

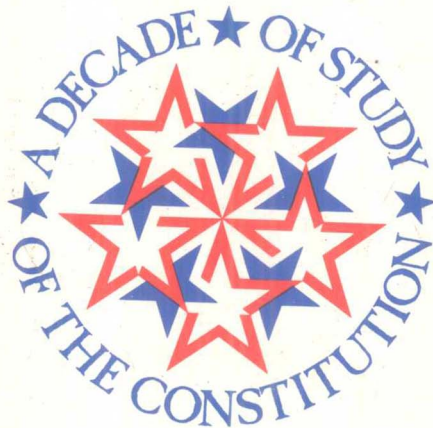


American Enterprise Institute  
Constitutional Studies

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# How Does the Constitution Secure Rights?

Robert A. Goldwin and William A. Schambra  
editors



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*Robert A. Goldwin  
and William A. Schambra  
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American Enterprise Institute for Public Policy Research  
Washington and London

This book is the third in a series in AEI's project "A Decade of Study of the Constitution," funded in part by a Bicentennial Challenge Grant from the National Endowment for the Humanities. The first book in this series was *How Democratic Is the Constitution?* and the second book was *How Capitalistic Is the Constitution?* both edited by Robert A. Goldwin and William A. Schambra.

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# The Editors and the Authors

ROBERT A. GOLDWIN is resident scholar and director of constitutional studies at the American Enterprise Institute. He has served in the White House as special consultant to the president and, concurrently, as adviser to the secretary of defense. He has taught at the University of Chicago and at Kenyon College and was dean of St. John's College in Annapolis. He is the editor of *A Nation of States* and coeditor of *How Democratic Is the Constitution?* and *How Capitalistic Is the Constitution?* He is the author of, most recently, "Three Human Rights Are Enough," *Center Magazine* (July-August 1984).

WILLIAM A. SCHAMBRA is resident fellow at the American Enterprise Institute and was, until recently, the assistant director of constitutional studies at AEI. He is coeditor, with Robert A. Goldwin, of *How Democratic Is the Constitution?* and *How Capitalistic Is the Constitution?* and author of "The Roots of the American Public Philosophy."

WALTER BERNS is John M. Olin Distinguished Scholar in Constitutional and Legal Studies at the American Enterprise Institute and professorial lecturer in constitutional law at Georgetown University. He is the author of *Freedom, Virtue, and the First Amendment*, *The First Amendment and the Future of American Democracy*, and *For Capital Punishment*, and numerous articles on constitutional issues in professional journals and popular magazines. He has served as professor of political science at Yale, Cornell, and the University of Toronto.

OWEN M. FISS is professor of law at Yale Law School and is the author of *Injunctions*, *The Civil Rights Injunction*, *The Structure of Procedure* and "The Forms of Justice" as well as numerous articles in law reviews and professional journals. He served as law clerk for Justices Thurgood Marshall and William J. Brennan and as special assistant,

in charge of the Civil Rights Division, to the assistant attorney general of the United States.

ROBERT A. RUTLAND, editor of *The Papers of James Madison* and *The Papers of George Mason*, is professor of history at the University of Virginia. He is author of *The Birth of the Bill of Rights, 1776–1791*, *The Ordeal of the Constitution*, *The Newsmongers*, and *The Democrats from Jefferson to Carter*.

HENRY SHUE is senior research associate of the Center for Philosophy and Public Policy at the University of Maryland, College Park. His work on human rights include *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* and an article entitled "Torture." He is currently working on a volume dealing with the moral issues surrounding nuclear strategy.

HERBERT J. STORING was, at the time of his death in 1977, the Robert Kent Gooch Professor of Government and director of the Program on the Presidency of the White Burkett Miller Center for Public Affairs, University of Virginia. He was the author of *The Complete Anti-Federalist* and *Black American Political Thought* and the editor of *What Country Have I? Political Writings by Black Americans* and *Essays on the Scientific Study of Politics*.

NATHAN TARCOV is professor of political science and in the College at the University of Chicago. He is also codirector of the John M. Olin Center for Inquiry into the Theory and Practice of Democracy. His writings include *Locke's Education for Liberty*, "Principle and Prudence in Foreign Policy: The Founders' Perspective," and "A 'Non-Lockean' Locke and the Character of Liberalism."

# Foreword

*How Does the Constitution Secure Rights?* addresses a question that could hardly be more timely given the intense interest in protecting human rights throughout a world in which the enjoyment of rights seems less secure than ever. Although the record of the United States in this matter is not perfect, most people would agree that we enjoy security of rights to a degree found in few other places. It is appropriate, therefore, as we try to perpetuate free institutions at home and encourage them abroad, that we turn to the document that chartered our nation and search therein for the methods by which we have actually secured to average U.S. citizens their rights.

This book is the third in a series being published by "A Decade of Study of the Constitution," AEI's project to help prepare the nation for a thoughtful observance of the bicentennial of the Constitution. The first two books were *How Democratic Is the Constitution?* and *How Capitalistic Is the Constitution?*—also edited by Robert A. Goldwin and William A. Schambra. Through such collections of essays—as well as through conferences and television and radio programs—"A Decade of Study" has attempted to raise again the fundamental political issues that appeared at the time of the founding and that have continued to agitate American politics to this day. The controversy that such issues can generate is well illustrated in these forcefully argued essays, written from various points of view. We are proud to publish this volume as a fitting expression of AEI's belief that the competition of ideas is fundamental to a free society.

WILLIAM J. BAROODY, JR.  
President  
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# Preface

When the American people proclaimed in 1776 the political principles to which the new republic would be dedicated, they put foremost the self-evident truth that all men are equal because they possess "certain unalienable Rights." Governments, they maintained, are instituted "to secure these Rights." This, then, became the purpose of the documents establishing our own government, the Constitution and its subsequent first ten amendments, commonly called the Bill of Rights. The high standards set for the security of rights by those documents became an important measure of our success or failure as a society; by that measure, we have done remarkably well, most Americans would agree, with some notable and unfortunate exceptions.

We Americans tend to judge not only ourselves but other nations as well by those standards. Indeed, when we seek to distinguish our form of free, liberal democracy from totalitarian or authoritarian regimes of the right or left, we frequently point to the protection of human rights here and the absence of protection for, or the suppression of, human rights elsewhere as the central difference. Concern for the protection of human rights has assumed global dimensions. Some of the most influential documents produced by the international organizations of the postwar world are bills or declarations of rights; and in conferences and publications around the world, public officials, journalists, scholars, and concerned citizens debate the nature of such rights and how they may be brought to all nations of the world.

Considering the breadth and intensity of interest in the security of rights, it is ironic and sad that so few peoples in the world enjoy even a minimal level of such security. Perhaps one of the reasons rights are so often affirmed in speech but denied in practice is that one important question is almost never asked: In those societies where rights are adequately protected, how is it done? That is, how are rights actually secured? How do the elements of such societies—the funda-



mental political principles, the basic political institutions, the social or class structure, and the arrangement of the economy—combine to make the enjoyment of rights a reality for the average citizen? Because the Constitution is the authoritative embodiment of our fundamental principles and the source of so many of our political, legal, economic, and social institutions, we may approach this issue in the United States by asking: How does the Constitution secure rights?

The answer that comes most quickly to the American mind is likely to be that rights are secured here primarily by the Bill of Rights. Ironically, James Madison, Alexander Hamilton, and other principal drafters of the Constitution were initially opposed to the idea of attaching a Bill of Rights to the Constitution. One of the authors in this volume suggests, therefore, that we have the Bill of Rights as the result of a fortuitous circumstance, namely, James Madison's reluctant yielding to public pressure to change his mind.

The belief that rights are most securely protected when they are numerated and defined in carefully prepared lists is reflected today in the controversy over the inclusion of "new" rights—such as the "subsistence rights" championed by one of our authors—alongside the traditional civil and political rights of the constitutional system.

Another likely American response to the question is that rights are protected primarily by a vigilant, powerful, and active judiciary. An author in this volume argues for that view and suggests that the protection of rights may in fact require courts fundamentally to restructure major institutions within the society, such as schools, prisons, police departments, and mental hospitals.

For a final approach to the task of securing rights, it is necessary to reconsider the arguments made by Madison, Hamilton, and others against the inclusion of a Bill of Rights in the Constitution. Even without the first ten amendments, Hamilton argued in *Federalist* No. 84, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." Rights would be secured in America, he argued, because the Constitution carefully delineated (and thereby delimited) the powers of the new government, and assigned them to three mutually checking and balancing branches. This arrangement of institutions helped ensure that neither the government as a whole nor any part of it would become so powerful as to be a threat to rights. Hamilton also believed, with Madison, that the secular, commercial republic implicit in the new Constitution would stimulate such a proliferation of economic interests and religious sects that no one interest or sect would form a permanent majority within the society. When such a permanent majority forms around a class interest or a zealously held religious or philosophical belief, they argued (and

several of the authors in this volume agree), then rights truly are in danger, and no "parchment barrier" list of rights or sitting judge, however vigilant, will be able for long to prevent oppression of individuals and groups in the permanent minority.

However one answers the question posed by this volume, the essays herein should give the reader a sense of the importance of this often neglected aspect of the debate over human rights. If we can understand how, in fact, our constitutional structure serves to protect rights, then we will be able to strengthen the institutions of liberty at home, and we may even be able to help other nations cultivate such institutions. At a time when the gap between the theory and practice of rights in the world seems only to be growing, no understanding could be a more valuable contribution to the safety and happiness of the people of the world.

ROBERT A. GOLDWIN  
WILLIAM A. SCHAMBRA

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# I

## How the Constitution Protects Our Rights: A Look at the Seminal Years

ROBERT A. RUTLAND

Several biographers of James Madison have taken great pains to fix in our minds the idea that Madison was the "Father of the Constitution." The sick young American nation had at least fifty-five attending physicians when the Federal Convention of 1787 met, but by laying the groundwork for the meeting, by offering a working draft in the Virginia plan, and by his careful efforts to maintain republicanism throughout the convention, Madison surely deserves special praise. If we add to his achievement in Philadelphia his note taking, his authorship of many of *The Federalist* essays, and his role in the Virginia ratifying convention (as well as the whole ratifying process), we must ask, Who has a better claim to be the father of our Constitution? The argument need not detain us long, unless we are devoted Hamiltonians.

Here I argue not for Madison as a constitution maker, but for Madison as the father of our Bill of Rights. In an era not notable for parental respect, I would add that when Madison left Philadelphia in September 1787, he probably would not have liked being called the father of anything—let alone the document he had just signed. Yet so powerful was the weight of public opinion, and so strong the current of Madison's will to save the struggling republic, that two years after Madison had helped bury a bill of rights in Philadelphia, he resurrected it and forced a reluctant Congress to swallow it.

Madison made a mistake at the Federal Convention: he had not cultivated his friendship with George Mason, a fellow delegate from Virginia, but allowed the older man to feel increasingly isolated in the last stages of the convention. On September 12 Mason appealed to the delegates to graft a bill of rights onto the Constitution. Mason said he wished "the plan had been prefaced with a Bill of Rights, and

would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.”<sup>1</sup> The impatient delegates quickly disposed of Mason’s idea by rejecting the plea—unanimously. No doubt Madison was on the winning side, for even the Virginia delegation voted no.

### Public Opinion Favored Bill of Rights

This tactical error had almost immediate repercussions. Mason left the convention in a huff and wrote a brief critique of the Constitution that began: “There is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declarations of Rights in the separate States are no security.” This sentence from Mason’s pen reverberated throughout the Republic like a thunderclap, forcing friends of the Constitution to seek a series of shelters from the storm of public opinion thus loosed. But as the Federalists of 1788 soon realized, a groundswell of public opinion represents a great deal more than opportunism or rhetoric. Mason’s thunderous opening statement touched the people emotionally and forced the supporters of the Constitution to acknowledge that they had erred. An exasperated Federalist in North Carolina complained that the opposition leaders “blow up an idle Fandango about Bills of Rights & Amendments, & what is still more infamous, [threaten to] throw us altogether out of the Union.” The echoes of such attacks soon reached Madison.

James Madison lost only one election in his lifetime, and that was owing to his failure to take public opinion into account. When he ran for the Virginia legislature in 1777, he refused to bring a barrel of ardent spirits to the polling place, hoping “to promote, by his example, the proper reform.”<sup>2</sup> Public opinion in Orange County, Virginia, held that any man who wanted a freeholder’s vote ought to show his appreciation, not his parsimony. Never again did Madison ignore public opinion. Indeed, he spent much of the rest of his life trying either to control it or to understand it. He had been a youngster when public opinion, fanned to ember heat in the Stamp Act controversy, made things uncomfortably warm for Parliament and

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<sup>1</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, Conn.: Yale University Press, 1911, 1937), vol. 2, pp. 587–88.

<sup>2</sup> James Madison, *The Papers of James Madison*, ed. William T. Hutchinson et al., 13 vols. to date (Chicago and Charlottesville: University of Chicago Press, 1962–), vol. 1, p. 193.

Parliament backed off. Public opinion had forced Virginians to make common cause with the people of Massachusetts after the punitive Boston Port Bill reached across the Atlantic. Washington's prestige had carried the convention along despite enormous handicaps; but once back in his home county, Madison realized that he must support a bill of rights to win election to the House of Representatives. He redeemed his campaign pledge by offering a bill of rights at the first session of the new federal Congress. Public opinion? No one knew its might more than Madison, unless it was his neighbor and colleague Thomas Jefferson. "The great extent of our Republic is new," Jefferson said. "Its sparse habitation is new. The mighty wave of public opinion which has rolled over it is new."<sup>3</sup>

### Prodded by Baptist Constituents

Jefferson exulted in this wave because he was riding it as he wrote. Surely Madison respected the political instincts of his old friend Jefferson, who had warned in 1787 that a bill of rights was "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference."<sup>4</sup> Madison's rebuttal was weak. Faced with the complaints of his Baptist friends, who feared persecution for their religious beliefs, he journeyed to Richmond and, when the subject of a bill of rights came up, resorted to argument of *Federalist* No. 10:

If there were a majority of one sect, a bill of rights would be a poor protection for liberty. Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to persecute the rest.<sup>5</sup>

As Madison saw, the attempt to disregard criticism of the Constitution on the bill of rights issue was not persuasive. A concession, the so-called recommendatory bill of rights offered at the Massachusetts convention, became an urgent issue by the summer of 1788. As John Marshall himself later conceded, "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained,

<sup>3</sup> Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* (New York: Random House, 1944), pp. 562-63.

<sup>4</sup> Madison, *Papers*, vol. 10, p. 337.

<sup>5</sup> *Ibid.*, vol. 11, p. 130.



amendments were proposed by the required majority in congress, and adopted by the states.”<sup>6</sup>

Madison the father of the Constitution became the father of the Bill of Rights when he realized that his own role in implementing the Constitution was imperiled by hostile public opinion. While running for a House seat, Madison was informed that he had been labeled as hostile to a bill of rights. He went to a great deal of trouble to broadcast a public letter in which he acknowledged his error. The Constitution had been ratified, and circumstances had changed. In his campaign letter Madison said a bill of rights

in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty. Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.<sup>7</sup>

Now there was no talk about the freedom guaranteed by any “multiplicity of sects.” The people had spoken; Madison listened and made his pledge.

Thus it was that at a most critical stage in our nation’s history public opinion forced some able politicians to revise their views about what Madison once called our “parchment barriers.” Their decision to drop opposition and add a bill of rights to our Constitution was one of the earliest indications that public opinion cannot be ignored in this country. Alexander Hamilton, who was so often wrong, had tried to tame the dissidents by saying that a bill of rights “would sound much better in a treatise of ethics than in a constitution of government.”<sup>8</sup> The other great lawyer at the federal convention, James Wilson, echoing Hamilton’s views, said that a bill of rights “was not only unnecessary, but on this occasion it was found impracticable—for who will be bold enough to undertake to enumerate all the rights of the people?”<sup>9</sup> Hamilton and Wilson misread the people’s attachment to explicit written statements of their rights;

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<sup>6</sup> *Barron v. Baltimore*, 7 Peters 249 (1833).

<sup>7</sup> Madison, *Papers*, vol. 11, pp. 404–5.

<sup>8</sup> *Federalist* No. 84.

<sup>9</sup> Farrand, *Records of the Federal Convention*, vol. 3, p. 143.