucky [October 1788], ibid., XI, 287-288.

69. I do not mean to deny that Madison still hoped that a diversity of economic interests would have the same beneficial effects as "a multiplicity of sects," only to suggest that he was more confident that Protestant sectarianism would continue to work in wonderfully divisive ways than he was about the consequences of economic development. Nathan O. Hatch, The Democratization of American Christianity (New Haven: Yale University Press, 1989) provides a marvelously provocative account of the fusion between Jeffersonian-Madisonian principles, on the one hand, and the sectarian creativity of the Second Great Awakening. On Madison's economic ideas, see Drew McCoy, The Elusive Republic: Political Economy in Jeffersonian America (Chapel Hill: University of North Carolina Press, 1979).

70. Wright, ed., The Federalist, 131-32.

71. Madison to Jefferson, October 24, 1787, Papers of Madison, X, 211-12.

72. Wright, ed., The Federalist, 344; and see the parallel discussion of the problem of delineating powers in Federalist 37, ibid., 269.

73. Papers of Madison, IX, 354.

74. For closer analysis of Madison's ideas of representation, see Rakove, "The Great Compromise," 429-436, and idem., "The Structure of Politics at the Accession of George Washington," in Richard R. Beeman et al., eds., Beyond Confederation: Origins of the Constitution and American National Identity (Chapel Hill: University of North Carolina Press, 1987), 261-94.

75. Papers of Madison, IX, 355-57; these quotations from the memorandum on the Vices of the Political System of the U. States were, of course, the first statement of the ideas better known from their reformulation in Federalist 10.

76. Madison to Washington, April 16, 1787, ibid., IX, 383-84.

77. It is significant that Madison used this term in Federalist 48 to describe both the inadequacy of the statements in the state constitutions prescribing the separation of powers and in his October 17, 1788 letter to Jefferson (discussed extensively below) registering his persisting doubts about the utility of bills of rights.

78. Madison to Jefferson, September 6, 1787, Papers of Madison, X, 163.

79. Ibid., X, 211-12; on the veto, see especially Charles F. Hobson, "The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," William and Mary Quarterly, 3d ser., 36 (1979): 215-35.

80. Only four weeks later, that theory would be published in the tenth number of The Federalist.

81. Quotations from this letter in this and the following paragraphs can be found in Papers of Madison, XI, 297-300.

82. Wright, ed., The Federalist, 131.

83. The obvious texts to be consulted on this point include Federalist 10, 49, and 50.

84. Morris to James Wilson, August 23, 1789, Willing, Morris, and Swanwick Papers, Pennsylvania Historical and Museum Commission, Harrisburg.

85. Speech in the House of Representatives, June 8, 1789, in Papers of Madison, XII, 196-209, quotations at 198, 204.

86. Ibid., 202, 208, 344.

87. Ibid., 206-207.

88. "In the arguments in favor of a declaration of rights [included in Madison's letter of October 17, 1788]," Jefferson had written on March 15, 1789, "you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." Ibid., 13.

89. This observation appears in the notes Madison kept for his National Gazette essays of 1791-1792; ibid., XIV, 162-163. In the printed essay on "Public Opinion," the corresponding passage reads:

"In proportion as government is influenced by opinion, it must be so, by whatever influences opinion. This decides the question concerning a Constitutional Declaration of Rights, which requires [sic; acquires was probably the intended word] an influence on government, by becoming a part of the public opinion." Ibid., 170.

90. Nor is it clear that this conviction was his alone. Herbert Storing has also suggested, on the basis of his deep reading of Antifederalist writings, that "The fundamental case for a bill of rights is that it can be a prime agency of that political and moral education of the people on which free republican government depends." Herbert J. Storing, ed., The Complete Anti-Federalist, vol. I, What the Anti-Federalists Were For, (Chicago: University of Chicago Press, 1981), 69-70.

91. Wright, ed., The Federalist, 349 (from the 49th essay).

92. From a Madisonian perspective, there are two ways to view the relation between the current debate over constitutional rights and the original intentions of this most influential framer of the Constitution and its amendments. Whether Madison would relish the idea that judges could "create" new rights, rather than merely recognize and protect preexisting but unenumerated rights, is certainly a good and indeed quite a challenging question. But the idea so central to recent conservative claims--that the federal judiciary should defer to local democratic preferences even where questions of rights may be implicated--strikes me as being the antithesis of the central Madisonian principle, viz., that the real dangers to rights would arise primarily within the states, and that

the best solution to this condition would require the creation of a national government capable of intervening to protect individuals and minorities against the abuse of factious majorities within the states and local communities.

93. See the essays collected in Randy E. Barnett, ed., The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Fairfax, Va.: George Mason University Press, 1989).

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