

# Parchment Barriers

ANTONIN SCALIA, JACK RAKOVE, JAMES MADISON, & THE MEANING OF RIGHTS

JACK N. RAKOVE  
DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS  
BEDFORD BOOKS 1998

*Michael A. Bellesiles*

THERE ARE THOSE who see history and culture as static, unchanging in its essentials. The law, such originalists insist, should adhere to that stasis. They usually hold this view in order to insist that the present is immutable, not subject to change. Such a perspective enjoys particular attraction for those who desire to maintain a rigid original reading of civic rights. Though rare among historians, the notion that specific rights have ancient roots which must not be disturbed finds some credibility among legal scholars.<sup>1</sup> More common is the position best repre-

sented by Justice Antonin Scalia, which seeks to anchor any change in the legal understanding of rights by a careful concern for the original intention of the framers of our Constitution.

In one of the most remarkable books of the last several years, Justice Scalia lays out a sophisticated and elegant argument for a “textualist” reading of the Constitution. The Justice then invites responses from four outstanding scholars: Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin. Here is a rare exercise in

---

*Michael A. Bellesiles teaches legal history and is the director of the violence studies program at Emory University.*

<sup>1</sup> See, for instance, Janet Lee Malcolm, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (Cambridge, Mass., 1994). Malcolm insists that the British Constitution served as a “model [that] was constantly before the framers of the American Constitution.” More than simply a guiding influence, the English system was actually what the American Revolutionaries desired. “When delegates copied British policies the public was reassured.” (pp. 150-51.)

intellectual integrity; and a testament to our shared national faith in the value of informed disagreement.<sup>2</sup>

Scalia insists on a distinction between textualism and original intent. The latter is grossly simplistic and fundamentally wrong in its effort to determine the exact intention of the framers or of lawmakers, and can swing just as easily in a conservative or activist direction. "It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Those who desire the Supreme Court to interpret law by reconstructing the thought of the Constitutional Convention or Congress will find no support in Scalia's essay. "The text is the law, and it is the text that must be observed." The exact words matter.<sup>3</sup>

Of course some of those words are rather archaic and others obscure. Justice Scalia perceives no problem. "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsman intended." Several of the commentators wonder if "meaning" is not just "intention" under a different label. Scalia responds that the distinction lies in what we look for; in the case of the Constitution's meaning we simply need to determine the contemporary meaning of a phrase. He gives as an example "cruel and unusual punishment." In the 1790s the death penalty was generally accepted, therefore Scalia finds no problem in maintaining the death penalty. But then in the 1790s prison was unheard of, and extended jail terms almost non-existent; should we therefore reject sentences of more than a few months as unconstitutional under

the original meaning of the eighth amendment? And Gordon Wood gently retorts, the framers of the Constitution meant for the judiciary to be activist and respond to changing circumstances. Scalia responds that it "cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change." We may not like it, but judges must be bound by what the framers "considered essential." Given that many of these framers considered slavery essential, we should at the very least allow for some "changeability."<sup>4</sup>

Scalia admits, rather disingenuously, that, "Sometimes (though not very often) there will be some disagreement regarding the original meaning." (I wonder if he realizes how much ink has been spilled in the debate over the meaning of the single sentence in the Second Amendment.) "And sometimes," he continues, "there will be some disagreement as to how that original meaning applies to new and unforeseen phenomena." Such a circumstance "requires the exercise of judgment" on the part of the Supreme Court. Well, when you get right down to it, "unforeseen phenomena" is a rather large loophole. I am fairly confident that almost every aspect of our modern society would come as a largely unforeseen phenomenon to every single author of the Constitution and its first amendments. More significantly, Laurence Tribe wonders why the courts should be bound by the exact meaning of the words in the Constitution. After all, the Constitution does not declare its "text to be the sole or ultimate point of reference." Even if there were "such a self-referential proclamation," it would "leave unanswered" the core "question: how is the text's *meaning* to be ascertained?"<sup>5</sup>

---

2 Antonin Scalia, et al., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton, N.J., 1997).

3 *Ibid.*, Scalia, 17, 22.

4 *Ibid.*, Scalia, 38, 40, 43; Wood, 49-63.

5 *Ibid.*, Scalia, 45; Tribe, 77-78.

Justice Scalia returns with an equally effective query: where do we draw the line? At what point does the court react so completely to changing social conditions that very little of the Constitution's separation of powers is left and the courts become an unelected super-legislature making policy decisions without regard to the will of the people? And in fact, has not that already happened to a large degree, as courts extend rights in areas never before imagined? Scalia concludes in despair that the "American people have been converted to belief in The Living Constitution, a 'morphing' document that means, from age to age, what it ought to mean. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority." Judges must stand as a bulwark against this tyranny of the majority by adhering to an interpretation of original meaning.<sup>6</sup>

It is doubtful that the majority will ever tear themselves away from their televisions long enough to care about the meaning of the Bill of Rights. Still, it is certainly easy to appreciate Justice Scalia's frustration with the current vogue for "rights talk."<sup>7</sup> Sometimes it appears that absolutely every discussion touching on questions of legal responsibility involves a consideration of perceived fundamental rights. Anyone who teaches constitutional law, or is the parent of a teenager, has probably encountered a powerful reserve of willful ignorance which finds a wide range of rights in our Constitution, from privacy to staying out late at night. At Michigan State, students have

actually rioted for their "right" to drink beer in a parking lot. And even when well informed people are correct about which rights are protected by our Constitution, they often show a surprising willingness to abandon consistency for policy. Essentially, most people hold an absolutist libertarian view of rights when it serves their purposes, while righteously demanding the responsibility of government action when supportive of their security or morality. Put another way, almost no one obeys the speed limit, yet nearly all rave about the lack of respect for the law when someone runs a red light in front of them.

Rights always seem obvious to those who hold that they are being denied. Think back to the first case in your property class, *Pierson v. Post*. Very likely many people identified with Lodowick Post, who had gone to all the trouble of chasing down the fox only to have the opportunistic Pierson walk off with the prize. It just doesn't seem fair. Yet as Justice Tompkins pointed out, "the sake of certainty, and preserving peace and order in society" required some limitations on the right of possession. Of course Tompkins and the majority were upholding the traditional, common law understanding of the rule of law; it was the lone dissenter, Justice Livingston, who wanted to alter the law as "our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career." In other words, the court should change the standard of law for the socially useful function of killing foxes. Justice Scalia would be offended by such an approach to the law, but, as the *Charles River Bridge* case demonstrates, the Supreme Court early on made the promotion of economic development the

6 Ibid., Scalia, 47.

7 For three completely different views of "rights talk," see Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (New York, 1991); Thomas Haskell, *The Curious Persistence of Rights Talk in the Age of Interpretation*, *JOURNAL OF AMERICAN HISTORY* 74 (1987): 984-1012; Ronald Dworkin, *THE MORAL READING OF THE CONSTITUTION* (Cambridge, Mass., 1996).

prevailing determinant of the validity of state action.<sup>8</sup>

Justice Scalia would have the Court abandon any notion of social utility in deciding cases, insisting that the original meaning of the Constitution must be the Court's compass. But is that original meaning really that easy to determine? Perhaps an historian can offer some useful insight on this perplexing question. Other than Gordon Wood, it is difficult to think of any contemporary scholar who has thought more carefully and more profoundly about the Constitution in its time than Jack Rakove. His *Original Meanings*, which justly won the Pulitzer Prize, is a brilliant and meticulous examination of the intellectual and political context of the framing of the Constitution. *Declaring Rights* is basically a documents collection for *Original Meanings*. Just as Scalia's book is so admirable in allowing the reader to consider a number of different interpretations of original intent, so *Declaring Rights* is a unique opportunity for a reader to reach an individual judgment of the original meaning of the Constitution.

Like Scalia, Rakove insists on the distinction between original meaning and original intent. Rakove efficiently dismisses the more naive versions of original intent. It is not just that the framers of the Constitution did not want their intentions to guide future generations, they also considered such an approach inherently dangerous. The participants at the

Constitutional Convention in Philadelphia took oaths of secrecy precisely because they appreciated that their deliberations would include a number of necessary political and intellectual compromises. Far better, they reasoned, if no one ever knew exactly what went into producing the simple language of the Constitution.<sup>9</sup>

James Madison formulated this position of non-reverence for the framers in a speech before the House of Representatives in April, 1796. Madison stated flatly that the Convention's debates should "never be regarded as the oracular guide" for understanding the Constitution. "As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."<sup>10</sup>

Rakove's most valuable contribution is his careful consideration of the political process by which that "dead letter" came to life. The Constitutional Convention devoted much of its time to "issues that the delegates approached as spokesmen for the particular interests of their constituents." This constant negotiation meant that, "the real challenge did not involve solving theoretical dilemmas posed by Hobbes or Locke or Montesquieu; it instead required efforts to accommodate the conflicting interests of different states and regions on such matters as the apportionment

8 *Pierson v. Post*, Supreme Court of New York, 1805, 3 Cai. R. 175, 2 Am. Dec. 264; *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). Stanley I. Kutler, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (Baltimore, Md., 1990).

9 Edmund Randolph perfectly summarized the purpose of the Constitution's language: "1. To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accomplished to times and events; and 2. To use simple and precise language, and general propositions. ..." Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (New York, 1997), 342.

10 *Ibid.*, 362. Ironically, Madison kept careful, though not necessarily accurate, notes of the Constitutional Convention which he released late in his life. Those notes continue to exert enormous influence on our conversations about the Constitution. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, *UNIVERSITY OF TEXAS LAW REVIEW* 65 (1986): 1-39.

of representation and taxes, the regulation of commerce, and the extension of the slave trade." What makes the Convention so admirable is that its participants were practical men, not philosophers. It is doubtful that a convention of academics would have produced a constitution at all, let alone one which anyone could understand.<sup>11</sup>

And, as Madison said in 1796, it was that entire political process, from the perceived crisis of the Confederation through the first Congress, which must serve as our guide to the meaning of the Constitution. After all, it was the stated intention of the Convention to not have a Bill of Rights. Yet it would be a grave error to omit these first amendments from the original meaning of the Constitution. Madison often stated that he saw no reason to enumerate protected rights, but it was Madison who bears the greatest credit and responsibility for the Bill of Rights which emerged, fully understanding its necessity to ensure the acceptance of the Constitution he had helped craft.

It was politics which led many framers to change their minds on several fundamental issues. In 1789, Representative William L. Smith quoted from *Federalist* #77 in arguing that the Senate had to provide its consent for the removal of a federal appointee. The next day he received a communication that Hamilton "had changed his opinion & was now convinced that the President alone should have the power of removal at pleasure." As Smith wrote Edward Rutledge, Hamilton's altered judgment probably bore some relation to the fact that "He is a Candidate for the office of Secretary of Finance!"<sup>12</sup> For Madison, the Constitution was about limiting state power, as Rakove puts it, "not only to free the Union

from its dependence on the states but to free the states from themselves by taking steps that would undo the damage done by the excesses of republicanism." Madison was utterly convinced at the time of the Constitutional Convention that the real danger to liberty and stability in the United States came from the states. The point was therefore not to limit executive power, but to put a cap on state authority and on the political majority acting through the House of Representatives. Yet years later, as Rakove notes, Madison was deeply embarrassed to find his own words from the *Federalist Papers* hurled back at him as "the new prominence of questions of foreign policy led him to a new conclusion: that it was the executive that wielded the greatest degree of power and initiative." And now here he was calling first for the enhancement of the power of the House of Representatives, and then for state nullification of federal acts.<sup>13</sup>

In short, we cannot take a freeze-frame of a particular moment in the articulation of the Constitution and its implementation and say that the opinions then expressed represented the intent of its many framers. Nor, according to Rakove, can we even be content with the notion that the rights protected by the Constitution are precisely enumerated by the Bill of Rights. Not only was that not Madison's intention, but the Ninth Amendment, "that constitutional joker," left the definition of essential rights wide open.<sup>14</sup>

One question, however, was resolved by the Bill of Rights: the vexing problem of the origins of rights. The Constitution itself legitimized rights. John Phillip Reid has demonstrated that Americans of the Revolutionary generation saw themselves as subject to British rights, but could not quite locate the origins of

11 Rakove, *ORIGINAL MEANINGS*, 15-16.

12 *Ibid.*, 350 (emphasis in original).

13 *Ibid.*, 34, 364; James Roger Sharp, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* (New Haven, Conn., 1993), 187-207.

14 Rakove, *ORIGINAL MEANINGS*, 289.

those rights.<sup>15</sup> That difficulty is not too surprising, since the British could not either. The “rights of Englishmen” began somewhere in the mists of time; “immemorial custom” as the English like to say. Even the Declaration of Rights of 1689 only affirmed what was already thought to exist. Their misreading of history determined the British view of the origins of rights. Rakove observes of this legal fiction: “The idea of this ‘ancient constitution’ was a shade less mythical than the primordial state of nature that Hobbes, Locke, and other writers imagined.” But no one could actually locate it, at least not accurately.<sup>16</sup>

Most collections on questions of rights begin with the Magna Carta. But as Rakove says, most of the items in the “Great Charter relate to aspects of feudal law that seem utterly foreign to modern readers.”<sup>17</sup> The framers of the U.S. Constitution also may have missed the point of reading a document enhancing the power of the barons of England. But the Magna Carta did serve mythic functions, creating the impression of a heritage of British liberty. A much more fitting starting place is the British Declaration of Rights of 1689, which is where Rakove begins. It serves mostly, though, to help record the distance the Americans traveled in the years 1775-1789. The Declaration of Rights aims exclusively at limiting the monarch’s power while enhancing that of Parliament. In the British and loyalist view, rights came from acts of the government. Thus Martin Howard, Jr., could write in opposition to the emerging patriot claims to natural rights that, “The colonies have no rights independent of their charters, they can claim no greater than those give them.” But

starting with the Virginia Declaration of 1776, the Americans moved from perceiving rights as something granted or permitted by the state, to an entitlement, something due us all just for being alive. For instance, an initial draft of the Virginia Declaration stated “that all men shall enjoy the fullest toleration in the exercise of religion.” But at James Madison’s urging that language was altered from a granted toleration to an inherent right, as “all men are equally entitled to the free exercise of religion.”<sup>18</sup> And even then, there is, as Rakove writes, a substantial evolution from the “ought” and “should” of the Virginia Declaration, “suggesting that a lesson is being taught,” to the “shall” of the Bill of Rights, which implies a command.<sup>19</sup>

The first years of the revolutionary struggle made evident that Americans and British leaders understood rights differently, though none of them with any clarity. The first bills of rights were at best ambiguous. “It was not clear whether bills of rights were part of this new organic law or merely flourishes of principles that deserved to be honored but did not establish legally binding or enforceable rules.” Some rights were precise, others mere “moral homilies.” It is no wonder that the Federalists would later mock the Anti-federalists for attempting to enumerate protected rights. One of the amendments proposed by the Pennsylvania convention stated that the national government would not hinder the “liberty to fowl and hunt in seasonable times, and on lands they hold ... and in like manner to fish in all navigable waters.” Noah Webster sarcastically proposed that, “Congress shall never restrain any inhabitant of America from

---

15 John Phillip Reid, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, VOL. I, THE AUTHORITY OF RIGHTS* (Madison, Wis., 1986).

16 Jack N. Rakove, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* (Boston, 1998), 25; J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (Cambridge, 1957).

17 Rakove, *DECLARING RIGHTS*, 7.

18 *Ibid.*, 53, 77-78.

19 *Ibid.*, 2.

eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night." The Federalists could justly ask whether "rights" include every activity, no matter how trivial, and whether all these rights need to be secured against every imaginable act of government, no matter how improbable. After all, the Federalists routinely pointed out, if Congress consisted of the people's representatives, why in the world would it go about attacking the rights of the people?<sup>20</sup>

Well Madison had a good answer to that one: because they could. In the eighteenth century rights were held collectively, not individually. "The real issue was not to enable individuals to enjoy a maximum degree of choice in their private lives – to choose their lifestyles, we might say – but to protect the people at large from tyranny." Thus, to best protect the people from a tyrant, "one had only to ask which part of government was most likely to act tyrannically." In a wonderful exchange of letters with Thomas Jefferson, Madison expressed his fear of the majority and its penchant for conformity and even tyranny. The whole point of the Constitution was to establish the structural barriers which would make it very difficult for the majority to follow its baser passions; but nothing could ever prevent the majority denying rights to others, including a Bill of Rights. "Where traditional theory held that the problem of rights was to protect the people *against* government, Madison realized that in a republic the pressing necessity was to find ways to protect one segment of the community – individuals and minorities – against the self-interested desires of popular majorities acting *through* governments." Madison dismissed bills of rights as

"parchment barriers" of little practical utility. The people had to be willing to respect rights, and if they were, there was no apparent reason to put them down in writing. If they did not respect the rights of some, no document would help.<sup>21</sup>

And as a slave-owner, Madison knew whereof he spoke. He did not respect the rights of his slaves because he did not have to, and benefited from that dereliction. Refreshingly, Madison did not offer rationalizations in bluntly using slavery as a prime example of "the danger of oppression to the minority from unjust combinations of the majority."<sup>22</sup>

Thomas Jefferson was also a slave-owner, but he spent a lifetime offering excuses for slavery. More than that, he structured a hierarchy of rights topped by the ownership of slaves. As Winthrop Jordan framed Jefferson's view, "rights belonged to men as biological beings ... and to know whether certain men possessed natural rights one only had to inquire whether they were human beings." Here is where Jefferson's rights reasoning collapsed, for he did acknowledge that blacks have the "moral sense" integral to humanity, but could not quite bring himself to therefore extend to them those certain inalienable rights which he so often promoted. Clearly there was a problem here. Jefferson opposed any restrictions on slavery in Missouri as a violation of white property rights, anticipating John C. Calhoun's argument that the Constitution existed specifically to protect the property in slaves. Madison maintained that the ownership of slaves was an economic interest not a right.<sup>23</sup>

Ironically, it was Jefferson who convinced Madison that an incomplete bill of rights is

20 Ibid., 306-307, 330; Cecilia Kenyon, "Men of Little Faith" *The Anti-Federalists on the Nature of Representative Government*, WILLIAM AND MARY QUARTERLY 12 (1955): 3-43.

21 Rakove, *DECLARING RIGHTS*, 22-23, 100, 106.

22 Rakove, *ORIGINAL MEANINGS*, 337.

23 Winthrop D. Jordan, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (Baltimore, Md., 1968), 431; Dumas Malone, *THE SAGE OF MONTICELLO* (Boston, 1981), 336-37;

better than none. But Jefferson held that the people needed to be protected from the federal government, whereas Madison feared the people. Jefferson was a hypocrite; Madison was right. Here was the wedge which would drive the nation asunder and almost destroy it. Most white Americans recognized property as an essential protected right. And the Constitution seemingly recognized slaves as property. What then of the human rights of the slaves themselves? Were not their rights subject to protection? Jefferson had also perceived this contradiction, writing in his *Notes on the State of Virginia* of the evil that came from “permitting one half the citizens thus to trample on the rights of the other.” By this telling choice of words, Jefferson not only made slaves citizens, but also the holders of basic human rights. But he could not seem to think through his own logic, so blinded was he by racism.<sup>24</sup>

Jefferson and Madison were not alone in their struggle to define the nature of rights and political organization during the revolutionary period; most of those involved with politics in these years grappled with these core questions. And what developed should not be taken as having been easy or obvious.<sup>25</sup> Many contemporaries realized the threat in Jefferson’s language of rights and wished to avoid it. When the Virginia convention set about writing a constitution in 1776, the initial draft language “that all men are born equally free and independent, and have certain inherent natural

rights” was rejected as a direct threat to slavery. Instead the convention adopted some vague rhetoric limiting rights to those who “enter into a state of society,” which was thought to exclude slaves.<sup>26</sup> Other states had perceptions of rights which carried a heavier charge of responsibility than modern Americans might accept. In 1780 the Massachusetts Declaration of Rights stated in the second article that, “It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING”; the third article allowed for a tax in support of religion. A rather distinctive understanding of religious freedom is at work here, one attempting to meld local cultural values with universal ideals. The effort to clarify rights is evidenced in Jefferson’s incredibly wordy and largely meaningless Virginia Statute for Religious Freedom of 1779. In a convoluted rambling sentence some fifty lines long, Jefferson says that people can practice their religious views or not without interference from the state, while also not actually requiring anything from the state to protect that liberty.<sup>27</sup> But here was the core difference between England and America by 1776: in England the Constitution emerged from the acts of Parliament and the Crown; in America it was the right of the people to create a written constitution guaranteeing those rights, no matter how obscurely.<sup>28</sup>

Madison and most of the other framers hoped to break free of precedent. John Adams,

---

John C. Calhoun, *A Disquisition on Government*, in Michael A. Bellesiles, ed., *BIBLIOBASE* (Boston, 1998).

24 Rakove, *DECLARING RIGHTS*, 150-66; Jefferson, *Jefferson on Slavery*, in Bellesiles, *BIBLIOBASE*, 7.

25 Jack N. Rakove, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* (New York, 1979); Patrick T. Conley and John P. Kaminski, eds., *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* (Madison, Wis., 1992)

26 Rakove, *DECLARING RIGHTS*, 77.

27 *Ibid.*, 90, 95-96.

28 Bernard Schwartz, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* (Madison, Wis., 1992).



in his masterpiece *Defense of the Constitutions*, insisted that the United States was creating the model for others to follow and not building on the “barren rock” of England’s government. Madison dismissed Locke and Montesquieu as “evidently warped” by their inexplicable admiration for Britain’s “constitution.” Relying on such philosophers for concrete solutions to political problems was ludicrous, “a field of research which is more likely to perplex than to decide.” The goal was to attain a balance – a balance among the branches of government, between the different levels of government, and between the rights of individuals and the needs of the broader political community. Interestingly, this balance would only truly be attained, Rakove maintains, with the Civil War amendments, “the most Madisonian elements of the American Constitution.” Here was an original intention fulfilled eighty years later.<sup>29</sup>

We all know that, when it came down to it, rights in the eighteenth century were limited largely to white male Protestant property owners. But ultimately speaking of rights is addictive. As Rakove points out, “The language of rights, then, is inherently expansive and potentially egalitarian.” As a consequence, “Much of the history of American rights since 1776 can be written as a story of the way in which new claimants of rights have appropriated an older language to their own ends” – to Justice Scalia’s annoyance.<sup>30</sup>

Federalists did not always understand why the Anti-federalists were so insistent on a bill of rights. James Iredell argued that the Anti-federalists were reading the Constitution backwards in attempting to set limits on the actions of government, that it should be “con-

sidered as a great power of attorney, under which no power can be exercised but what is expressly given.” It certainly is true, Iredell continued, that, “no man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution.” Madison shared this view, but gave in to the Anti-federalists for political reasons.<sup>31</sup>

For a long time it seemed as though the Federalists were right, and that a bill of rights was largely insignificant. The Sedition Act became law despite the first and tenth amendments, and lapsed because of a change of government. Similarly, southern states opened people’s mail to ferret out their version of “rights talk” and forbade public discussion of abolition while Congress passed the notorious gag rule, all without regard to the first amendment. In *Barron v. Baltimore*, Justice John Marshall held that the Bill of Rights did not apply to the states. And then there was the Civil War, ultimate proof of the power of a majority to tyrannize a minority, and of the states to threaten the very existence of the nation. It took the fourteenth amendment to bring Madison’s vision of a federal government protecting the minority to fruition. Even then, however, it was not until the twentieth century that the courts began using the Bill of Rights to secure personal liberties.<sup>32</sup>

Rakove summarizes Madison’s political vision by writing that, “the people themselves were not innocent bystanders in the enactment of unwise or unjust laws – they were the real source of the problem because they saw politics as the means to assert their private interests and passions over and against the true public good of society.” No reliance could therefore be placed upon virtue. Rather the

29 Rakove, *ORIGINAL MEANINGS*, 337-38, 356.

30 Rakove, *DECLARING RIGHTS*, 31.

31 *Ibid.*, 146.

32 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); Richard C. Cortner, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* (Madison, Wis., 1981)

nation needed to take advantage of its size and project the maximum amount of rights on the broadest number of people so that they could counteract one another and prevent the triumph of a single interest group to the detriment of all. And just to make sure, the national government should have a veto over state legislation. The latter proposal was twice rejected, first at the Constitutional Convention, and then in consideration of Madison's list of amendments for the Bill of Rights.<sup>33</sup>

The Constitutional Convention did adopt some of Madison's reasoning. The Constitution includes a few specific protections of rights. Fearing the actions of radical state governments, the convention inserted a prohibition on states emitting bills of credit and enacting laws which impaired contractual obligations.<sup>34</sup> But there was a hierarchy of rights. Madison and most of the framers feared attack upon their property by rogue legislatures. There was an ordering even among forms of property. Slave owners, following the lead of Thomas Jefferson, gave primacy to slave property over all other rights. Madison had a different idea. Despite his

warnings in *Federalist* #10, his structure of rights did not lead with property. As he explained in an essay on "Property" in 1792, property "embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them. ... In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." Madison concluded that, "conscience is the most sacred of all property."<sup>35</sup> As Michael Kammen has argued, "Madison's final judgment on the problem of striking a balance between the rights of property and the property in rights leaned in favor of the latter because doing so would maximize human freedom."<sup>36</sup>

The interesting historical tale of the twentieth century is how this rights hierarchy collapsed to the point that federal courts appear intent upon protecting all rights equally. Jefferson would not be amused. It is likely that Madison would feel vindicated. *JB*

---

33 Rakove, *DECLARING RIGHTS*, 103.

34 Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789-1815*, *WILLIAM AND MARY QUARTERLY* 44 (1987): 529-48.

35 Madison, *Property*, originally in the *NATIONAL GAZETTE* 29 March, 1792, in Saul K. Padover, ed., *THE COMPLETE MADISON* (New York, 1953), 267-69.

36 Michael Kammen, 'The Rights of Property, and the Property of Rights': *The Problematic Nature of 'Property' in the Political Thought of the Founders and the Early Republic*, in Ellen Frankel Paul and Howard Dickman, eds., *LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION* (Albany, N.Y., 1988), 12.