ON MADISON AND MAJORITARIANISM: A RESPONSE TO PROFESSOR AMAR

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Some fourteen years ago, in Washington, before an audience consisting largely of law school professors and federal judges, I said there probably was not a law school in the country that did not teach constitutional law, and few that did not make it a part of the required curriculum. So far as I knew, however, none offered a course on the Constitution as such. No one in the audience took exception to that comment. I was moved to make it in part by a telephone call from my eldest daughter, then in her first year of law school, who told me that her constitutional law class began with the Fourteenth Amendment. I doubt that Professor Akhil Amar begins his course with cases dealing with the Fourteenth Amendment. As he says in his paper, much is lost by the clause-bound approach that now dominates constitutional discourse.[1]

Professor Amar looks at the Bill of Rights "holistically," insisting that its meaning is greater than that of the sum of its various parts.[2] He argues that although the Bill of Rights was designed to protect individuals and minorities from popular majorities, its primary purpose or "thrust" was not to impede popular majorities, but to empower them.[3] In contrast, James Madison stated that the original, unamended Constitution was unique in that it totally excluded "*the people in their collective capacity*, from any share in the [government]."[4]

Professor Amar's thesis purports to reconcile this division of views by contending that the popular majorities kept out of the government by the unamended Constitution were brought back in by the Bill of Rights.[5] But what majorities are these? When Amar says that the essence of the Bill of Rights was more

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1. Akhil R. Amar, *Some Comments on "The Bill of Rights as a Constitution"*, 15 HARV. J.L. & PUB. POL'Y 99 (1992) [hereinafter *Comments*]; *see also* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1990) (explaining the proposition in more detail) [hereinafter *Bill of Rights*].

2. *See Comments*, *supra* note 1, at 100.

3. *See id.* at 100-02.

4. THE FEDERALIST No. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original).

5. *See* Amar, *Bill of Rights*, *supra* note 1, at 1132.

structural than not, and more majoritarian than countermajoritarian,[6] he must be referring to local, not national, majorities. Sponsored by the Anti-Federalists, the Bill of Rights was intended to restore, or to secure, the rights of states and local majorities, and to protect the local institutions that somehow promote "an educated and virtuous electorate."[7]

Professor Amar does make a persuasive case. The Establishment Clause of the First Amendment, for example, *can* be read to mean that "Congress shall make no law respecting [state] establishment[s] of religion," thereby protecting such *state* institutions. The Second Amendment, in securing the right of the people to bear arms as part of local militias, does indeed reflect the Anti-Federalist fear of a national standing army. Like Alexis de Tocqueville, whom Professor Amar quotes on the point,[8] the Anti-Federalists did emphasize the political importance of the jury, as reflected in the Fifth,[9] Sixth,[10] and Seventh[11] Amendments.[12] And Professor Amar is surely right when he says that the Ninth Amendment[13] should be seen not as a statement of individual rights but as a declaration of the ultimate sovereignty of the people.[14]

As Professor Amar might have pointed out, however, the Anti-Federalists were not completely satisfied with the Bill of Rights as it emerged, largely through the efforts of Madison, from the First Congress. It was "[no] more than a pinch of snuff,"[15] said one; "whip-syllabub, frothy and full of wind, formed only to please the palate."[16] What was missing? The

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6. *See* Amar, *Comments*, *supra* note 1, at 99, 100.

7. Amar, *Bill of Rights*, *supra* note 1, at 1132.

8. *See id.* at 1185 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 320 n.4 (Vintage ed. 1945) (1838)).

9. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

10. *See id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

11. *See id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common.").

12. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 18-19 (1981).

13. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

14. *See* Amar, *Bill of Rights*, *supra* note 1, at 1199-1201.

15. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 775 (Washington, Gales & Seaton 1834).

16. *Id.* at 774.

late Herbert Storing gives a clear answer in his illuminating essay, "The Constitution and the Bill of Rights."[17] Missing was a declaration of the sort found in, for example, the first article of the Virginia Declaration of Rights of 1776:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[18]

During the Virginia ratification debates, in fact, Patrick Henry pointed to this provision in his call for a bill of rights.[19] Patrick Henry's colleague, Edmund Randolph, made the same point: A bill of rights must provide "a perpetual standard . . . around which the people might rally" if and when the legislature should violate the limits of its power.[20]

The Constitution, in other words, should remind the people of their ultimate sovereignty, including their right "to alter or to abolish"[21] a government should it violate the trust bestowed in it. It was said that:

> Those rights [to renew the government] characterize the man, essentially the true republican, the citizen of this continent; their enumeration, in head of the new constitution, can inspire and conserve the affection for the native country, they will be the first lesson of the young citizens becoming men, to sustain the dignity of their being. . . .[22]

Madison and the Federalists generally did not disagree with the "sovereignty" principle, but, as Storing suggested, Madison was determined that no statement articulating the principle be given a prominent place in the Constitution. As Storing stated, "The problem with a bill of rights as a 'perpetual standard' or a set of maxims to which the people might rally is that it may tend to undermine stable and effective government."[23] Madison rejected the Virginia model precisely be-

17. *See* Herbert J. Storing, *The Constitution and the Bill of Rights*, *in* TAKING THE CONSTITUTION SERIOUSLY: ESSAYS ON THE CONSTITUTION AND CONSTITUTIONAL LAW 266 (Gary L. McDowell ed., 1981).

18. THE VIRGINIA DECLARATION OF RIGHTS art. 1 (1776).

19. *See* Storing, *supra* note 17, at 277.

20. *Id.*

21. Amar, *Bill of Rights*, *supra* note 1, at 1200.

22. Storing, *supra* note 17, at 277 (quoting VIRGINIA INDEPENDENT CHRONICLE, June 25, 1788).

23. *Id.*

cause he was intent on establishing a stable and effective government. According to Storing, "The Virginia Declaration of Rights asserted that free government depends on 'a frequent recurrence to fundamental principles' [and the] Federalists doubted that."[24]

Hence, the "perpetual standard" or statement of "first principles" was not pressed to the fore but explicitly consigned to the Ninth Amendment. There, in a less conspicuous place and with language more sober than that of Patrick Henry, it serves as a reminder to the people that they are the source of the powers exercised by government. It is unsurprising that local majorities in Virginia and elsewhere resorted to the Ninth Amendment during the secession debates of 1861.[25]

My chief objection to Professor Amar's thesis concerns his association of Madison with the project of empowering local majorities as a means of checking the national government. Madison above all others had worked to limit the capacity of such majorities to interfere with a stable framework of national governance. In the Philadelphia Convention, Madison was the most persistent supporter of the so-called Council of Revision, which would have had the authority to veto state legislation on political as well as constitutional grounds.[26] Indeed, as he wrote to Jefferson at the conclusion of the Convention, without the Council of Revision the Constitution was "materially defective" in light of "the injustice [of state laws, which] has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism."[27]

Although the Anti-Federalists may have sought the Bill of Rights as a means of empowering local majorities as a check on the national government, Madison understood the Bill of Rights differently and placed his hopes for a framework of sound governance elsewhere. As he states in *The Federalist*, "In the extent and proper structure of the Union . . . we behold a republican remedy for the diseases most incident to republican

24. *Id.*

25. *See* 3 PROCEEDINGS OF THE VIRGINIA STATE CONVENTION OF 1861 at 24-25 (George H. Reese ed., 1965); JOURNAL OF THE PUBLIC AND SECRET PROCEEDINGS OF THE CONVENTION OF THE PEOPLE OF GEORGIA 98 (Milledgeville, Ga., 1861).

26. Madison was the principal author of the so-called Virginia Plan, which called for a Council of Revision with the authority to veto state legislation. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 21, 164, 168, 171; 2 *id.* at 27, 440, 589.

27. *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1788), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 646 (Philip B. Kurland & Ralph Lerner eds., 1987).

government."[28]

Professor Amar cites that passage in *The Federalist* where Madison states that "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[29] Professor Amar finds that the "conventional understanding of the Bill [of Rights] seems to focus almost exclusively on the second issue (protection of minority against majority) while ignoring the first (protection of the people against self-interested government)."[30] To Professor Amar, on the other hand, those who framed the Bill of Rights were most concerned with the protection of the people against self-interested government.[31] This issue was certainly not first in Madison's mind, as the passage succeeding the one quoted above bears out:

> Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, *the rights of the minority will be insecure*. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority . . . the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.[32]

We are left with a traditional understanding of the origin of the Bill of Rights: It was sponsored by the Anti-Federalists, and not James Madison, out of a fear that the new national government would abuse its power. Professor Amar has given us the best account yet of the means by which they hoped to guard against such abuses. The post-incorporation use of the Bill of Rights, via the Fourteenth Amendment,[33] to protect individuals and minorities against local majorities, takes nothing away from Professor Amar's argument. It does demonstrate, how-

28. THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

29. THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

30. Amar, *Bill of Rights*, *supra* note 1, at 1133.

31. *See* Amar, *Comments*, *supra* note 1, at 103-04.

32. THE FEDERALIST No. 51, *supra* note 29, at 323-24 (emphasis added); *see also* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 273 ("Altho. it be generally true . . . that the danger of oppression lies in the interested majorities of the people rather than the usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source.").

33. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (2d ed. 1988) and cases cited therein.

ever, that Madison was justified in finding the original Constitution defective for not providing a sufficient check against such majorities.