

Three Themes of Civic Education for Liberty in Democracy

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The future of civic education in 21st century America is rooted in the nation's past, the late 18th century founding of the United States. The concepts and themes at the core of the civics curriculum are embedded in America's founding documents, especially the 1776 *Declaration of Independence*, the 1787 *Constitution of the United States*, the 1787-88 commentaries on the Constitution in the 85 papers of *The Federalist*, and the 1791 *Bill of Rights*, Amendments 1-10 of the *Constitution*. Unlike other nations at the time of its birth, the founding of the United States was based on a set of ideas that fostered the civic and political unity of a diverse American people in a pluralistic society. By contrast, most other nations of that time, and after it, developed their political unity and cultural cohesion from long-nurtured ethnic or racial identities.

The time-honored mission of a common civic education in America has been the transmission of the nation's founding ideas to each successor generation in order to sustain a common civic identity. The creedal concepts of the founding generation have defined the American nation. They have sustained the coherence of its people, citizens formed by a common civic culture based primarily, if not exclusively, on common commitments to ideas about civil liberty anchored in constitutionalism.

James Madison, the symbolic host of all conferences conducted here, at his Montpelier home, was a key contributor of ideas to America's founding documents (an exception being the Declaration of Independence) and thereby a provider of content for

the education of America's citizens. Madison, in concert with such founding-era luminaries as Alexander Hamilton, Thomas Jefferson, and John Adams advanced distinctive concepts of republicanism, compound federalism, popular sovereignty, civil liberty, and constitutionalism. The key to the founders' political thought, however, was their concept of constitutionalism.

The founders constructed American constitutions of the founding era—the original 13 state constitutions, for example, and the 1787 federal Constitution, to address two purposes of constitutionalism expressed in the Declaration of Independence. First, constitutional government should be instituted to secure the natural rights to liberty of individuals under its authority. Second, the source of the constitutional government's authority should be the consent of the governed or popular sovereignty.

Today, most Americans take for granted the continuation of their legacy of constitutionalism bequeathed by the founders. James Madison and other founders, however, worried about the sustainability of their ground-breaking constitutional ideas. They presciently recognized three critical challenges of constitutionalism that Americans would continually confront: 1) **providing ordered liberty**; 2) **preventing majority tyranny**; and 3) **protecting private rights**. They wondered: Could the American people of the future meet these challenges? Would their constitutional republic endure?

Unless the people of a democratic republic continue to cope adequately with the three critical challenges of constitutionalism, they will neither maintain their rights to civil liberty nor their popular sovereignty. Thus, the list of themes at the core of civic education for liberty in democracy should include, among others, the three challenges of constitutionalism noted by America's founders.

In this paper, I briefly discuss each of these three critical challenges of constitutionalism, and I explain why each of them should be central themes of a common civic education for the American people. I use thoughts and words of James Madison and other founders to support my arguments for a civic education based on the core concepts of the American political tradition, with special emphasis on the idea of constitutionalism, and the critical challenges associated with the practice of limited government through the rule of law as the guarantor of civil liberty in a democratic republic.

1. Providing ordered liberty: This is the first and most significant of the three critical challenge of constitutionalism. This challenge has been posed and discussed brilliantly by such seminal thinkers in the Anglo-American political tradition as Edmund Burke and David Hume. No one, however, has framed it better than James Madison. In the 51st paper of *The Federalist* (February 6, 1788), Madison said:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions [a well constructed constitution that effectively empowers and limits government].

In this profound statement, Madison pointed to the primary test of any democratic republic committed to the liberty of individuals: Could the people construct and establish ordered liberty by simultaneously and enduringly empowering and limiting their government? If so, this constitutional government could secure the rights to liberty of

individuals under its authority. And the people would satisfy the American founders' standard that a constitutional government should be instituted for the purpose of protecting their natural rights. But to actually meet this challenge, Americans, according to Madison, must recognize the immutable and universal flaws of human nature that make an empowered government both necessary and dangerous.

Madison's assumptions about human nature brought him to a political truth that many Americans of the founding era did not perceive. He understood very well that the rights of the people to liberty are equally at risk if the government is too strong or too weak. If the government is not sufficiently empowered by the people's constitution, then it cannot act effectively to protect them against domestic predators or foreign invaders, who would, if they could, deprive individuals of their rights to liberty, property, and safety. And, if the government is not sufficiently limited by the people's constitution, then rulers can and probably will use their power unjustly against individuals and groups.

Madison's proposed solution to the challenge of providing ordered liberty was two-fold. First, there would be "dependence on the people" who, by exercising constitutionally protected rights of political participation, would prompt the accountability of the governors to the governed. But according to Madison, something else was needed—"auxiliary precautions"—to ensure that power in government would be both adequately exercised and limited. Madison's "auxiliary precautions" are such fundamental principles of American constitutionalism as enumeration of the government's powers, separation of powers, checks and balances among the three branches or functions of government, decentralization and division of power through federalism, specification of particular limitations on the power of government in

relationship to the rights of individuals, popular sovereignty as the source of authority for government, and a written constitution as the supreme law of the land, applicable equally and fairly to all citizens and their political/governmental institutions..

Madison's solution to the generic constitutional problem of ordered liberty is paradoxical in its combination of opposing tendencies: latitude for the power of government and limits on this power. But through the proper combination of these opposing tendencies, the rights of individuals to liberty could be secure; because the government would be limited by law to thwart tyranny and empowered by law to prevent anarchy. Madison, however, was ever-mindful of the complexity of this challenge of constitutionalism. In a letter to Thomas Jefferson (October 17, 1788), he wrote:

.It is a melancholy reflection that liberty should be equally exposed to danger whether the government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience.

While recognizing the complexity of this challenge, citizens must learn to cope with it. Why? Because the good health, even the very life or death, of a constitutional democratic republic depends upon successful responses by the people to the continuing challenge of establishing and maintaining ordered liberty. Thus, this challenge of constitutionalism must be a theme at the core of civic education for liberty in democracy.

Civic educators must realistically, vividly, and persistently confront their students with cases and primary documents that raise public issues about the latitude and limits of the government's power in relationship to the liberty of individuals and the order of their communities. Through such lessons, citizens can learn to analyze and respond competently to public issues about limits to the exercise of power by government and limits to the exercise of liberty by individuals. This kind of civic education can help

citizens develop the capacity to cope with the first of the three inescapable challenges of constitutionalism.

2. Preventing majority tyranny, the second unavoidable challenge of constitutionalism in a democratic republic, was a great concern of James Madison and other notable founders, such as Alexander Hamilton, John Adams, and Thomas Jefferson. Madison, however, was the one who most memorably and insightfully commented on this potential plague of popular government. In a famous letter to Thomas Jefferson (October 17, 1788), Madison wrote:

Wherever the real power in a Government lies; there is the danger of oppression. In our governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts to which the government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to. . . . Where the power is in the few, it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many, not of the few, the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

Madison's warning about majority tyranny was novel and unbelievable to many Americans. During the founding era, the conventional wisdom pointed to monarchy or other forms of autocracy as the source of tyranny. Therefore, most people of Madison's time believed that a democratic republic, grounded in popular sovereignty, could not yield tyranny by the majority. They thought it improbable, even impossible, for a government truly representative of the people to act against the rights of the people.

However, James Madison's inquiries about republics in the past, and his assumptions about human nature, led him to conclude that unlimited power in

government, regardless of its source, would yield tyrannical abuse of individual rights. An insufficiently limited democracy, therefore, would inevitably practice tyranny of the majority against unpopular minorities and violate the primary purpose of American constitutionalism—security for the rights of every person in the polity.

Thomas Jefferson agreed with Madison about the danger of majority tyranny and the need to prevent it. In his First Inaugural Address (1801), Jefferson expressed an enduring principle of constitutional democracy: “All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable, that the minority possess their equal rights, which equal law must protect and to violate would be oppression.” Thus, Jefferson rejected the crude and simplistic notion that unlimited majority rule singularly defines democracy, and he set the terms for our understanding today, that an authentic constitutional democracy is majority rule with protection of minority rights.

The American founders’ sought to prevent or at least minimize majority tyranny in their democratic republic through constitutional design. Their constitutionalism protected and promoted diversity and pluralism among the people and rejected rigid political and social homogenization. American constitutionalism also raised obstacles to majority tyranny through the people’s representatives in Congress by the separation and sharing of powers among the legislative, executive, and judicial branches of government. And it posited specific limitations on the power of the representative government in order to guarantee the rights of individuals, especially the right to dissent from the prevailing public opinion.

Alexander Hamilton, Madison's partner in the *Federalist* papers project, especially emphasized an independent judiciary exercising judicial review as an aspect of American constitutionalism that could prevent majority tyranny and protect rights of individuals in the minority. In the 78th paper of *The Federalist* (May 28, 1788), Hamilton stressed the power of an independent judiciary to declare acts of government unconstitutional as a barrier to the threat of majority tyranny. Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, which duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Hamilton, Madison, Jefferson, Adams and other American founders did not base their defense against majority tyranny entirely upon constitutional design. They also proposed ongoing education of the people about their constitutionally protected rights and the potential of majority rule to degenerate into majority tyranny. They hoped that a common civic education would imbue each successive generation of the people with dispositions against majority tyranny and for constitutionally protected rights to liberty on equal terms for everyone in the polity, including the most unpopular persons.

Madison often warned his fellow citizens about the inadequacy of relying only upon "parchment barriers"; that is, he believed the words of a written constitution were a necessary but insufficient means to the protection of individual rights. He insisted that "the people ought to be enlightened [through civic education], to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it" (*The National Gazette*, December 22, 1792).

I also believe that a constant theme of civic education today and in the future should be recognition of unlimited majority rule as a corrupt form of democracy and resolution among the people to stand against it. The core curriculum should include analysis of primary documents and cases that exemplify the challenge of protecting minority rights against majority tyranny.

Textbooks and teachers should emphasize both successes and failures in American history regarding the rights of minorities. Students need to know the sad events of their nation's past, when the constitutionally protected rights of some individuals and groups were unjustly denied. Thus, they may learn lessons about how to avoid such injustices in the future. But students should also be taught positive examples in American history, when minority rights were courageously upheld in fulfillment of the nation's founding principles. Thus, they might be inspired to act similarly in the future to protect minority rights against the ever-present threat of majority tyranny.

Landmark Supreme Court cases are especially valuable sources of constitutional issues on majority rule and minority rights. These cases and the Court's resolutions of them provide valuable lessons about the primacy of rights to liberty in American constitutionalism and the Court's use of judicial review to protect these rights. By examining the primary documents associated with the landmark cases, students will learn that some of the best statements ever made on constitutional rights can be found in the Court's opinions. Justice Robert Jackson, for example, expressed memorable and instructive words about majority rule and minority rights in a constitutional democracy; Jackson's message belongs in the core curriculum of civic education. Justice Jackson wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections (*West Virginia Board of Education v. Barnette*, 319, U.S. 624, 1943).

3. Protecting private rights, the third critical challenge of constitutionalism, is directly related to the preceding quotation of Justice Jackson's 1943 opinion for the Court, which notes that certain rights of individuals are protected by constitutionally restraining the government from acting against them. Inherent in the very idea of American constitutionalism is a general restriction of the government's range and reach to prevent its unwanted invasion of the private domain of society. In particular, the Constitution of the United States explicitly prohibits government from violating such private rights as ownership and use of private property, voluntary civil association in the formation and direction of non-governmental organizations, freedom of conscience in regard to the free exercise of religion, and the right to freedom from unwarranted entry by agents of the government into one's home or private place of business.

In several papers of *The Federalist*, Alexander Hamilton and James Madison noted the importance of private rights in their design of constitutionalism. In the 10th paper of *The Federalist* (November 22, 1787), James Madison wrote:

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.

In another part of the 10th *Federalist* paper, Madison noted the “diversity” and “inequality” in abilities or “faculties” of different individuals “from which the rights of property originate.” He asserted, “The protection of these faculties is the first object of government.” According to Madison and other American founders, the constitutional government must maintain conditions of stability and safety in society, so that individuals are free to privately seek personal fulfillment and to pursue happiness on their own terms, in line with their different capacities or talents. Thus, the “pursuit of happiness” is cast as an individual’s private right to choose and act, protected constitutionally from governmental control, but enabled by the government’s power to maintain law and order.

Madison recognized the socially disruptive clashes that would inevitably arise from the conflicting interests and opinions of diverse individuals and groups in their private pursuit of happiness. So, he emphatically asserted in his 10th *Federalist* paper, “The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.”

So, there is room in the political thought of Madison and other founders for both negative constitutionalism, limiting government to protect rights against power, and positive constitutionalism, using powers of government to protect and promote individual rights. In a constitutional democratic republic, each generation of the people decides, through representatives in government, the conditions and extent of public regulation to impose on the private sector of society. However, a premise of constitutionalism in America has always been the need to preserve certain indispensable limitations on the scope and reach of government power.

The American founders certainly relied upon negative constitutionalism to protect private rights. James Madison, for example, revealed early in his public life a strong commitment to negative constitutionalism and private rights. In 1776, at the age of 25, he participated in the framing of the Virginia Bill of Rights and personally contributed the free exercise of religion clause to Section 16 of this document. Nine years later, he drafted and distributed his “Memorial and Remonstrance” in favor of a private right, freedom of conscience, and against Virginia’s establishment of state-supported religion. Furthermore, Madison, Hamilton, Adams, and other founders strongly advocated constitutional protection of the private right to own and use property for personal profit.

The founders believed the exercise of private rights, such as participating in the voluntary associations of civil society and the free exchanges of the economic marketplace, were a countervailing force against government encroachment on civil liberties. I share the American founders’ partiality for a free and open civil society and market economy, based on the private rights to civil association and property; because I believe the vitality of a society’s private sector can thwart development of an all-encompassing state-centric government capable of severely curtailing the people’s civil liberties.

In line with the American founders’ ideas of constitutionalism and civil liberty, civic education should emphasize the protection of private rights against the tendency in our era toward a bigger government and a smaller private sector of society. Civic educators should require students to examine events and documents in world history that raise issues about the conditions and scope of governmental power in relationship to the public and private rights of individuals. From such inquiries, students may form sound

judgments in defense of private rights against the modern and post-modern temptations to seek social justice through extensive government regulation and control of the society and economy. Careful study of twentieth-century world history will yield the understanding that a government with sufficient power to provide comprehensive economic and social security has the capacity to diminish or deny traditional rights to liberty.

In conclusion, I recall and review three critical challenges of American constitutionalism, which should be main themes of civic education for liberty in democracy. These challenges of constitutionalism are:

- 1) *Providing ordered liberty,*
- 2) *Preventing majority tyranny,* and
- 3) *Protecting private rights.*

I have claimed that these three inescapable challenges are necessary, if not sufficient, themes of civic education dedicated to the preservation of individual liberty in a constitutional democracy. If the people of a democratic republic would sustain and advance their public and private rights to liberty, then they must know how to confront and resolve critical challenges of constitutionalism. They must be prepared through civic education to independently make choices in response to these perennial constitutional challenges and to responsibly accept the consequences.

I strongly advocate a liberal civic education, which develops the capacities of citizens to live their lives in liberty. I maintain that a firm foundation for an education in liberty is ideas embedded in America's founding documents. Civic educators, therefore,

should remember the wisdom of Section 15 of the 1776 Virginia Bill of Rights, which declares “That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.” It is the fundamental principles of American constitutionalism, perpetuated by civic education, which can enable citizens of the twenty-first century to continue their heritage of liberty under law.

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