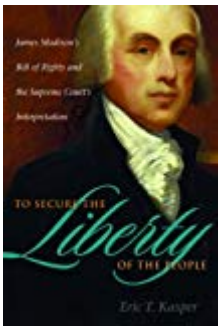
H-Net Reviews
in the Humanities & Social Sciences



Eric T. Kasper. *To Secure the Liberty of the People: James Madison's Bill of Rights and the Supreme Court's Interpretation.* DeKalb: Northern Illinois University Press, 2010. x + 301 pp. $38.00 (cloth), ISBN 978-0-87580-421-7.

Reviewed by Michael Green

Published on H-Law (June, 2011)

Commissioned by Christopher R. Waldrep (San Francisco State University)

Getting Right with Madison

In a recent interview in which he attacked the majority decision in *District of Columbia v. Heller* (2008), in which Justice Antonin Scalia argued for the majority that the Second Amendment established an individual right to bear arms, Justice Stephen Breyer contended that James Madison had a motivation for writing the Second Amendment: to reassure his countrymen that Congress had no plans to nationalize state militias, and thereby "get this document ratified." Pauline Maier, the William R. Kenan, Jr., Professor of History at MIT, gently disagreed, pointing out that the Constitution had been ratified and musing on the militia's role in government and society. "How far the court will go in striking down state and local gun laws remains to be seen, although the outcry against Justice Breyer's comments shows that conservatives are looking to press the issue," she concluded. "In any case, one thing is clear: to justify such rulings by citing Madison and the other founders and framers would not honor their 'original intent.' It would be an abuse of history."[1]

More than half a century ago, David Herbert Donald mused about politicians who have spent so many years "getting right with Lincoln."[2] Breyer's observations and the responses to them serve as a reminder that for "getting right" with the Constitution, and especially the Bill of Rights, no one matters more than Madison, who left his fingerprints all over that document. As Gordon Wood, who has been getting right with Madison and the other Founders so long and so well, observed, "There might have been a federal Constitution without Madison but certainly no Bill of Rights."[3] His influence on the Constitution, its ratification through the writing of *The Federalist*, and its almost immediate revision in its first ten amendments may seem immeasurable–except that that influence and its origins continue to be measured. However, while politicians continue to invoke Abraham Lincoln as often as they can and whether or not his views actually apply to the given situation, Madison's importance tends to be more limited to the scholars, lawyers, and judges who try to divine what his contributions to the Constitution, and his speeches and letters, really meant.

Eric T. Kasper is a scholar, lawyer, and judge who has

tried to parse what Madison said and how others have interpreted him. The result, *To Secure the Liberty of the People*, is an unusual and useful book. Kasper combines political theory–both where Madison got his thought and what he thought–with scorekeeping and analysis on how Supreme Court justices have used and abused Madison. The combination sometimes seems askew because the book seems to try to do too much. But it works, and it is worthwhile reading for those interested in legal history, philosophy, and the founding generation–and, indeed, getting right with Madison.

For a jumping-off point, Kasper uses the different ways in which Supreme Court justices have invoked and interpreted Madison. Justices as disparate as William Rehnquist and William J. Brennan, Clarence Thomas and David Souter, have relied on Madison's writings as a source for majority and dissenting opinions when writing about the same case. This is not because Madison suffered from the same tendency as his good friend Thomas Jefferson of taking more radical positions in private letters than he did in public statements, but for several other reasons. One is that, as a voracious reader, Madison combined the thoughts of a variety of philosophers and historians into creating his own worldview, and contradictions were inevitable. Another is the question of the two Madisons and how to reconcile the Federalist of the 1780s with the Jeffersonian Republican of the 1790s, since Madison's main writings on the Constitution broke into two disparate streams: *The Federalist*, the essays designed to win ratification, and the subsequent essays in which he sought to explain the approved document and the changes he sought to make to it in the Bill of Rights.

The first part of Kasper's book analyzes Madison's philosophy, how he developed it, and its relationship to his writings on the Bill of Rights. Kasper traces the ancestry of his thinking through his Princeton professor, John Witherspoon, to the great influence on Witherspoon, the Scottish philosopher David Hume. "Hume's outlook on human nature was a mix of both hope and despair. This left Madison with a 'realistic' understanding of human nature, whereby no one could be completely trusted but some would be capable of achieving virtue," Kasper writes (p. 17). Yet Madison also drank deeply from the natural rights liberalism of John Locke and the belief in individual liberty espoused by Adam Smith and Jefferson. "What throws off Supreme Court justices and many academics is the rich complexity of Madison's thought." On the one hand, "those who see Madison as a classical republican often focus too much on his statements regarding the attainment of virtue. This group of scholars neglects Madison's views on natural rights and on the ability of a liberal system to lead people to the achievement of virtue," Kasper writes. "On the other hand, those who see Madison solely as a natural-rights liberal often neglect Madison's statements on virtue. Grasping Madison's ideas on human nature–which directed Madison to fear our vices and find hope in our virtues–allows one to draw together a coherent set of ideas about Madison's political theory" (p. 32).

Perhaps the most important point Kasper makes is how this combination led to Madison's evolving view of the Bill of Rights: from unnecessary to a concession to win ratification of the Constitution to an important addition to the original document. Tactical reasons helped explain the change: Madison had tried and failed at the constitutional convention to create a congressional veto of state laws (which, if he had succeeded, would doubtless have led to an even more acrimonious battle among judges, lawyers, and legal scholars about original intent and judicial review). The Bill of Rights would further underpin the individual freedoms that Madison held dear and protect them from majorities, minorities, and wayward interpreters of the Constitution. Nor did Madison want to go back on his word and that of other ratifiers, who had assured those undecided on the Philadelphia convention's work that they would add a Bill of Rights as soon as possible. And the realistic view of human nature that Kasper so carefully delineates made Madison wary of leaving the freedoms he expected the original Constitution to protect in any danger.

Kasper also does a fine job of tracing how the Bill of Rights evolved and how Madison managed its passage–the subtitle appears to have been carefully chosen, for this book deals not merely with the Bill of Rights, but with "James Madison's Bill of Rights." The process of writing and passage displayed Madison's multiple gifts. He designed an interlocking set of rights, ultimately–at least in his mind–inseparable from one another. Then he had to master the committee and floor procedures in the new Congress for the amendments to pass and go to the public for ratification. As important as he was and remains to the Bill of Rights, however, Kasper is careful to point out that "what Madison thought about these rights is only one part of the larger puzzle of constitutional interpretation": others played a part in the creation of the first ten amendments, which, as Madison originally designed them, differed in a variety of ways from the finished product (p. 132).

Nonetheless, the project of "getting right with Madi-

son" has influenced how Supreme Court justices have interpreted both "the Father of the Constitution" and his offspring. After laying out Madison's words and deeds, Kasper moves into related yet different territory: how and whether justices have correctly interpreted what Madison said and did about the Bill of Rights. He creates four categories and assesses the recent justices who fit into them. The "devotees" who "fundamentally understood" Madison were Hugo Black, William Brennan, Anthony Kennedy, and David Souter (p. 153). The "learners" were Potter Stewart and Sandra Day O'Connor. The "inconsistents" were Warren Burger, John Paul Stevens, Antonin Scalia, and Clarence Thomas. The "name droppers" who "cited and quoted Madison inappropriately and out of context" were Felix Frankfurther, his close friend and ally Robert Jackson, and Jackson's former law clerk, William Rehnquist (p. 208).

Kasper argues cogently for each of his lists, quoting from opinions and from Madison. Yet his lists reveal surprises and fodder for debate. Black certainly would be proud, given his devotion to the Founding Fathers and contention that he merely followed the letter of the Constitution, yet observers debate whether he grew more conservative with age or the issues simply moved jurisprudence in different directions. Brennan ranks as one of the Court's most liberal members ever, while Souter, his successor, moved left during his tenure yet belonged to a bloc considered "liberal" despite being more centrist generally than such earlier liberals as Black, Brennan, William O. Douglas, and Earl Warren. Kennedy has been a swing vote for much of his tenure on the Rehnquist and Roberts Courts, usually reaching more conservative conclusions than his former colleague Souter. As for the other categories, for Scalia, the leading modern advocate of "original intent," to be "inconsistent" on Madison is ironic or amusing, possibly both, especially in light of his frequent antagonist, Stevens, and closest colleague, Thomas, falling under the same rubric.

Just as these justices have argued, so, too, it is possible to argue with Kasper. He lays out an excellent case for explaining Madison's views and the justices who have evaluated them. But it is striking how the justices who get or fail to get right with Madison often are on different parts of the ideological spectrum, and that point in itself merits further attention. Granting that this is a work of political science and not of history, at least on its face, Kasper might have addressed how historians have viewed Madison more than just so briefly in his notes, thereby making clearer just how extensive this argument, and the attempts to reconcile what some historians see as the contradictions in Madison's thought, have been.

However, to make that argument is to assess the book that Kasper might have written, and not the book he wrote. That would be like assessing the Bill of Rights that Madison should have written, and not the one he wrote. What Kasper wrote is a major contribution to our understanding of Madison, the Bill of Rights, and the Supreme Court. What Madison wrote survives 220 years later, and remains the light that guides us, in right and wrong directions.

Notes

[1]. Pauline Maier, "Justice Breyer's Sharp Aim," *New York Times*, December 22, 2010, national edition, A29.

[2]. David Herbert Donald, *Lincoln Reconsidered: Essays on the Civil War Era*, 3rd ed. (New York: Vintage Books, 2001), 3-14.

[3]. Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009), 69.