

# A Nation Still Learning What Madison Knew

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STANFORD, Calif. - This week, we will be marking James Madison's 250th birthday. At a conference marking this occasion a fortnight ago at Princeton, the audience repeatedly asked the panelists what Madison would think of some contemporary problem.

To historians, such questions always seem miscast, especially when asked about Madison. While he is often described as the most profound theorist of his generation, he was also a deeply empirical thinker who reasoned on the basis of hard-earned experience. It would be unfair to ask what he would think today, solely on the basis of his 18th-century concerns, without granting him the capacity to ponder all the experiences we have acquired since.

Yet his ideas remain peculiarly useful when thinking about contemporary constitutional issues. No doubt some of this relevance reflects his authoritative role in establishing the Constitution. Even though Madison lost most of the points he worked hardest to carry at Philadelphia in 1787, no one contributed more to shaping the final document.

Madison's deeper legacy rests, however, on his grasp of fundamental problems of constitutional government with which we still wrestle. Three problems were paramount in his thinking: the inherently messy nature of American federalism, the identification and protection of fundamental rights, and the recognition of freedom of conscience as the essential individual right.

Thanks to the Supreme Court, we are again debating the extent of state sovereignty. Madison was committed to the autonomy of the states, but he doubted whether the concept of sovereignty provided a useful way to think about the respective powers of the union and the states. At Philadelphia, he repeatedly argued that the states should not be treated as sovereign jurisdictions. He worked mightily to deny them equal votes in the Senate, and he hoped to give Congress a veto on all state laws, a measure that would have stripped the states of any pretension of sovereignty.

The convention rejected both positions, of course, and the states retained a claim to their original status as quasi-sovereign members of the union. Madison himself strengthened that claim in the Virginia resolutions of 1798, which argued that the states could properly protest unconstitutional acts of Congress. But he also knew that appeals to sovereignty -- whether made on behalf of the union or the states -- were inherently dangerous.

The concept of sovereignty had traditionally been used to identify an absolute, final, irresistible authority within a government. Madison realized that the Constitution had destroyed that concept by vesting both the nation and states with particular sovereign powers, often in overlapping ways. To make this messy allocation work, Americans would need to puzzle out the distribution of powers on a case-by-case basis. The truth of federalism, Madison understood, lay in its prosaic details. Appeals to the ultimate

sovereignty of either the union or the states were a formula for confrontation, not conciliation.

Madison's original animus against the states was also tied to his concern for the protection of minority rights. Here, too, he challenged conventional wisdom. For most 18th-century liberals, the problem of rights was to protect the whole people against the coercive power of monarchy.

Madison was the first to realize that this formula was irrelevant to the American republic, where real power lay with popular majorities, who would use legislative power to burden whichever minorities they disliked. Because such unjust majorities could form more easily within the narrower compass of a state than in an extended nation, the best way to protect rights was to enable Congress to intervene within the states, restricting the ability of popular majorities to run roughshod over minorities and individuals.

That analysis was premature for 1787, but it was ultimately vindicated by the modern application of the equal protection and due process clauses of the Fourteenth Amendment, which applied the provisions of Madison's original Bill of Rights against the states. In this sense, the rights revolution of the 20th century fulfilled Madison's original vision of 1787.

How did Madison acquire this understanding of rights? In large part, through his powerful commitment to freedom of conscience. For Madison, as for Thomas Jefferson, the horrific religious persecutions of the 16th and 17th centuries were the equivalent of what the history of racial slavery and discrimination has been for us: the most compelling example of the systematic denial of fundamental rights to unpopular minorities. Their radical solution to the religion problem was to recognize that every individual retains a sovereign right to accept or reject the claims of religion, entirely free of the coercive authority of the state or community.

Today, efforts are repeatedly made to suggest that Madison and Jefferson were not quite the ardent advocates of separating church and state that their strongest statements on the subject suggest. In fact, the more Madison thought about the subject, the more militant his thinking grew.

The great virtue of his approach becomes evident the more we wrestle with the confusing interpretation of the First Amendment's religion clause that is the legacy of the Supreme Court's unhappy efforts to develop satisfactory tests for evaluating government aid to religion.

Madison's radical solution to the problem was simply to privatize all religious activity. He was confident that competition between denominations in the spiritual marketplace would keep religion healthy, while freeing government from the impossible task of deciding whether, when and how to support religion.

On all these questions, anyone who delves into Madison's writings will discover an

original, creative, skeptical, quizzical and discriminating mind. These very qualities make him a more elusive figure to understand than Jefferson, with his passionate if problematic commitment to equality, or Benjamin Franklin, with his wit and wisdom, or even Alexander Hamilton, with his better grasp of public policy. But Madison was our most penetrating political thinker, and his birthday is well worth commemorating.

Drawing (Peter Hoey)

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