



UNLOCKING
THE
FEDERALIST PAPERS

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We attempt in this volume to accomplish what the subtitle suggests: unlock the full wisdom, thought and power of the *Federalist Papers* to countless generations of young Americans.

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The Security for Civil Rights Must Be the Same as That for Religious Rights

Religious Freedom in the *Federalist Papers* by Matthew J. Franck

Federalist Papers referenced in essay: #1, 2, 10, 23, 48, 51, 52, 55, 84

Editors' Note: For a wide variety of reasons (as discussed in the following essay), religious freedom is not treated in any significant detail in the Federalist Papers. However, for other reasons (also discussed in the essay), religious liberty was very much on the minds of the Founders. No book that attempts to "unlock" the Roots of Liberty would be complete without a treatment of the Founders' understanding of freedom of religion, and it is within such a spirit of inquiry that this essay is included.

A. Questions of religion, religious freedom, and religious strife are not major themes of the *Federalist Papers*. Not one of Publius' eighty-five essays takes the protection of religious liberty as a distinct subject worthy of a sustained focus. Yet, we know during this period of American history, from the revolution through the ratification and amendment of the Constitution (1775-1791), the protection of religious liberty, and the proper relationship of religion to politics, were of great concern to the Founders. Why, then, in the single most important contemporaneous commentary on the Constitution, do the authors have so little to say on this subject? And when the subject is

treated—always just in passing—what do the *Federalist Papers* have to teach us about religious freedom?

B. In the midst of the Revolutionary War, after the Continental Congress passed the Declaration of Independence in 1776, most of the thirteen former colonies—now calling themselves states—created constitutions for themselves. These replaced royal charters that were now either of no use, or fundamentally flawed as charters for self-governing republics. Most of these new state constitutions had something to say on the subject of religion and religious freedom, since most American states exhibited a good deal of religious diversity, and many had been settled by refugees from religious persecution. Practically all Americans were Christians, though there were a few Jews. Practically all Christians were Protestants, though there was a substantial Catholic population in Maryland.

C. However, the diversity among the Protestants was considerable: Episcopalian, Presbyterian, Congregationalist, Dutch Reformed, Methodist, Baptist, and Quaker. In the politics of the newly independent states, it was vital these groups accommodate one another peaceably, and not make their different beliefs the basis of political conflict. Everyone should be free to worship as he or she saw fit, without being coerced to believe (or pretend to believe) in the doctrines of an official faith. On this much, all agreed.

D. But, much else was negotiable. Should office holding be restricted to Christians, or even more narrowly to Protestants? (Most of the states had some test of this sort.) Could a state recognize one particular church as privileged over others, even while leaving people otherwise free to worship where and as they please? Should tax dollars support religious ministries or religious education? If so, should citizens be entitled to direct their own tax

dollars to support ministries of their choosing—or to opt out altogether? To these questions, states gave widely different answers.

E. In the state of Virginia, a certain religious controversy is much remembered today because James Madison was in the thick of it. The state's new constitution, adopted in 1776, had a strong statement on religious freedom. As a result, the Episcopal Church, which had served as the established (official) church of the Virginia colony, largely lost its predominant position. But in 1785, a bill was proposed in the Virginia legislature to support Christian clergymen with tax dollars. Madison successfully opposes it in a petition famously known as the *Memorial and Remonstrance*. He argues that such legislation interferes with the rights of individual conscience and the duties men owe first to the "Governor of the Universe" before any human government. The clergy-supported bill was defeated. But, the very next year the Virginia legislature adopted Thomas Jefferson's *Virginia Statute for Religious Freedom*. This law bolstered the protection already in the state constitution. From this episode, we know Madison was deeply concerned about state limitations on all freedoms, especially religious freedom. The lack of much discussion of this subject in the *Federalist Papers* cannot be taken as evidence that the authors did not care, but, rather, they had little or no concern about the federal government's potential for limiting religious liberty.

F. America's first attempt at a constitution binding states together, the Articles of Confederation, did not contain any provision on religious freedom. But the presumption of the Articles is nearly all the important business of politics is to take place at the level of the states, with the Confederation loosely uniting them for defense and diplomacy. When the Constitution was drafted in 1787, its aim was to change that equation and give a new national government much more responsibility for the internal

affairs of the United States. Still, the states would presumably remain closest to the people's everyday lives (an idea the *Federalist Papers* themselves underscore repeatedly). Many of the specific protections of individual liberty—including religious liberty—that one commonly found in the state constitutions were not thought to be necessary or appropriate in the new constitution. The Framers believe issues related to religious freedom would mostly occur in the context of state laws and policies, and be governed by each state's constitution.

G. Moreover, the *Federalist Papers* is a series of essays intended to defend the proposed constitution and advance the cause of its ratification by the states. The three authors have no interest in picking unnecessary fights by pointing to things the Framers left *out* of the Constitution. They are concerned with defending what is *in* the Constitution, and the way in which it fundamentally reforms—for the better—the relationship of the states to the nation, and the relationship of the people to both levels of government.

H. The Constitution does make one statement about religious liberty. Article VI, Section 3 requires public officials of the state and federal governments to take an oath to “support this Constitution,” and then adds “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The phrase was introduced by Charles Pinckney of South Carolina and elicited little debate or discussion during the Constitutional Convention. Even today this seems one of the least controversial clauses the Constitution could possibly contain. Madison never offers explanation or defense of it, merely alluding to it in No. 52 when he remarks service in the House of Representatives is “*open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.*”

I. There are two major reasons that Article VI, Section 3 is barely referenced in the *Federalist Papers*. First, the most extended objections to the lack of a religious test were not raised until July 1788—and the last of the *Federalist Papers* was published in May 1788. (However, in January, some delegates to the Massachusetts Convention had noted the lack of a religious test for office contradicted the motivations of the earliest settlers, many of whom came to America to preserve their religious traditions.) Second, the authors did not anticipate there would be any significant opposition to these provisions. When Charles Pinckney presented this idea at the Convention, it was accepted almost without debate. The Framers did not expect any real concerns to be raised in the state ratifying conventions.

J. Yet, various Anti-Federalists objected to the clause. Why? Some openly worried that the “no religious Test” principle would permit non-Christians to hold public office. Others were concerned that “papists” (Catholics) or Jews could hold office. Still others thought the clause might open office holding to persons who believed in no God at all. A test for specifically Christian belief would be problematic, due to a wide variety of forms of Christianity. If one were not prepared to state up front what forms of religious belief were ruled *in*, it would be very difficult to state what was ruled *out*. And no one, it seems, was prepared to write “no Jews, Muslims, or atheists” into the text of the Constitution.

K. The July 1788 debates from the North Carolina ratifying conventions provide useful insights into concerns about “no religious test.” Delegate Henry Abbot feared this would lead to “papists, deists, and Mahometans” taking office. David Caldwell wanted a test because “the Christian religion was best calculated, of all religions, to make good members of society on account of its morality.”

L. Supporters of the clause argued that a religious test was, in and of itself, a limitation on religious liberty and contrary to American ideals. Supporter James Iredell commented, “I consider the clause under consideration as one of the strongest proofs . . . that it was the intention of those who formed this system to establish a general religious liberty in America.” Samuel Spencer noted, “Religious tests have been the foundation of persecutions in all countries.” Some delegates expressed concerns that requiring such a test would lead to an established church at the national level.

M. In general, Anti-Federalists throughout the country had three major reservations on the status of religion under the proposed constitution. 1) The “no religious Test” clause might result in the election of the “wrong” kind of people (and the definition of *wrong* varied from state to state); 2) The new federal government might interfere with the states’ systems of preference for Christianity, Protestantism, or particular denominations, and several states’ established churches could be threatened; and 3) Religious liberty in general would not be protected from invasion by the federal government. Some people held all three views at once.

N. It may seem as if the third reservation cannot be squared with the first two. However, it was common, at the time of the Founding, for political thinkers to be concerned about striking a balance between support for religion (owing to its perceived connection to sound morality) and freedom of religious belief. They did not automatically think that absolute equal status for all religious views was required by the principle of religious freedom, nor that complete religious equality was the best way to provide support for religion and thus for morality. Today, we are more inclined to think both, and thus insist on all religious views (and even irreligious views like agnosticism, atheism, or secularism)

being treated equally. Many of the Framers would not agree.

O. However, the demand for a bill of rights turned out to be one of the most significant Anti-Federalist critiques. Nearly everyone agreed the federal government should be stronger than it had been under the ineffective Articles of Confederation, and it was not difficult to make the case that the Constitution filled the bill nicely. But the Framers' omission of a bill of rights—an idea considered and rejected in the Constitutional Convention—gave the Constitution's opponents their most powerful weapon. This omission was not enough to defeat the Constitution in any state. It was not even enough to force the amendment of the Constitution as a precondition of its ratification. But it was enough to produce, in about half the states' ratifying conventions, resolutions calling on the new Congress to propose amendments for the states to consider.

P. In the first session of the First Congress in the summer of 1789, James Madison, now a member of the new House of Representatives and eager to ensure ratification of the constitution, consolidated over thirty-seven proposed amendments and persisted in his campaign until a dozen proposed amendments were sent to the states. Ten of them were ratified by December 1791 and are popularly known as the *Bill of Rights*. The one that became the First Amendment begins with a protection of religious liberty: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This language satisfied those who wanted a general protection of religious freedom; those who wanted to prevent the establishment of an "official" or preferred church by the federal government; and those who wanted to prevent that government's interference with any preferences then existing at the state level.

Q. Given Madison's experience in 1785 with the Virginia

controversy over support of clergymen, it is not surprising he also proposed an amendment that would protect the “rights of conscience” (as well as free speech and press, and jury trials) from violation *by the states*. While this proposed amendment survived the debate in the House, it was rejected by the Senate and not sent to the states. Madison later said this was the “most valuable” amendment of all, and he regretted its defeat.

R. Madison regarded a limit on states’ authority over religious liberty as “more valuable” than the protection of religious liberty from federal power. He shared Alexander Hamilton’s arguments (No. 84) for the omission of a bill of rights from the original Constitution. Statements of the rights the federal government was forbidden to violate, Hamilton argued, might be “*fine declarations*,” but no language we might place in the Constitution could be so precisely drafted as to secure those rights with perfect success, protecting everything that should be protected and no more than that. The language would require interpretation; interpretation would necessarily involve the branches of the very government one was trying to restrain; and the one restraint to which the government would answer would be the people’s authority. Therefore, concrete freedoms, ultimately, “*must altogether depend on public opinion*.” Madison and Hamilton were arguing a bill of rights added nothing to the Constitution. As Hamilton concludes (No. 84), the Constitution as it came from Philadelphia in its original form was “*itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS*,” and would thus safeguard all liberties, including religious freedom. What did he mean?

S. The *Federalist Papers* emphasize the essential goal in designing a constitution for a free people is not the use of fine words about rights that amount only to “parchment barriers” against tyranny (No. 48), but, instead, the design of an “internal

structure” (No. 23) that tilts all the outcomes of the political process in favor of freedom. Whether it was religious liberty, or freedom of speech and press, or the free use of one’s ability to acquire property, the real protection was provided by federalism, the separation of powers and checks and balances, and other features of the Constitution’s system of republican government. These principles themselves relied on public opinion, kept it at arm’s length, and shaped and directed it in ways friendly to freedom.

T. From the very first essay, the *Federalist Papers* is skeptical that we can simply trust majority rule to maintain liberty. Even when people’s motives are good, they can be misled into thinking they have all the answers, and justifiably force others to agree with them. Hamilton reminds his readers of bloody religious strife, still fresh in the memory of people only removed by a generation or two from European soil:

Nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution. (No. 1)

U. Over and over, the authors of the *Federalist Papers* pushed their readers to recognize the unique pitfall of a democratic republic: the principle of democratic rule can lead to the oppression of minorities, with the majority itself turning out to be freedom’s enemy. Therefore, the most important goal of the Constitution is to restrain, channel, and moderate the great power of the majority, without abandoning the principle ideal in a republic that the people will ultimately rule.

V. This recurring theme is most comprehensively fleshed out when Madison (No. 10 and No. 51) makes the novel argument that

majority rule at the level of the whole United States will be more trustworthy than majority rule at the level of any individual state. In the larger, more diverse political environment of the entire country, there will be many more “factions”: self-forming groups of people, organizing and pressing their views in the public sphere. None of them will hold the upper hand as the majority and all will have to learn to make compromises with one another, accommodating each other’s particular interests in order to form the shifting, temporary, cobbled-together majorities that can win elections and pass laws. In such an environment, there are no permanent winners and losers. Everyone wins some fights and loses others.

W. Madison explicitly includes different religious viewpoints in this political analysis. In addition to factions organized around economic self-interest, he considers “*zeal for different opinions concerning religion*” (No. 10) as a strong basis for organizing. But, in this new democratic republic, the urge to impose one’s own view on the whole world, “*by fire and sword*” (No. 1) will be replaced by moderation, and toleration of fellow citizens’ different views, precisely because *so many* different views exist, and power must be shared. “*In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects* (No. 51).” He continues later in the same essay:

In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.

X. This could be contrasted with a less favorable outlook in the

smaller environment of a single state: “*A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source* (No. 10).” This helps explain why Madison, in the First Congress, thought a constitutional statement protecting religious liberty (and other freedoms) from *state* governments was more vital than a similar statement aimed at the new federal government. The states could be restrained by the federal government, but for restraining the federal government itself, a different calculation was required, as no political authority higher than itself would exist. In national politics, a free and dynamic process of democratic rule would be its own best insurance policy, supplemented by the backup mechanisms of the separation of powers, and checks and balances among the branches of government.

Y. If Madison seems skeptical of the good motives of religious citizens, does that mean he is skeptical of religion? Or does he think of religious faith as sometimes inclining people toward bad behavior rather than good? Not at all. He is realistic about what Christians call man’s “fallen” nature, and is concerned with giving our politics a structure and shape that control the worst in us and bring out the best.

Z. Madison is certain if the unrestrained power of majority rule falls into the hands of a single-minded group, without any need for it to compromise with others, “*neither moral nor religious motives can be relied on as an adequate control*” of the majority’s behavior (No. 10). This recognition that morality and religion need the help of wisely formed institutions is coupled with a faith that, if we *do* wisely design our politics, the good sense and sound morality of most people, grounded in their religious upbringing, will be the bedrock on which our constitutional order and our liberties rest:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another. (No. 55)

Madison is ultimately hopeful about human nature, or else he could not endorse the idea of a democratic republic at all.

AA. The authors of the *Federalist Papers* assume, for all their religious diversity, the American people are by and large the children of a shared culture, with a shared moral foundation:

Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence. (No. 2)

Certainly this statement exaggerates, for political purposes, the degree of cultural, ancestral, and even linguistic sameness among the Americans of 1787. Still, the essential teachings of the Christian faith, the use of the English language as the common

speech nationwide, the inheritance of British legal principles and political traditions, and the shared and unifying experience of the Revolution made Americans into one people with a shared consciousness of a shared identity. As the nation matured after the Founding, it faced problems of assimilating new groups—immigrants from every land, emancipated slaves, and formerly independent Native Americans—into the American mix. Language, law, and a kind of “civic religion” melded elements of Judeo-Christian teaching with patriotic political principles, and became the essential tools of that assimilation. And, among these essential principles of the American psyche is the protection of full religious freedom for all, whatever their beliefs. As President George Washington said in a famous 1790 letter to the Jewish congregation of Newport, Rhode Island:

For happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. . . . everyone shall sit in safety under his own vine and figtree and there shall be none to make him afraid.